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THE NECESSITY FOR A LIVING CONSTITUTIONALIST CONSTITUTION: THE PERKS FOR THE SOVEREIGN

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Abstract:

This essay will attempt to retrace the steps towards the construction of a Constitution and its impact on its subjects when interpreted in a manner or another. More specifically, I will be concerned with the roots and the authority of law, for start. Having set some parameters for the discussion, I will then proceed to identify the theoretical role, traits and scope of a Constitution, as derived from a conception of law. Then I will try to narrow the scope of the discussion by referring to Ralws' view on Constitutions as a political act, only to show that, in the end, a certain view of the interpretation of the Constitution can do justice to its fundamental purpose, the respect for the Sovereign's (people) will.

Key-words: Law, Constitution, interpretation, living constitutionalism, originalism, Sovereignty

1. Theoretical discussion

The first significant question to be asked is related to the question of the origin of law. Differently put, there is the vast field of law, delineated in this one relevant aspect, the political one, through the line drawn between sovereign and individuals. The main question is whether law is coercive only through the "habit of obedience" (Hart 1961, 50) of the latter towards the former, where the former are not held to any account by third parties, or by anything else; in a different key, if X can be said to be subject of laws issued by Y only if X habitually accepts or follows said laws (Hart 1961, 50). Still, as Hart's argument unravels, the habit of obedience is not a concept that can significantly explain the continuity of authority and the persistence of laws (Hart 1961, 51). Firstly, habits of obedience would not successfully explain the rightful continuation of the emission of laws from one sovereign to another, if only the first benefited from the benefit of obedience. Secondly, the same concept cannot explain why the new legislator's emitted laws will create an obligation to obey (Hart 1961, 55). This argument, that laws and compliance came about as a result of the habit of obedience, came to life through Austin, Bentham or Hobbes and their purported proposal of legal realism (Hart 1961, 64).

Another significant contribution with regard to the sources of law was made by Joseph Raz (Raz, The Authority of Law 1979). He proposes an approach on authority and its origins and traits. Firstly, it is worthwhile to point out that authority is not necessarily based on a de facto perspective. In other words, authority can be circumscribed by the necessary conditions for an entity to hold authority. Tautological as that may be, this view does not permit one to identify much in the way of the meaning of authority itself or holding authority (Raz, The Authority of Law 1979, 5). Differently, this approach can only possibly point out the locus or the context of authority, one may infer.

The second perspective rejected in the definition of authority is that of de jure authority. In this case, authority can simply bring to mind the conclusion that authority must be justified. Hence, authority is justified (defined etc.) by some act from which it receives its reasons (Raz, The Authority of Law 1979, 6). Asking for action X is reason enough for some individual to believe that the entity requiring X

holds authority, it can be inferred. However, a similar criticism to the first approach is proposed by Raz to the second perspective, that it too much circumstantial and not very specific (Raz, The Authority of Law 1979, 7).

Thirdly, authority can be conceived as the ability to wield power. Authority can be identified in this case as the capacity to influence the actions of others (Raz, The Authority of Law 1979, 7). Still, there is the qualification that authority must be effective, but also be accompanied by ancillary claims, in that the exercise of power must be also recognised to be done with a claim (right, at a stretch) to that action (Raz, The Authority of Law 1979, 9).

Fourthly, authority cannot be solely explained by means of a system of rules. That is, this fourth objection tries to prove that an entity does not possess authority only if the reference to a system of rules proves to be advantageous to the entity. More likely, authority cannot be understood in this way due to the fact that there is nothing to specify which rules are to give the holder authority (Raz, The Authority of Law 1979, 9).

Hence, can authority be defined in a satisfactory way? Raz argues that it can, circumventing the aforementioned objections. First of all, there is no absolute authority, in the sense that it can emit perfect obligatory commands (Raz, The Authority of Law 1979, 13).

The fact of the matter is that a rule is open to acts of noncommittal nature. In other words, it does leave open paths towards non-compliance which can be, in turn, assigned a value, positive or negative. Furthermore, a rule can not only be disregarded, but it can also be perceived as unsuitable. In addition, a rule has a sort of internal strength, it creates uniformity (it sets a certain standard), also named “internal aspect” (Hart 1961, 57). The last case can be seen as a sort of pressure towards the ones not conforming to the expected path dictated by the law (Hart 1961, 55-57). One might argue that the last aspect relates to a normative foundation of laws. Consequently, the continuation of the ability of the lawmaker lies in the reason that it has both the habitual obedience of individuals, but also that it has a right to perform that ability (it is qualified according to one criterion or another) (Hart 1961, 59).

