

# THE CONTEXTUAL DEPENDENCE IN THE INTERPRETATION OF CONSTITUTIONAL RIGHTS: AN ANALYSIS FROM THE POINT OF VIEW OF THE POST-NEOPOSITIVIST EPISTEMOLOGY

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**Abstract.** The analysis aims to reflect on how the external context conditions the legal interpretation of the constitutional provisions that recognize fundamental rights. To this end, some methodological indications from the field of philosophy of language are adopted, implicitly defending the possibility of a transposition, not mechanical and uncritical but analogical, of some essential acquisitions of semantic holism.

**Keywords:** Normative indeterminacy, constitutional rights, constitutional interpretation, semantic holism, external context, post-neopositivist epistemology.

**Summary:** 1. INTRODUCTION. 2. THE INTENTIONAL VAGUENESS OF THE CONSTITUTION: THE TWO POLES OF THE THEORETICAL DEBATE. 3. A HYPOTHESIS OF ANALOGICAL TRANSPOSITION. 3.1. The “Canonical” Distinction between Sense and Reference. 3.2. Semantic Holism and the Contextual Dependence of Sense. 3.2.1. The Abandonment of the Synthetic-Analytical Dichotomy in W.V.O. Quine’s Perspective. 3.2.2. The Thought Experiment of the Radical Translation and the Principle of Charity in Donald Davidson’s Perspective. 3.3. Some Contextualists Research Programs: Two Examples. 3.4. The Role of Context in the Legal Interpretation of Constitutional Rights. 3.5. Moral Reading of Constitution and Reflexive Equilibrium. 4. CONCLUSIONS.

## 1. INTRODUCTION

This study intends to defend the thesis according to which both in the doctrinal reconstruction<sup>1</sup> and in the judicial interpretation of a system of constitutionally recognized rights, and more particularly of ethical-political doctrines that they incorporate, operate substantial criteria of rationality. These criteria – it is argued – lead to formulating, also on the basis of the reference to personal convictions as well as conceptual background

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<sup>1</sup> I take up the notion of “reconstruction of a doctrine” from Bruno Celano (“[l]a ricostruzione di una dottrina [...] consiste nella riformulazione, e nel riaggiustamento, di insiemi di enunciati, selezionati entro insiemi di testi (scritti e non) dai contorni indefiniti. Riformulazione e riaggiustamento mirano alla ristrutturazione, alla sistematizzazione, degli insiemi di enunciati rilevanti: vengono individuati, o ricavati, assunti, principi, presupposti, tesi, che si ritiene siano atti a rendere conto di aspetti significativi della dottrina”).

schemes, a globally coherent interpretation of the constitutional text (and especially of his substantive part), attributing to the discursive level an internal connection such that the contradictions, if they arise, are in any case limited. To this end, it is maintained that a post-neopositivist theory of meaning is more or less implicitly presupposed in this operation. The paper also shows that semantic indeterminacy reflects the holistic character of meaning and of belief, considering that the interpretation of discourse (of the uttered proposition) is widely influenced by the common ground that exists between speaker and hearer.

In particular, the following insights are taken up: (1) the abandonment of the analytic-synthetic dichotomy; (2) the thought experiment of the “radical translation”; (3) the principle of charity and the correlative thesis of the “Background” of meaning. We will try to show, in this sense, that these assumptions can concretely contribute to illuminating several notable aspects that characterize the functioning of interpretative practices within a constitutionalized legal context. In this regard, we will focus above all on the prominence given to the conditioning exerted by the interpretive context with the aim of highlighting the structurally indeterminate character of the translation and more generally of the interpretation. In considering the philosophical-linguistic debate, of course, it is not intended to exhaustively reconstruct the research programs identified, but only to highlight some ideas potentially applicable to the field of constitutional interpretation.

In the first section I compare two models of constitutional drafting, the broad one and the detailed one, illustrating the main reasons for the impracticability of this last solution. Then I try to apply some essential categories of semantic holism and of contextualist approach to the constitutional interpretation of rights. I conclude with some observations on the semantic presuppositions implicit in the moral reading of the constitutional text and in the search for a reflexive equilibrium between our immediate intuitions and the more consolidated ethical-judicial principles.

## 2. *THE INTENTIONAL VAGUENESS OF THE CONSTITUTION: THE TWO POLES OF THE THEORETICAL DEBATE*

According to the authoritative reconstruction of H.L.A. Hart, all terms (e.g., class nouns or adjectives) have a *fixed meaning core* in which indeterminacy is minimal because there is a generalized consensus about their inclusion (or exclusion) in the extensionality of the term (the set of objects, events, states of affairs to which it applies), and a “*penumbra area*” defined by difficult or doubtful cases.<sup>2</sup> With respect to such a zone, the interpreter has a certain space for discretion because the reference of the terms used is not completely determined (the classical example: the adjective ‘bald’). In Chapter VII of *The Concept of Law* entitled “*Formalism and Rule-Skepticism*” and dedicated to legal interpretation, the author makes the following observation using the example of the linguistic expression “No Vehicles in the Park”:

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<sup>2</sup> In this regard, Endicott (1997) points out that, contrary to what Hart seems to believe, on many occasions it can be controversial to determine whether a given case falls within the core of certainty or the penumbra zone.

in all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable ('If anything is a vehicle a motor-car is one') but there will also be cases where it is not clear whether they apply or not. ('Does "vehicle" used here include bicycles, airplanes, roller skates?') (Hart 1994, p. 126).<sup>3</sup>

According to Hart, similar remarks can be applied to legal language<sup>4</sup>, since it is closely related to ordinary language. Interpretation is sometimes the result of a cognitive process and sometimes the product of a discretionary decision: it discovers meanings in easy cases and creates meanings in difficult cases. Therefore, in formulating general rules, the legislator is not expected to foresee every possible combination of circumstances that may occur in the future. For every general rule there can always be some factual situation in which the question of whether or not a specific concrete case falls within the scope of application of the rule to be applied, if any, cannot be resolved on the basis of linguistic conventions or customary rules of interpretation.

In the presence of a situation of uncertainty, when faced with flexible general rules, it is necessary to choose between different theoretically possible interpretations to determine the actual content of the normative statements. In this regard, Hart explicitly speaks of the "*open structure* (or texture)" (Hart 1994, ch. VII) of the legal language to refer to phenomena such as the incompatibility of norms, the possibility of departing from the law, the presence of hard cases, and so on. The development of this notion is due to Friedrich Waismann (1945), who, taking up some ideas developed by Ludwig Wittgenstein in particular in §80 of the *Philosophical Investigations*, in an article on *Verifiability* analyses the possibility that all empirical statements are characterized by a structural vagueness. Within the philosophical-legal debate, and indeed also in Hart's intentions, the reference to an open texture tends to reinforce the idea that vagueness<sup>5</sup> represents an inevitable characteristic of the legal language.

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<sup>3</sup> For an in-depth discussion (in a critical vein) of this example, see Schauer (2009, pp. 151-158), who notes that often the most significant interpretive problems come not from textual or lexical difficulties inherent in the arrangement of the utterance, but from value or teleological reasons attributable to a choice of the interpreter.

<sup>4</sup> For a framing of the topic of legal language indeterminacy, see Bix (1993).