In order to show that the law commands authority, Raz constructs an argument leading from normative power. If there are reasons for actions (primary), as is the case of obeying a request from a parental figure, there can be secondary reasons that enforce or weaken the claim of first-order reasons. This is the case if we think of a certain hierarchy of command, say, through which General X dictates that the Private J should obey or not Sergeant W's order. At this point, Raz names a secondary reason a "protected reason" the reason that will mean that J will follow X's command but not that of W, at the same time (Raz, The Authority of Law 1979, 17-18). Returning to the crux of the demonstration (the fact that law has authority), a certain act A is one that implies normative power if some entity/entities (individual, supposedly) regards A as a protected reason because it would be convenient for individuals to use acts such as A (Raz, The Authority of Law 1979, 18). To my mind, there is a degree of internalisation of the reason (understood broadly) by individual(s) to use protected reasons, for instance to change other protected reasons etc.

Normative power, then, allows an individual to change protected reasons. This can be done through "power utterances", as Raz names them (Raz, The Authority of Law 1979, 18). The latter can be used to exclude reasons (as in X, J, W), to allow the modification to a former protected reasons and to make one the rightful modifier of protected reasons (Raz, The Authority of Law 1979, 18). Hence, crucially, authority enables one to change reasons; power enables one to change protected reasons. Therefore, power is the larger species to which the family authority belongs (Raz, The Authority of Law 1979, 19). In detail, authority is present (for X) when three conditions obtain: somebody (X) entitles somebody else (Y) to do something (A), where (W) is concerned tangentially, when X has the power to do so and when Y's A will affect W and when X has authority over W (Raz, The Authority of Law 1979, 20).

Law, in another account, (Dworkin;s), is defined in relation to force as a provision that does not recommend the use of force, regardless of the reasons for its use (brilliant as opposed to obscure), except in the case that past values and decisions give it license to do exactly that (Dworkin, Law's Empire 1986, 93). Even more specifically, the law exists in virtue of a justified use of coercion against citizens (Dworkin, Law's Empire 1986, 109).

Another point related to law is that it is persistent. Subsequently, one must give an explanation to this trait as well. In other words, how can one explain that laws outlive

their creators? The quite plain reason for which laws do not heed the passage of legislators is that they are, indeed, created on the qualification (the right) of the legislator at that time. However, due to the fact that the X and the Y were similarly qualified (i.e.: royal birth, election, wealth) to create legislation, laws are respected, regardless of their origin (Hart 1961, 63).

Moreover, the limits of a sovereign's law-making abilities lie in the fact that it can pass legislation that overrides its legal domain, but the said legislation will be void (Hart 1961, 69). In other words, it is not a matter of duty or obligation on the part of the sovereign, but rather a matter of hurdles that the aforementioned entity faces.

The changing of a Constitution can be achieved by a body distinct from the ordinary legislative body or by the respective body using a special procedure (Hart 1961, 73). Consequently, one may ask who the sovereign without an obligation to heed others is. Hart concludes that that entity is the people that elects legislatures; the aforementioned sovereign (Hart 1961, 74-75). This paradox can be solved if one identifies the analytical difference between the public capacity of individuals and their private capacity (Hart 1961, 76).

Rules can be, in contrast to the first architecture of the theory, construed as not deriving from authority (force or habit), but rather as a dichotomy: primary and secondary. Whereas the first instruct the individual with regard to abstention or duties, the second type concerns a modification in the first, a sort of dynamic in the structure of power (Hart 1961, 81). Regardless of the flaws of the Austinian-Hobbesian model, one of its premises was correct: law creates distortions in human behaviour, otherwise (in the case of legal non-existence) non-existent (Hart 1961, 82). Understood as tangled in this new conceptual nexus, laws create obligation not through force or habit, but rather through their imposition of standard, set, behaviours and their focus on individual cases, despite their general aspect (Hart 1961, 85). What makes a legal system different from one of rules (understood generally) is that it provides ancillary avenues for the realm of laws apart from the primary rules, the secondary ones (Hart 1961, 95). The connection between secondary and primary rules is realised through the recognition of rules. The last means that a secondary order rule is supported by the group and that it is correct in trying to alter, introduce etc. primary rules (Hart 1961, 94). In other words, recognition acts as a middle ground, as a connection, between the two.