<sup>5</sup> On an analytical level, it is possible (and appropriate) to distinguish the *vagueness* of the meaning of normative texts from their *indeterminacy*, *i.e.*, the fact that each normative text potentially expresses a plurality of alternative meanings: "mentre la vaghezza è dovuta all'indeterminatezza dei criteri di applicazione di un termine, l'indeterminatezza di un termine valutativo è dovuta al carattere effettivamente o potenzialmente controverso dei suoi criteri di applicazione" (Diciotti 1999, p. 377). A vague term, therefore, is not semantically indeterminate but rather unknowable (in the absence of cognitive resources to determine its content in borderline cases). We are faced with vague terms if there are predicates whose application is imprecise since there are "border cases" in which it is not possible to define exactly where the concept in question begins to/stops being applicable. In this regard see also Williamson (1994).

A relevant characteristic of constitutional drafting is the peculiar form of *intentional indeterminacy* particularly found in gaps, which is present in all those cases in which the authors of the provision, due to the absence of empirical information about the future, cannot regulate in detail the modalities and contents of its application.<sup>6</sup> In the case of the Italian context, for example, it is evident that it in the post-war period nanotechnology, the Internet, or the structure of DNA could not be empirically known, but, likewise, neither could be the future evolution of religious practices. This configuration of the constitutional language is not accidental; rather, it is a systemic aspect concerning its peculiar mode of drafting.

Within a substantive legal culture model (a context characterized by the presence of interpretative and argumentative styles that enhance the moral profiles related to the “justice” of the particular case), the constitutional provisions conferring fundamental rights and their limitations are usually formulated through a wide use of evaluative expressions or locutions (“equal social dignity”) and indeterminate expressions (“right to health”, “right to life”, “family as a natural society”, etc.).

Constitutional texts recognize values that tend to be formulated broadly and generically so that their meaning may later be specified when applied. This raises the problem of determining the content of the notions connoted by the evaluative expressions recognizing these rights.

This margin of discretion conferred to the judge in his interpretative activity does not necessarily have to equate with rule-less arbitrariness.<sup>7</sup> In fact, there are some constraints, such as, for example, the argumentative techniques accredited in the legal culture of reference and with respect to which the interpretative activity must be consistent in some way. Similar constraints derive from certain institutional and legislative factors, the *communis opinio* or the generalized consensus of the community of interpreters, the opinions of legal experts or technicians eventually consulted<sup>8</sup>, case-law precedents, among others. These “guiding principles”, which cannot be traced back to a moral reasoning devoid of any connection with legal procedures, can operate as an important factor in narrowing down the margin of discretion involved in the interpretative activity of the judges.

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<sup>6</sup> Although it is not part of the purpose of this research, it is evident that the indeterminacy of constitutional provisions also relates to the political disagreement of constituent fathers to reach precise agreements. See on this point, Sunstein (1996, pp. 35-61), who refers to two different types of partially and “incompletely theorized” agreements: the first concerns the constituents, who have to formulate principles characterized by a high degree of generality; the second may occur among the constituents but, most often, develops between the legislators, since they have to ponder and specify the content of the constitutional provisions.

<sup>7</sup> It is indeed a controversial point, on which there is a heated contrast between theorists of formalist and substantialist orientation. For some excellent reconstructions of the legal debate, see especially Waluchow (1994, ch. 7); Stone Sweet (2000); Shapiro, Stone Sweet (2002); Koopmans (2003); Hirschl (2004); Blichner, Molander (2008).

<sup>8</sup> On this topic see Canale (2021) (“a legal text, such as a statute or a regulation, is opaque if a legal authority is not able to grasp its full linguistic content but is nevertheless in a position to use it, thanks to an expert’s opinion, in legal decision-making. When this occurs, not only do experts contribute to fact-finding but also to determining the content of the law”; *ibid.*, pp. 1-2).

Therefore, in most cases, the constitutional provisions conferring fundamental rights possess an “open” and partially unpredictable scope of applicability. In this regard, Luis Prieto Sanchís outlines with particular clarity and devoid of any ideological compromise in favour of the thesis in question the opposite hypothesis, which is based on the strict delimitation of the contents of the constitutional clauses:

[s]ince the Constitution is a norm and a norm that is present in all types of conflicts, constitutionalism leads to judicial omnipotence. This would not be the case if the Constitution had as its sole object the regulation of the sources of law or, at most, just established a few precise fundamental rights. In such a case, the constitutional norm and, consequently, its judicial guarantee would only come into play when some condition for normative production was violated or when some of the areas of guaranteed immunity were constrained (Prieto Sanchís 2001, p. 208, my translation).

A normative inclination in favour of this thesis is instead present, for example, in the approach of Luigi Ferrajoli. This author insists on the opportunity to adopt a style of constitutional drafting (and interpretation) centred on a need of semantic rigor: “as regards the textual formulation of the constitutional provisions – he writes – the conception of the Constitution as a limit, or according to the model of the rules, requires that the constitutional text be formulated by resorting to statements and linguistic formulas which are clear, precise, and codifying rights with a well-defined scope” (Ferrajoli 2010, p. 2815).<sup>9</sup> Even before Ferrajoli, at the end of the 1920s, Hans Kelsen (2011) was already defending a model of constitutional language in which, at the risk of displacing the normative powers from the Parliament to an organ not politically responsible, the provisions attributing fundamental rights were not formulated in excessively abstract and generic terms, excluding vague and emotionally loaded concepts as far as possible. The main purpose here is to warn against the danger that the inclusion of open material provisions could encourage a transfer of regulatory powers from the legislature to the courts, follow a logic incompatible with the principle of separation of powers.

It should be noted that such a model of constitutional language contrasts radically with the practice of rights management within the current constitutional landscape. Although it largely depends on how burdensomeness the corresponding revision process may be, there is no doubt that contemporary constitutions are often drafted with a long-term duration intention. Within them, the conditions of application of the constitutional provisions are hardly (cannot be) determined with accuracy to be able to channel future developments.

In fact, a constitutional drafting technique which aspired to eliminate any margin of uncertainty, perhaps by resorting to a closed and rigorous list of rights, would end up condemning the Constitution to a rapid obsolescence, due to the changing economic, social, political, demographic conditions, etc. In this regard, one can consider the reasoning

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<sup>9</sup> See also Ferrajoli (2016, pp. 173 ff.).

of Victor Ferreres Comella, who, reflecting on the problem of the need for precision in the constitutional text, observes:

[t]he detailed Constitution entails the unjustifiable binding of the present and future generations to the decisions of a generation already dead; it does not allow for new ethical demands derived from aspects of human freedom and dignity that are not contemplated in its specific open clauses; and it hinders the development of interpretative processes that make it possible to politically integrate the members of a plural society, as well as diverse States, within a common public culture based on shared values (Ferreres Comella 1997, p. 138, my translation).

The argumentation of the Spanish constitutionalist clearly shows the asymmetry existing between the prescriptive model of a “*Constitución de detalle*” (detailed Constitution) – which aspires to crystallize constitutional values and principles in an immutable hierarchical web – and the practice of interpretation and application of constitutional provisions. According to this author, this peculiar drafting technique can foster a debate, within parliamentary majorities, on the meaning of constitutional rights and their relationships as they adapt to the circumstances of specific cases of application.

Similarly, Michel Fromont argues in favour of the greater degree of “*démocraticité*” (democratic character) of the constitutional rights and principles codified in contemporary constitutions, due to the more stable consensus that may be generated on them compared to the provisional agreement of a given electoral moment. “The judge who interprets the Constitution and imposes upon the other government bodies the respect of the rules contained in the constitutional text expresses somehow an older or broader democratic legitimacy which is not destined to fluctuate as rapidly as that of the main political organs of the State”.<sup>10</sup>

From this perspective, the very indeterminacy of the constitutional provisions which confer fundamental rights can constitute a factor of vitality of the constitutional text, a means of ensuring that the legal system is flexible in the face of the inevitable modification of the social context (diachronic level) and of the demands of justice of the concrete case (synchronic level). This updating task should be carried out based upon changes related to linguistic conventions and the set of values, interests, and moral needs of every specific community.