Put differently, a secondary rule identifies a primary rule and may enact a modification in the latter in virtue of the Constitution, the enactment by the legislative or the precedents available (Hart 1961, 100-101). Therefore, one needs to look towards the ultimate rule of recognition (say the Constitution) to see that it stands at the top of a legal system and that the latter is conditioned by the existence of criteria of validity that are sanctioned by the ultimate rule of recognition. Also, the former must be respected in general. Moreover, the rules of recognition must be publicly accepted by officials (Hart 1961, 117).

So, does the law have authority? There are two significant issues that Raz discusses. The first is that law has de facto authority. That is false, as de facto authority requires legitimacy, conferred on it by individuals (Raz, The Authority of Law 1979, 29). Secondly, the law has authority in its own right, as a sort of command that supposes adhering to some reason and refusing all other contradictory reasons (Raz, The Authority of Law 1979, 29). So, if the law holds authority, is it legitimate? The reason, similar to the second point reviewed above, is that it is, due to the fact that the law is in itself a reason to act/not act and that it comes into the play of reasons a person experiences. However, its weight is superior to other considerations and its existence includes protected reasons (reasons to act to some act dictated by another reason and to discard all other opposing alternatives) (Raz, The Authority of Law 1979, 30).

However, as authoritative as it may be, the law lacks in several respects. Firstly, it does not take into account all the relevant reasons and, secondly, it does not easily transform according to demands. The two objections have quite pragmatic answers: to the first issue, that the law has a moral charge that makes this failing insignificant in comparing the flawed law with the non-existence of law; to the second, that it can be still amended (Raz, The Authority of Law 1979, 31-32). Finally, the claims authority if all these arguments are laid into place. It necessitates that all those touched by it acquiesce to the standards imposed (Raz, The Authority of Law 1979, 33).

2. Constitutions

Ronald Dworkin tackles the issue of Constitutions (Dworkin, Law's Empire 1986). The main point of a Constitution is to (issue) cement constraints on issues pertaining to society (Dworkin, Law's Empire 1986, 355). The role of the Constitution can be regulated, as was the case of the US, by regarding it as a law and not as set of guidelines for the other institutions (Dworkin, Law's Empire 1986, 355).

Dicey (Dicey 1979) lays out a comprehensive introduction on the topic of Constitutions. One of the first points to remember is that Constitutions were perceived as far more than a judicial act, they were seen as works enlivened and touched by the spirit of the country whose Constitution they were (Dicey 1979, 2). The scope of constitutional law is the exercise of power in the state. Specifically, it is concerned with how members of the state relate one to another, how the exercise of authority will be carried out or stipulates what the limits of some branches of government will be (Dicey 1979, 23). Or, as Ackerman puts it: "The Constitution presupposes a citizenry with a sound grasp of the distinctive ideals that inspire its political practice" (Ackerman 1991, 4).

Raz proposes a more elaborate definition of a Constitution. On this account, it is a theoretical concept dependent on seven traits (Raz, Between Authority and Interpretation 2009, 324). Firstly, it delineates the attributions of the main branches of government. This is synonymous with the mapping out of the do's and don'ts for each branch. Secondly, a Constitution must be designed in order to be stable and survive for a long period. In a different sense, a Constitution must be stable and durable, even if susceptible to change. Thirdly, it is usually written. Fourthly, the Constitution lies on a superior position to ordinary law. Fifthly, there are mechanisms through which it can be measured against other laws. Sixthly, the modification of its amendments is more difficult than that of other laws. Finally, it also includes principles after which the government of that state may be carried out. In this sense, it carries the opinion of the Sovereign (people) as to the political direction, generally defined, that their society should embrace (Raz, Between Authority and Interpretation 2009, 324-325).