In analysing these approaches, it is necessary to highlight a basic problem. They tend to cast an optimistically irenic vision of the process of concretization of constitutional provisions. They thus neglect how these constitutional drafting techniques can represent one of the main causes of conflict between the legislator and the judiciary. In the context of contemporary constitutionalism, a large part of legal disputes may in fact be somehow based on some of the substantive contents of the constitution, this phenomenon frequently

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<sup>10</sup> Fromont (1996, p. 132, my translation).

being the origin of interpretative conflicts. Although it is undeniable that, in certain circumstances, the consideration of *extra-linguistic factors* can contribute to facilitate the application of obscurely formulated norms<sup>11</sup>, there are, however, some deeper reasons which should at least lead to an attitude of caution in the face of the judiciary's tendency to interpret constitutional provisions based on a global consideration of the external context (in whatever way one conceives it). For explanatory purposes, it may be appropriate to revisit some remarks drawn from the scope of the *semantic holism* approach.

### 3. A HYPOTHESIS OF ANALOGICAL TRANSPOSITION

#### 3.1. The “Canonical” Distinction between Sense and Reference

Adopting a canonical distinction within the philosophy of language, we can assume that meaning contains two dimensions: *sense* or *intension* – which represents the intra-linguistic component of meaning – and *reference* or *extension* – that is, the relation of the word to the object it denotes.<sup>12</sup> The most complete elaboration of this distinction, as it is known, goes back to Friedrich Ludwig Gottlob Frege (1948) in his famous essay *Über Sinn und Bedeutung*.<sup>13</sup> Discussing the concept of identity, the author develops an analysis of conceptual or informational content that affects all categories of linguistic expressions: singular terms, predicates, and utterances. Without delving into the complexity of Fregean analysis, let it suffice to note that it establishes a basic separation between: (i) the sign or linguistic expression; (ii) the sense, or mode of presentation of the object; (iii) the reference or extension, *i.e.*, the object itself. In a very schematic way: the sphere of reference refers to the relationship between language and the extralinguistic reality, *i.e.*, the external world; instead, the sphere of sense includes the contents that speakers are able to associate with the expressions they use to understand and use language. The reference of a singular term is constituted by the object denoted, while the sense points to the way in which this object is presented; the reference of an utterance coincides with its truth-value, while its sense is the very thought expressed by it. The latter dimension, insofar as it may be (i) expressed in a language, and (ii) grasped and shared by all individuals, should not be confused with its subjective and intra-psychoic representation (*Vorstellung*), *i.e.*, the mental image that speakers tend to associate with each expression.

Related to the definition of meaning and reference is what is generally referred to as the “*principle of compositionality*” or “*Frege’s principle*” (see Frege 1984, pp. 390-406), according to which the meaning of an utterance is a function of the meaning of its parts and its rules of composition. Since it applies both to sense and reference, this assumption generally requires harmonic relationship between syntax and semantics. Thus, starting from a finite repertoire of meaningful expressions, it is possible to systematically construct

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<sup>11</sup> At the same time, Marmor (2005, p. 133; 2014, ch. I) points out that the indeterminacy of the legal language may depend on its communicative context (the ways in which the information contained in words is communicated) in which legal texts are used.

<sup>12</sup> In this regard, see especially Villa (2012, pp. 163-180).

<sup>13</sup> On this topic see also Dummett (1975).

a potentially infinite number of meaningful utterances. A confirmation of this principle, according to Frege, can be found in the so-called “*substitutivity test*”: if, an expression within an utterance is replaced by another coreferential one, the reference of the utterance remains unchanged, and the truth-value unaltered. Let us consider an example. If, in the statement “the Morning Star is a planet”, we replace a term with the same reference as “the Evening Star” (Venus), the overall reference (*i.e.*, the truth value of the statement) remains unchanged. The principle of compositionality and the law of substitutivity also apply to compound utterances. Thus, the reference or truth-value of a compound utterance depends on the truth-value of its compounding utterances; by substituting one utterance for another coreferential utterance, the overall truth is not affected.<sup>14</sup>

### 3.2. *Semantic Holism and the Contextual Dependence of Sense*

Revisiting and radicalizing the theses developed at the beginning of the twentieth century by the physicist, historian and philosopher Pierre Duhem, Willard Van Orman Quine (1961) proposes an image of knowledge according to which the minimum unit of empirical significance coincides with the whole network of our beliefs considered in their entirety. In this perspective, all our theoretical statements (not only the scientific ones) appear meaningless, if considered in isolation. In particular, the principle of revisability of assertions applies as much to the logical-mathematical field as to the linguistic sphere.

To summary it very succinctly: (a) in principle, there are always an indefinite number of theories capable of explaining observed facts; (b) any theory can be preserved, no matter how much evidence to the contrary there may be, as long as fairly radical corrections are made somewhere in the auxiliary hypotheses, not in the hypotheses directly tested at any given time. Any experiment relies to some extent on some basic assumptions, which can be summarized in the following terms: if we assume that a theory T implies an observational consequence O:  $T \rightarrow O$ , and that the experiment to which O refers does not occur (hence  $\sim O$ ), by *modus tollens*,  $\sim T$ . A theory thus consists of an indeterminate (not a priori delimitable) set of assumptions:  $T \equiv (i1 \wedge i2 \wedge i3 \dots \wedge in) \text{ e } \sim T \equiv \sim (i1 \wedge i2 \wedge i3 \dots \wedge in)$  which implies that  $\sim (i1 \wedge i2 \wedge i3 \dots \wedge in) \equiv \sim (\sim i1 \vee \sim i2 \vee \sim i3 \dots \vee \sim in)$ . The confirmation of a theory is a complex demonstrative process, structured in an extensive comparison between all the propositions derivable from its axioms and the data of experience. The unitary character of the empirical confirmation of a theory is not given by the single statements that compose it, but by the theory itself understood as a whole.

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<sup>14</sup> For a criticism of this approach, see the arguments of Quine (1961, pp. 139-159), who elaborates several examples aimed at showing how the semantic content of a linguistic expression is not always reducible to its reference (“[o]ne of the fundamental principles governing identity is that of *substitutivity* – or, as it might well be called, that of *indiscernibility of identical*. It provides that, *given a true statement of identity, one of its two terms may be substituted for the other in any true statement and the result will be true*. It is easy to find cases contrary to this principle. [...] The principle of substitutivity should not be extended to contexts in which the name to be supplanted occurs without referring simply to the object. Failure of substitutivity reveals merely that the occurrence to be supplanted is not *purely referential*, that is, that the statement depends not only on the object but on the form of the name. For it is clear that whatever can be affirmed about the object remains true when we refer to the object by any other name” (*ibid.*, pp. 139-140, italics in the text).

Quine's approach – it is worth insisting on this point – has a much broader scope of application. It is not limited only to the world of physics (as in the case of Duhem)<sup>15</sup>, but more generally involves scientific methodology, as well as the extra-scientific, cognitive and linguistic spheres.<sup>16</sup> Not only our (scientific) knowledge, but also the meaning of our daily utterances is the result of a complex network of beliefs, where conceptual linguistic information and empirical data appear as inextricably connected.

Below we will indicate, without any pretence of exhaustiveness and without deepening the complex theoretical debate that they have generated, some insights attributable to the area of the post-neopositivist theory of meaning that can concretely contribute to illuminate several notable aspects that characterize the functioning of interpretative practices within a constitutionalized legal context.<sup>17</sup> As we will attempt to show, these representations of meaning contain interesting applications at the level of the theory of legal interpretation, because of the prominence given to the conditioning exerted by the interpretive context, and because of the conception of the relationship between objects and facts (and the linguistic symbolism used by the community of speakers to account for them).

### 3.2.1. *The Abandonment of the Synthetic-Analytical Dichotomy in W.V.O. Quine's Perspective*

A starting point of Quine's analysis (1961, pp. 20-46) is given by the Fregean distinction between meaning and denotation, both for singular terms and for predicates. Now, according to a canonical reconstruction, two expressions are in a relation of synonymy if they possess the same meaning: the term "bachelor", for example, is synonymous with "unmarried adult man"; conversely, a statement that is analytic is true by virtue of the meaning of the expressions: in other words, it can be reduced to logical truth by substituting synonymous terms. As is well known, Quine radically questions this distinction, and in particular the hypostatization of the meaning which presupposes (like Wittgenstein, Quine also rejects the search for mental entities that correspond to the meaning of words). Indeed, he shows that it is not possible to define the concept of analytic – and therefore the meaning on which it is based – without falling into a vicious circle.

The reasoning, reproduced herein an extremely synthetic way, is roughly the following. To define synonymy, the only method that does not presuppose the concept of

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<sup>15</sup> The Duhemian perspective excludes extra-scientific disciplines as well as those sciences that have not yet reached the "so-called stage of maturity" (see Duhem 1894, p. 182), since "[e]n de telles sciences, la comparaison entre les déductions d'une théorie et les faits d'expérience est soumise à des règles très simples" (Id. 2016, p. 146).

<sup>16</sup> For a critique of the connection between semantic and extra-semantic spheres within the holistic perspective, see Fodor & Lepore (1992) ("whereas the natural objects of semantic interpretation are linguistic entities like formulas, the natural bearers of confirmation relations are trans-linguistic entities like propositions"; *ibid.*, p. 53).

<sup>17</sup> In the classical reconstruction of Riccardo Guastini (1990, p. 185), with this notion we mean that "processo di trasformazione di un ordinamento al termine del quale esso risulta totalmente 'impregnato' dalle norme costituzionali". The term 'constitutionalization', although in a less articulated meaning, already appears in Tarello (1980, p. 337).

analytic seems to be the one that appeals to the idea of substitutivity. However – Quine argues – even *equiextensional expressions* but not synonymous, that is, with the same extension but different meaning (“endowed with kidneys” and “endowed with heart”, for example), cannot be replaced in *intensional contexts* (*i.e.*, logical expression in which the replacement of one term with another fitted with the same meaning can change the entire truth value of the expression). The notion of synonymy therefore presupposes the use of the concept of substitutivity in all contexts, including intensive ones. On the other hand – the author points out – an intensional language (and the notion of necessity that it entails) is understandable only if the notion of analyticity has already been understood. This creates a vicious circle because analyticity represent what we have to define: the notion of intension, in other words, should have been an *explicatum* of the concept of meaning, but this *explicatum* fails, according to Quine, to reach a sufficient level of conceptual clarity and must therefore be abandoned.<sup>18</sup>

Our propositions cannot be divided into two separate classes: on the one hand the analytical ones, whose truth depends on the meaning, and on the other the synthetic ones, whose truth depends on the facts. Even if a language will produce true and false sentences (and will contribute to forming theories, that is, sets of true sentences), it will no longer be possible to distinguish the constitutive sentences of the meaning in a language (“bachelors are adults who are not married”) and utterances that are not such (“bachelors are available people”). The distinction between the synthetic and the analytic – Quine argues – must therefore be rethought as a question of degrees, empirically based on our propensity to keep or abandon certain statements.

What is important to underline, in view of a transposition on the level of constitutional interpretation, is that according to this line of reconstruction the meaning we attribute to a term also (and often *predominantly*) depends on our *beliefs about things*: asking ourselves about the meaning of a term or of an utterance is not ultimately separable from reflecting on the reality that surrounds us.

### 3.2.2. *The Thought Experiment of the Radical Translation and the Principle of Charity in Donald Davidson's Perspective*

The “*radical translation*” or “*radical interpretation*” (see Quine 1990, pp. 37-50; Davidson [1973] 1984) is an ideal experiment of translation between two languages and

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<sup>18</sup> An alternative, just mentioned in *Word en Object*, is that of the definition of analyticity intended as an explicitly conventional introduction of new notations for the purpose of simple abbreviation. This seems the only case of definition that does not presuppose the relation of synonymy: in this case the definiendum becomes synonymous with the definiens since it was specially created for the purpose of simple abbreviation. Quine, however, believes that this kind of definition covers only a few cases. (“There does, however, remain still an extreme sort of definition which does not hark back to prior synonymies at all: namely, the explicitly conventional introduction of novel notations for purposes of sheer abbreviation. Here the definiendum becomes synonymous with the definiens simply because it has been created expressly for the purpose of being synonymous with the definiens. Here we have a really transparent case of synonymy created by definition; would that all species of synonymy were as intelligible. For the rest, definition rests on synonymy rather than explaining it”; Quine 1960, pp. 25-26).

cultures that have never come into contact. It presupposes a situation in which, in order to carry out his task, the interpreter has only connections between verbal expressions and observable behaviours. In such a context, he will therefore be induced to focus on the reactions of assent and dissent of the natives. It thus becomes possible to understand in an already known language a completely unknown language, specifying the truth conditions of its utterances. Especially in Davidson's approach, the drafting of a translation manual (that is, the elaboration of a theory of meaning) of the potentially infinite set of utterances belonging to a natural language unknown to us seems to require the attribution, in terms of heuristic hypothesis, of a complex of beliefs, and in general of propositional attitudes (attitudes specifiable by reference to a proposition), to speakers. Furthermore, the characteristics of this interpretative process are implicitly found within the intralinguistic dialogue in general.

In Davidson's perspective, in particular, the idea of radical translation aims to bring to light what, in some ways, is already implicit in every interpretation (see above all Davidson [1973] 1984, p. 125). In intralinguistic communication there is a continuous process of adjustment and convergence towards shared meanings; our interpretative constructions may differ in particular attributions of belief or assignments of meaning. A process such that, on the one hand, the interlocutor's beliefs are derived from the meanings we believe he attributes to the words and, on the other hand, the meanings of his words are derived from what we imagine are his beliefs. The empirical evidence – explains Davidson – is not enough to disambiguate the content of meanings and beliefs. Consequently, there are always several possible interpretations compatible with the verbal emissions of our interlocutors. According to his approach, communication is configured as a sharing not of meanings intended as linguistic conventions but of fundamental beliefs related to our world (see especially Davidson [1974] 1984).<sup>19</sup>

Among the various reasons of interest that this thought experiment brings to light, due to its relevance for the purposes of the discourse developed so far, the *structurally indeterminate character of the interpretation* (in the Davidson version, more focused on semantic problems) should be highlighted: the idea that, depending on the conceptual schemes used by the linguist-observer, there always may be different translation models compatible with empirical data, but incompatible with each other. There will always be more than one theory of adequate interpretation to any particular body of evidence. The