However, a Constitution is concerned, if carefully looked at, with two analytically different parts: one which deals with proper laws, enforced by the courts (called the law of the constitution), and the other that deals with other stipulations (limitations or distributions of power) that are not enforced by courts (called the convention of the constitution) (Dicey 1979, 24). The first is, of course related to strict interdictions:

"The Queen can do no wrong" (Dicey 1979, 24). The second is related to issues such as the obligations of officials that do not have legal grounds for court action: "a bill must be read a certain number of times before passing through the House of Commons." (Dicey 1979, 26).

Significantly similar, the Constitution appears in Ackerman's account as a dualist concept, in that it embodies two dimensions: decisions made by the sovereign (people) and those made by the government (Ackerman 1991, 6). Still, the Constitution remains a course littered with hindrances for the government faction. That is because they must obtain serious support from those whom they govern (Ackerman 1991, 7). That is because the conception of democracy favoured by Ackerman seems to differ from a monistic one. The latter stipulates that under free and equitable conditions the winning party receives the prerogatives available and that they, in turn, do not alter the course of the next election (Ackerman 1991, 8). In this respect, the system of the UK seems to Ackerman most compatible with monist democracy: little can counter-majoritarian decisions count apart from the majoritarian ones (one can gather). In other words, the people can vote for the repeal of a law or another, but no institution can take up this role (or become part of the process; it is a view that regards elected representatives as crucial) (Ackerman 1991, 8).

Contrary to this, the dualist view implies that lawmakers do, indeed, get a quite important say in the making of ordinary legislation. However, if it comes to more profound modifications, they must consult other institutions along the designated path (Ackerman 1991, 9). Simply put, this system is in place so as not to trifle or vacillate with decisions made by the Sovereign (what Ackerman calls "We the People") (Ackerman 1991, 10).

Consequently, there can be said to be a difference between the monist and dualist democracy (and the corresponding views on law and the Constitution) (Ackerman 1991, 11). Apart from these two models (views) on democracy and law, there is a third one, the foundationalist one. This last view relies on the restriction on the ability of the legislative and/or the Sovereign, in exchange for the protection of a fundamental right. Surely, there are multiple interpretations of what the fundamental, core, right should be protected (for Dworkin it is equal concern and respect, or for Epstein the property rights) (Ackerman 1991, 11).

The distinctive difference that marks the separation of monist views and the foundationalist ones is that the first do not emphasise rights as much as and in a similar degree to that that foundationalists do. If right X is fundamental for foundationalists (general term that can be filled by multiple rights) and, as a result, the judicial review must annul all laws contrary to X, the foundationalist will be pleased, whereas the monist will raise a counter-majoritarian objection (Ackerman 1991, 11-12). By extension, monists can be accused of a sort of hot-headedness, whereas the foundationalists of being definitively drawn to perspectives too theoretical and divorced from the reality of society (Ackerman 1991, 12).

The relevance of the dualist conception is manifest as soon as one shows that both these approaches can be accommodated by the first. It can be argued, as Ackerman does, that monism can be satisfied by the two-track system (dualist) because the latter allows the modification of laws according to the will expressed through ballot, whereas the foundationalist can be content that the preoccupation for the protection of rights will not be disregarded (through the judicial review, for instance) (Ackerman 1991, 12-13).

Constitutions, understood along the lines sketched by Raz, must still answer the question relative to their authority. The validity of a Constitution (and its inherent authority) lies, in part, in the identity of the issuing party, as with any law (Raz, Between Authority and Interpretation 2009, 329-330). Understood from a different angle, this signifies that a Constitution has authority only if the issuing entity had authority (Raz, Between Authority and Interpretation 2009, 330). A Constitution, indeed receives its authority from its framers or from other laws and if the framers or other laws or bodies were authorised (morally) to create the Constitution, it follows that the Constitution is authoritative (Raz, Between Authority and Interpretation 2009, 332).

If, however, a Constitution is not drafted as a result of existing conditions (legal, structures of authority), the question becomes trickier. Raz, in searching the answer, refutes Hart's argument from rules of recognition. To wit, rules of recognition were what could be named a Constitution, a set of rules that are enforced and that has authority that emanates from the conditions in which it exists. Namely, thus regarding the Constitution is to compare it to a living body, sustained by the activity of officials etc. Moreover, this approach can be refuted if it one considers the Constitution as not

only a sort of static system, but rather as a dynamic, amendable, one (Raz, Between Authority and Interpretation 2009, 332-334).