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<sup>19</sup> In this regard, Celano (2013, p. 108) links the abandonment of the analytic-synthetic dichotomy with the adoption of an *encyclopedia semantic model* (see Eco 1984, ch. 2), modelled on the image of the rhizome, in which the process of interpretation gives rise to a potentially infinite chain of interpretants which takes the name of “unlimited semiosis”. In a semantic system of this type, it is always possible to follow different interpretative lines according to the contingent contexts and choices. (“[u]na specificazione del significato dei termini di una lingua naturale non è un insieme finito di equivalenze definitorie da dizionario. Un dizionario non è semanticamente competente, né costituisce un modello adeguato della competenza semantica di un parlante. La semantica di un linguaggio naturale non è un insieme di definizioni stipulative: la nozione di analiticità (non formale) non costituisce una fondazione solida per una teoria del significato”; Celano 2013, p. 106).

attribution of meaning to an expression is an operation that cannot be separated, in the final analysis, from the formulation of conjectures about the speaker's beliefs.<sup>20</sup>

In order for a conversation to take place on a rational basis, it is to be hoped a “*common ground*” of knowledge shared by the interlocutors (see from this point of view also Stalnaker 1974). This common ground is precisely represented by the set of assumptions that speakers presuppose – or at least should presuppose – within the communicative process. It is also necessary that the interpreter starts from the assumption that the pattern of attitudes proper to the speaker, against the background of which the interpreted speech is placed, consists of beliefs that are largely correct and coherent, is largely free of contradictions, largely agrees with that of the interpreter himself, and fundamentally conforms to his ideal of rationality. The interpreter, from this viewpoint, must move from a presumption of coherence and consistency<sup>21</sup> of the interlocutor having a tool that allows interpreting the meanings of his utterances.

Now, among the heuristic hypotheses that can facilitate the understanding of the meanings and beliefs of others, an important role is played by the so-called “*principle of charity*” or “charitable interpretation”.<sup>22</sup> On the one hand, this maxim prescribes to avoid as much as possible the attribution of false beliefs, logical fallacies, falsehoods or attitudes that are not shareable to speakers; on the other, it requires interpreting a speaker's statements in the most rational and sensible way possible. In this way, the participants in the communicative interaction will be able to share a broad set of background beliefs, increasing therefore the rationality of inter-subjective communication. It is also possible to understand any errors, inconsistencies, contradictions, opinions diverging from one's own, and in general forms of the irrationality of the other speakers.

The first formulation of this principle can be found in Quine (2013, p. 54, n. 2) and it was then taken up by various authors and in particular by Davidson, in whose theory it assumes not only a descriptive valence, of an explanatory principle, but also prescriptive-normative. It is not part of the purpose of this study to analyse all the meanings, however

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<sup>20</sup> I lack the space, within this article, to extensively analyse the complex problems which, in this regard, have been debated in the philosophical-linguistic debate. I just point out that several criticisms have targeted semantic holism, in most cases aiming at highlighting the implausibility of some of its consequences; the threat it would represent for the diachronic stability of meaning and, consequently, for the processes of communication and understanding. Taking this approach, it seems problematic to determine the extent to which meanings may evolve, and the extent to which the individual speaker and the linguistic community continue to use language with the same meanings over time. If the meaning of a word depends on the totality of the language in which it is embedded – it is widely argued – it will inevitably be linked to the totality of the peculiar uses of the idiolect of each individual speaker. For example, the meaning of “car” would end up referring to the particular meaning that each subject attributes to the word, based on their individual and private use of language. Consequently, if it is not possible for two speakers to share the same meaning of words, if the meaning of words varies across subjects, communication itself becomes unmanageable. See in particular Dummett (1991, pp. 221-244).

<sup>21</sup> For the distinction between consistency (logical compatibility) and coherence (substantial congruence) between norms, see especially MacCormick (1984).

<sup>22</sup> Davidson (1974), sometimes, has also referred to it as the principle of ‘rational accommodation’.

numerous, in which Davidson declined this principle. It may be enough to note that the process of interpretation turns out to depend on the combination of two aspects: a holistic assumption of rationality in belief and an assumption of causal relatedness between beliefs and the related objects.

On these bases, interpretation can be understood as a process aimed at maximizing the rationality of the speaker's utterances under the profile of coherence and correspondence (the presumable similarity of cognitive responses to the world). This framework, therefore, is always capable of generating a set of possible worlds, as long as they are compatible with the "common ground" of the speakers.<sup>23</sup>

### 3.3. Some Contextualists Research Programs: Two Examples

The most recent philosophy of language has seen the spread of a theoretical orientation pointing out that not only the sense of a word is always dependent on the context, but, more radically, the very meaning of a word or of an utterance is linked to language in its entirety (see in particular Wittgenstein 1968). This approach is configured as a review and an extension of the Fregean assumption that a word has meaning only in the context of the utterance in which it is inserted. According to this perspective, the change in the meaning of any part of the language produces a more or less direct change in every other part of it.

On the other hand, within Frege's perspective, in indirect contexts (conveying knowledge and beliefs) the reference coincides with the content of the belief, the thought believed or known, while in direct speech utterances the reference coincides with the truth-value. Although some anticipation of this principle appears in his *Ideography* (Frege 1967) its real formulation occurs in *The Foundations of Arithmetic* (Frege 1950, § 62) and then disappears in later writings. Now, a particularly controversial problem within the Fregean approach is the relationship between the principle of context and the principle of compositionality, which create a possible contrast related to the way and order meaning is determined. In general terms, there seems to be a certain tension between the idea that the meaning of the whole depends on the meanings of its components and the idea that the meaning of any one expression depends on the meanings of all other expressions (not just those components). In fact, if one accepts the holism implicit in the principle of context, the criterion presupposed by the compositionality of the determination of the meaning of simple expressions as prior to that of the meaning of complex expressions is lacking<sup>24</sup>.

Another relevant aspect of Frege's theory is that it takes the laws of mathematics, understood as universally and timelessly valid as a model for the meaning of an utterance. Absent from this theoretical apparatus is the consideration of the pragmatic dimension of the extra-linguistic context, which is embedded within the semantic sphere.

<sup>23</sup> In this regard, see also J.R. Searle, who refers to different possible backgrounds that preside over the understanding of the meaning of the utterances ("the notion of the literal meaning of a sentence only has application relative to a set of contextual or background assumptions" (Searle 1978, p. 117).

<sup>24</sup> On this point, see the approach of Dummett (1981). More generally, see Pagin (1997).

The most systematic overturning of this approach is due to Wittgenstein, who, particularly in his *Philosophical Investigations*, emphasizes how language is inextricably linked to a complex web of actions, conventions and rules that, depending on the context in which they are inserted, produce different contents for each statement. The contexts of use in which the expressions we usually employ are inserted cannot be described on the basis of a mere formal analysis of language. For example, in utterances such as “this tree is covered with leaves”, the mere sequence of words cannot convey the complete expression of the thought, as it needs to be completed by temporal and spatial information, as well as by other data related to the reference context (tones, looks, other aspects of behaviour, etc.). Therefore, to understand the meaning of a word within an utterance, it is necessary to know the rules that govern the “*linguistic game*” (“the whole, consisting of language and the actions into which it is woven”; Wittgenstein 1968, §7) in which the utterance is inserted, in most cases based on a function that is not denominative but expressive; for example, to communicate a command, a prayer, or a lament. Only in the context of a linguistic act does an utterance therefore express a determined content. Without wanting to analyse in depth the two positions under consideration, as well as the considerable problems of interpretation that they have generated, we can limit ourselves to consider their basic difference.

Compared to the Fregean approach, in the second Wittgenstein – including therefore not only the *Philosophical Investigations*, but also that collections of notes, lessons, diaries and letters following the publication of the *Tractatus logico-philosophicus* – the context is no longer given by the single statement, but by a set of possible statements within which a term is inserted. The meaning of the utterance can be understood only against the background<sup>25</sup> of a web of words and actions represented by linguistic games.

The constitutive assumptions of semantic holism will then influence various research programs, united under the fundamental thesis that words are not associated, as traditional semantics believed, with sets of abstract application conditions, but rather with particular applications. These approaches show, among other things, how the relations maintained between the utterances and the context (both linguistic and extra-linguistic) are often relevant for the very determination of the conditions of truth of the same.

Countering the idea of a mechanical determination of the truth conditions of utterances by their linguistic meaning, these theories conceive of meaning as an outcome, that is, as the product of the interaction between the collection of past contexts of use and the present context. The ways in which dependency relationships between these occasions

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<sup>25</sup> On the background concept, see Searle 1983, ch. V; 1998, pp. 107-108 (“[i]t is this set of capacities, abilities, tendencies, habits, dispositions, taken-for-granted presuppositions, and “know-how” generally that I have been calling the “Background”, and the general thesis of the Background that I have been presupposing throughout this book is that all of our intentional states, all of our particular beliefs, hopes, fears, and so on, only function in the way they do – that is, they only determine their conditions of satisfaction – against a Background of know-how that enables me to cope with the world”).

of use manifest themselves are therefore not given a priori, but are determined by the context itself.<sup>26</sup>

A particularly relevant model of pragmatic conception of language undoubtedly influenced by the Wittgensteinian reconstruction is the so-called “*indexical contextualism*”, *i.e.*, that form of semantic relativism according to which “different characteristics of contexts determine different contents for the utterance that becomes the object of a communication activity” (Villa 2017, p. 220, my translation).<sup>27</sup> The denomination of this approach refers to those utterances in which there are indexical or deictic elements (*personal, spatial and temporal deictics*).<sup>28</sup> These are expressions such as “I don’t want this here” or “this is more expensive than that”, which refer to the spatio-temporal situation in which the same utterance is uttered, to the persons who utter or receive the utterance. They are thus assumptions which are not directly connectable to the semantic profile of the utterance in question.<sup>29</sup> As a first approach, a *context* can be seen as a set of boundary or background factors that affect, the meaning of a phenomenon, process, or representation from a spatiotemporal and/or logical perspective. In linguistics, more specifically, context can be conceived as the “position” in which a given utterance is used within a sentence or language itself. However, indexical expressions present peculiar characteristics that cannot be ascribed to this general scheme, since their reference (think of cases of indexicals such as “I”, “now”, “here”, “he”, “she”, “you” etc.) is given in a relative form. They may refer to various subjects according to their respective contexts; *i.e.*, their content may vary not only according to the change in the state of affairs, but also with respect to a single state of affairs.<sup>30</sup>

Partially similar to this theoretical orientation is a research program known as “*dynamic semantics*”, a framework in logic and natural language semantics focused on the purpose of identifying the meaning of a sentence not with the conditions of truth,

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<sup>26</sup> For a recent example of the use (of some categories) of the pragmatic approach in the field of legal theory, see the work of Francesca Poggi, who reformulates the Gricean theory of conversational maxims by investigating its applicability to ordinary normative discourse and to the legal field; see Poggi (2020).

<sup>27</sup> In this regard, in dealing with indexical contextualism, Herman Cappelen speaks of “*content relativism*” to underline how, in situations in which the context of reception of the message is separated from the context of emission (and this is also the case of legal communication), the interpreter will be led to reconstruct the meaning of the message within that context of reference (see Cappelen, 2009, pp. 23-24, 32-33).

<sup>28</sup> See, for this category, Halliday & Hasan (1976, ch. 2).

<sup>29</sup> Representative examples of this approach can be found particularly in MacFarlane (2009); Weatherston (2009). An interesting survey of the different aspects of contextual dependence is due to Perry (1998), who distinguishes between: (A) *pre-semantic context*, which allows for the disambiguation of syntactic categories; (B) *semantic context*, relating to the situation in which indexicals, demonstratives, and anaphoric pronouns are shown to refer to; (C) *post-semantic context*, relating to the other aspects of context that depend on general theories and conceptions.

<sup>30</sup> See Recanati (2004, espec. p. 143) “According to Indexicalism, it is the sentence which, via the conventional meaning of the context-sensitive expressions it contains, triggers and controls the appeal to the speaker’s meaning. The speaker’s meaning thus plays a role in the determination of truth-conditional content, but it does so only when the sentence itself sets up slots to be pragmatically filled (Minimalism)” (*ibid.*, p. 96). Insisting on the relevance of this approach for legal theory, Villa (2017, ch. V).

but with the effect that its emission produces in the context where the conversation takes place.<sup>31</sup> In fact, this approach treats the meaning of a sentence as its potential to update a context, emphasizing the growth of information content over time. From this point of view, compositional meanings (often called “context change potentials”) have the nature of functions or relations; interpretation of a proposition is conceived as an information updating step. What is important to note, for the purposes of the discourse that will develop in the next paragraphs, is that the semantic tradition, among other things, explains how the interpretation of discourse is constantly influenced by the common ground (understood as in constant development) that exists between speaker and hearer.

### 3.4. The Role of Context in the Legal Interpretation of Constitutional Rights

The transposition of some of these methodological tools into the sphere of the legal experience (not in a complete or unreflective fashion, but critically) can help to shed light on several notable aspects that characterize the contextual dependence of the interpretation of constitutional rights and, more generally, the legal phenomenon per se, as a practice characterized by its own specific contextual assumptions. This point of view shows how the foundation of the judges’ interpretive choices is constituted by the selected normative data, and is influenced in a decisive way by different theoretical assumptions and different legal policy options. The contextualist approach seems particularly suitable to account for the functioning of interpretive processes involving constitutional provisions conferring fundamental rights.

The broad configuration scope that the drafting of constitutional rights tends to leave to the interpreters, especially in cases where they are dealing with terms incorporating dense substantive ethical content<sup>32</sup>, can clearly foster a creative role on the part of the judge. However, outlining this framework does not mean (does not imply, does not require) attributing an inherently positive value to contextually-influenced *evolutive interpretation*<sup>33</sup>. To put it briefly, the structural vagueness of the constitutional formulas can lead the judge to adopt an attitude oriented towards identifying the content of the rights in the interpretative context in which the constitutional text is inserted, thus allowing himself to be conditioned by the social morality (or conscience) of reference<sup>34</sup>. This room for discretion for both constitutional and ordinary judges could have deleterious consequences. For example, it may favour the emergence of an interpretative practice influenced by an external

<sup>31</sup> *Ex multis*, see the works of Robert Stalnaker (1972), Hans Kamp (1981) and Jeroen Groenendijk (1991a, 1991b).

<sup>32</sup> This notion can be understood as that set of rights, principles, values, and interests which place a series of material constraints on the choices which can be legitimately pursued through legislation; see Celano (2013, pp. 125-130).

<sup>33</sup> “[S]i dice ‘evolutive’ ogni interpretazione che attribuisca ad un testo normativo un significato nuovo, diverso da quello usuale o consolidato. L’interpretazione evolutiva è frutto dell’adattamento di vecchie, o relativamente vecchie, leggi (o costituzioni) a situazioni nuove, non previste dal legislatore storico (o dai padri costituenti)” (Guastini 2011, p. 100).

<sup>34</sup> In this regard, see the remarks of Alchourrón, Bulygin (1991, pp. 315-317); Moreso (2001); Navarro (2008, pp. 39-55). More recently, see Sardo (2018, pp. 176-178).

atmosphere hostile towards the protection of constitutional rights<sup>35</sup>. The interpretation of their content may be similarly affected by an unfavourable economic-financial conjuncture or by a fragmented and conflicting cultural climate, that makes this work of sociological reconnaissance (the “mapping” of moral values diffused within a given society) even more difficult. In these and other circumstances, the lingering risk is to erode the very meaning of constitutional rigidity<sup>36</sup>, while making less transparent the decision of the judge, who will ultimately be led to appeal to some implicitly assumed evaluative criterion.

The use of an interpretative key focused on the relevance of contextual factors can help to understand the structural limits of the knowledge of judges (and, more generally, of any legal operator), which feature a complex web of information that is inevitably partial and fragmentary at their disposal. Since our set of information is necessarily partial and incomplete, and due to the unavoidable (diachronic and synchronic) instability of natural languages, it is practically impossible to know the legal consequences of constitutional clauses conferring fundamental rights. This should encourage us to observe the whole range of possible cases to eventually develop statistical calculations. In this sense, it could almost be said that, just as the degree of logical probability and corroboration of the empirical content of scientific theories is greater or lesser depending on the level of precision with which they are formulated<sup>37</sup>, similarly, in the field of legal interpretation, only at a relatively abstract and generic level of formulation of principles and values does it appear possible to obtain an agreement, inevitably incomplete and provisional, between bearers of different conceptions of the public good (of the obligations, rights and moral values that claim priority).

The above can be illustrated with an example. Taking up Daniel Mendonca’s reconstruction, the Spanish Constitutional Court’s position on the classic conflict between the right to information and the right to free speech on the one hand, and the right to privacy and the protection of one’s image (protected by Articles 20.1, 20.4 and 18.1 of the Spanish Constitution), on the other, can be summarized in the following formula: “[t]he right to information prevails over the right to honour, unless the information is libellous or, even if not libellous, is not truthful or lacks public relevance” (Mendonca 2003, p. 79, my translation).<sup>38</sup> Now, since courts cannot deal with legal disputes by applying a specific

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<sup>35</sup> At the same time, it should be noted that an originalist and static interpretative model, oriented to cognitively identify and deductively apply the original meaning of constitutional provisions, does not necessarily imply a conservative political ideology (see in this regard Sardo 2018, pp. 155-158).

<sup>36</sup> See in this regard Goldsworthy (2011, pp. 51 ff.).

<sup>37</sup> See in this regard Popper (2002, pp. 162-163).

<sup>38</sup> In the author’s view, the identified rule constitutes a more concise reformulation of two fundamental rules found in many rulings of the Spanish Constitutional Court: 1) “[la libertad de información], como regla general, debe prevalecer siempre que la información transmitida sea veraz y esté referida a asuntos públicos que son del interés general por las materias a que se refieren y por las personas que en ellas intervienen” (STC 142/1991); 2) “[no pueden] entenderse protegidas por las libertades de expresión e información aquellas expresiones o manifestaciones que [...] resulten formalmente injuriosas o despectivas, y ello equivale a decir que estos derechos no autorizan el empleo de apelativos injuriosos utilizados con fines de menosprecio, puesto que la Constitución no reconoce ni admite el derecho al insulto” (STC 85/1992).

pre-established hierarchy rule, but only intervene based on concrete circumstances, it is reasonable to speak of rules of conduct that cannot be applied peremptorily in future cases. On a logical and hypothetical level, the first step will consist in the construction of a taxonomy that allows to place each case within a certain category; subsequently, some rules of conditional priority will be elaborated, without implying an exhaustive hierarchization, but only an open and revisable order. The most important of these rules states that when there is a collision between freedom of expression and the right to privacy, the conflict must be resolved in favour of the latter right, but freedom of information must prevail whenever the information content is truthful and of public importance. This rule should be understood as open-ended and incomplete, since there is nothing to exclude the possibility that in the future new circumstances may arise, requiring the addition of another condition to those already established or the reformulation of the concepts of “truthfulness” and “public relevance”.

This process is undoubtedly subject to a form of inter-subjective control, since the solutions identified may represent models of guidance for future cases. However, it is always possible for the judge to free himself from the constraints constituted by the precedent. It is always possible, in broader terms, to work out a new universe of properties that has a different structure to establish a new order of compatibility between the conflicting norms.

A brief note. It should be noted that the theoretical orientation described here does not necessarily have to be associated with a metaethical “*irenistic*”<sup>39</sup> (or “coherentist”, depending on the denominations) approach, who believes it is possible to obtain a stable balance between the values that inform the substantial ethical content of the constitutional state, nor on the other hand does it imply the defence of the so-called “*one-right-answer*” *thesis*.<sup>40</sup> There is no logical link, from this point of view, between the use of a holistic interpretative method and the idea of an exhaustive and harmonious determination of the relevant properties of the standards. On the other hand, the orientation described here seems largely compatible with a model of reasoning of a *particularistic* nature, according to which “any consideration can represent a valid reason and all valid reasons must be

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<sup>39</sup> This denomination was first proposed by Celano (2013, spec. pp. 65-71) and was then taken up by various authors (see, for example, Barberis 2006; Luque Sánchez 2013). Settings of this type, which refer to intuitionist and cognitivist presuppositions, can be found in particular in the works of Finnis (1980, spec. chapters IV, V); Häberle (1993, pp. 39, 41, 62, 68).

<sup>40</sup> As is well known, the first and most complete elaboration of the thesis of the only correct answer comes from Dworkin (1986, spec. ch. 7). Although it is generally associated with an objectivist and/or essentialist type of argumentation in terms of the knowability of ethical values (see for example Celano 2013, p. 104, note 15), in reality this thesis states more moderately that it is unlikely, although not entirely impossible, that, at least from the point of view of the judge, there are cases in which the reasons for deciding in favour of one or the other of the two legal goods worthy of protection are perfectly balanced: law, in this sense, it can be completed from the inside, since it is possible to apply the norm that best suits the ethical-political principles on which each legal system is founded (see in this regard Atienza 2010; 2013, pp. 551 ff., 573 ff.).

weighed and compared to each other to establish what is correct to do within a particular case” (Redondo 2008, p. 102).<sup>41</sup>

By adopting this perspective, nothing prevents us from recognizing that, in some contexts, general and abstract ethical norms may exist that can guide the interpreter in the analysis of cases. What the particularistic model affirms, however, is that in these cases one can only speak of provisional and revisable “rules of thumb”, generalizations of particular decisions not necessarily valid for future cases. The decisions adopted, always relating to specific cases, are capable of being universalized on the basis of the rule of judicial precedent, projecting on all generic cases with similar characteristics.<sup>42</sup> The intrinsic variability to which the relevance of individual cases is subject does not exclude, on a conceptual level, the possibility of building “consistent”, logically coherent conflict systems, within which a generally unique response emerges for certain cases of conflict.

### 3.5. Moral Reading of Constitution and Reflexive Equilibrium

As we have tried to show, in a model of substantive legal culture, the widespread use of evaluative and indeterminate formulas, with a generic and indefinite conceptual basis, frequently characterizes the linguistic structure of the legislative provisions that recognize fundamental rights. This structural aspect seems to suggest, if not even impose in certain cases, the use of forms of moral reasoning (not *tout court* but) variously guided by the consideration of legal factors such as, for example, the argumentative techniques accredited in the legal culture of reference, possible case law precedents, etc. In other words, it seems to involve recourse to a model of *moral reading of the Constitution*<sup>43</sup>, capable to interpret and apply clauses endowed with the mentioned characteristics.

Not unlike how it can happen in understanding the meaning of a speech formulated in natural language, in identifying (and interpreting) the rights conferred by a constitution, we are constantly looking for a *reflexive equilibrium*, in which our ethical-judicial

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<sup>41</sup> In a nutshell, the particularist approach argues that moral reasoning does not represent a perfect inferential chain and generic cases are always capable of presenting exceptions. Like irenicism, particularism also affirms that conflicts between values or principles present one and only one correct solution; but, contrary to the latter model, he believes that this solution cannot be identified *ex ante* for future cases, but is valid only for a concrete case. For a debate on ethical particularism, see above all Schauer (1991), McDowell (1998), Raz (1999, espec. p. 245), Sinnott-Armstrong (1999); McKeever & Ridge (2006), Hooker & Little (2000).

<sup>42</sup> Naturally, this model is mostly reflected, on a more strictly legal level, in common law systems, in which the revocation, also called “overruling”, determines the retroactive exclusion of the former judicial within the system and its replacement with the other established test case. The binding nature of the precedent can also be overcome by the technique of distinguishing: in this case the judge excludes the applicability of a specific precedent to the present case, based on some differences that appear relevant to the question to be decided.

<sup>43</sup> For this notion see above all Dworkin (1996) “[A]ccording to moral reading, these clauses must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government’s power” (*ibid.*, p. 7).

principles and our immediate intuitions are also involved.<sup>44</sup> In this regard, it is convenient to quote widely what Giorgio Pino writes:

starting, for example, from a very generic definition of the freedom of expression of thought, and assuming some values and objectives that justify the protection of this freedom (in hypothesis, the development of democracy and individual autonomy ) we will have paradigmatic cases of its violation (censorship in relation to an anti-government newspaper); while it will be uncertain whether other behaviours really constitute instances of the exercise of the freedom in question (pornography, commercial advertising) and if some other behaviours represent a violation of the same freedom (public financing of government newspapers, although without exerting a censorship towards the other newspapers). The answer to these last cases can only be provided by committing ourselves to an argument that evaluates the meaning and scope of the values underlying the recognition of a certain right, and also its relationship with other relevant values; and this argumentation may induce us to include or not certain modalities of manifestation of the thought of the field protected by the right (and then to reformulate its definition), or even to reformulate the very justification of the right, continually unravelling between the cases in which the right is relevant and the substantive justification of the right (Pino 2008, pp. 408-409, my translation).

Based on these starting assumptions, relying on the identification of some paradigmatic cases (real or imaginary), *i.e.*, hypotheses in which we are sure that certain relevant terms find application, it becomes possible to develop a rational argumentation in support of the extension or exclusion of a dubious case. In these circumstances we will be led to ask ourselves, possibly also in the light of further moral principles and judgments, whether the characteristics of certain paradigmatic cases are also present in other cases which, in principle, could fall under the same discipline. In this operation, the interpretation of constitutionally enshrined rights is ultimately one with the reconstruction of their doctrinal background: the identification of the ethical-political doctrines (liberalism, socialism, republicanism, etc.)<sup>45</sup> from which they originate on the historical level and the values (life, property, freedom, equality, etc.) that they embody.

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<sup>44</sup> The holistic character of reflective equilibrium is underlined above all by Rawls (1971). The relevance of this intuition for the theory of law is analysed in particular by Maniaci (2008).

<sup>45</sup> “Una dottrina, una teoria etico-politica, è un contenuto di significato, un contenuto di senso complesso (non, ovviamente, un insieme di enunciati). I criteri di identità di una dottrina sono, dunque, i criteri di identità di un contenuto di senso. L’identificazione di una dottrina è la ricostruzione di un contenuto di senso, mediante la comprensione di un insieme, verosimilmente indefinito, di enunciati. Se una costituzione incorpora una dottrina, per comprendere la costituzione – ossia, per determinarne il senso – occorrerà comprendere che cosa sia incorporato, e per comprendere che cosa sia incorporato occorrerà identificare – ossia, ricostruire – la dottrina” (Celano 2013, p. 99).

#### 4. CONCLUSIONS

(1) In the previous considerations we tried to show how it is ultimately implausible, even counterintuitive, to consider that a constitutional text which is the result of a “social contract” between heterogeneous political-cultural traditions and conceived with the aim of lasting for a long time, may contain detailed regulations, rights formulated in an accurate and precise manner. On the contrary, the extremely generic framework outlined by the constitutional provisions opens up for the interpreter a plurality of “*constitutionally possible worlds*” (different, and often equally “reasonable”, are the ways of interpreting abstract moral principles).<sup>46</sup>

A global reading of the set of rights, principles, goods, and interests recognized within the constitutional systems of contemporary liberal-democratic states shows an articulated web of potentially conflicting, incommensurable, and incompatible values. The rights, values, and ethical principles that inform the content of current liberal democracies’ constitutions seem to present a global internal link (or, at least, a web of relations), which emerges both in (indeed more frequent) cases of incompatibility and in their synergistic cooperation.

(2) When concretizing provisions that recognize constitutional rights, judges behave predominantly as moral agents by adopting, more or less implicitly, an “*internal point of view*” with respect to legal practice<sup>47</sup>. In other words, in the process of interpreting and applying the law, judges are not faced with external “objects” independent of their own observation; rather, they tend to interpret provisions based on a continuous internal comparison with the substantive and value-oriented dimension of the constitution, influenced, among other things, by their own immediate moral intuitions, by the “cultural crystallizations” sedimented outside the legal text (see in this sense Häberle 2001, p. 33) and by the general ethical principles of the legal culture of reference. The transition from judge-selected provisions to norms can be conceived as a fundamentally entropic process of interdependence and interaction between interpreters and available normative materials (judicial precedents, paradigmatic cases, para-normative acts, etc.). Relying on a necessarily finite set of pre-selected information and interpretive strategies, judges arrive at a provisional conclusion which is deemed correct *all things considered*, and often guided by substantive assumptions of practical reasonableness or inclusive conceptions of the public good.<sup>48</sup>

<sup>46</sup> The expression is taken from Moreso (1997, p. 167).

<sup>47</sup> For this notion, the reference is Hart (1994).

<sup>48</sup> See in this regard Fiandaca (2011, pp. 1395-1396; “l’identificazione del contenuto, la determinazione della portata e dei limiti di valori e principi costituzionali dal contenuto indeterminato come dignità, uguaglianza [...] sono operazioni che richiedono – non di rado – il ricorso a considerazioni e argomentazioni morali sostanziali, le quali, lungi dal poter essere sviluppate tramite un’attività di semplice interpretazione del testo costituzionale in sé considerato, rimandano alle ideologie e alle concezioni morali comprensive di riferimento dei singoli interpreti”); and also Celano (2013, p. 105; “una teoria plausibile del significato è una teoria che rappresenta l’attribuzione di significato a un enunciato, o a un complesso di enunciati (la comprensione di un discorso), come un’impresa di carattere olistico e coerentista, guidata dal principio di carità e da assunti sostanziali di ragionevolezza. Queste caratteristiche si presentano in forma tanto più marcata, quanto più il discorso oggetto di comprensione contiene termini generici, astratti, aperti, indefiniti, suscettibili di una molteplicità di specificazioni”).

(3) For the reasons considered above, it is illusory to believe that the indeterminacy of the style of constitutional drafting of rights, though largely unavoidable, automatically produces beneficial effects in interpretation, in terms of the democratic legitimacy of the judicial management of rights rather than in relation to their implementation. In the current constitutional panorama, the judge always bears a considerable burden of argumentation whenever he has to make an interpretative choice. The judicial power is obliged to “base” its choices (justify its decisions) in relation to various matters, including, of course, the balancing of rights. In this sense, the legal reasons supporting interpretative decisions appear structurally partial, thus enabling potentially conflicting results.

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