Secondly, the argument from consent receives the all too familiar critique regarding the availability of consent (or its requirement from individuals; no one is called to consent to the Constitution). Moreover, there is the less remarkable issue that individuals may refuse to accord their consent due to irrationality or whim, for instance. These are the two criticisms levelled at the consent-approach (Raz, Between Authority and Interpretation 2009, 335). Raz's critique also serves to show that consent is not the way to imagine the source of a Constitution. This is due to the fact that authority does not necessarily imply consent. That is because consent can be founded on the fallible human nature and consequently not need imply that the individual had good reasons to consent. Moreover, even other sorts of authority, such as the political aspect of it, do not always require or request consent (for instance the support for the protection of the right to property; one does not consent to uphold another's claim that he be covered for the loss suffered) (Raz, Between Authority and Interpretation 2009, 337).

Thirdly, one may argue that no author of a Constitution can gave authority over the course of life on which future individuals will need to embark. Laws have a finite domain, spatially and in terms of reach (banking regulations, property rights, pharmaceutical regulations etc.) (Raz, Between Authority and Interpretation 2009, 338-339). Hence the conclusion that Raz reaches, that constitutions need to find authority from other sources apart from that conferred on it by the makers (except if it is a new constitution) (Raz, Between Authority and Interpretation 2009, 343). Raz states, as a response to these searches, that a Constitution is authoritative (legitimately, one may add) if it derives its trait from the empirical validation received through existence, an existence qualified as positive or negative through the moral principles that confine it. In other words, a Constitution has authority if a set of moral principles is in accord with what the Constitution proposes and if the same law does not cease to exist (Raz, Between Authority and Interpretation 2009, 348).

In order to close this part of the essay, I will simply state that the most useful circumscription of law is made by Hart by marking the division between the primary and secondary order rules. Furthering this understanding of legislative acts, a Constitution is the ultimate (superior) recognition rule. That is, it is the rule according

to which all the other rules loose or gain their authority/strength. To go even further, this conception of law corroborates nicely with Ackerman's account of a dualist system of law: law created by the Sovereign people and law created and enacted by means of a Parliament (usually). Why this choice? Because it seems to award the greatest degree of power to the ultimate issuing authority in a society: the citizens.

3. Political conception

In his search for the basis of a stable and politically liberal society (Rawls 1993), Rawls touches on the idea of Constitutions, understood as constitutional essentials, but also as documents, that can be interpreted, which lie at the foundation of the whole institutional construction of society.

The role of establishing a constitutional consensus is to ensure that the political rivalry in a society is limited. In other words, this consensus is built on the topic of electoral procedures, for instance (Rawls 1993, 158). What this procedure does is to set in stone particular rights or provisos, if one chooses to call them so, outside of the vested interests of the political struggle. If the analogy is helpful, it resembles a sort of safety net that cannot be altered easily (Rawls 1993, 161).

The most significant trait of this consensus is that is relative to issues relatively narrow in width and depth: what the fundamental rights ought to be in society (conscience, association etc.). This leaves a whole lot of other issues unsettled (Rawls 1993, 159). If the problems upon which consensus falls deserve revisiting at an ulterior time, there is nothing hindering modification (although it must be said that Rawls suggest it be a slow and considerate process) (Rawls 1993, 160). Furthermore, a constitutional consensus is necessarily public and expressed as to be easily understood (Rawls 1993, 162). Furthermore, although a more abstract argument, this mechanism may entrench a spirit of cooperation and of toleration (Rawls 1993, 163).

Delving deeper into the subject, a Constitution, according to Rawls, following Locke, is that the constituent power of the accord, that of the people, is to govern ordinary power. Moreover, the expression of the citizens' will implies the establishing a hierarchy that favours higher law (created by means of a Constitution or constitutional agreement) instead of common law (Rawls 1993, 231).

Additionally, a Constitution contains the vocalisation of the mode in which citizens desire to be govern (govern through intermediaries or delegation, if one favours the strict meaning). Fourthly, it is a way through which the citizens can ensure their continued participation as veritable Sovereigns. Lastly, Constitutions identify limits and assignments of power. More specifically, they will establish that, for instance, three governmental branches will have power, but that the three ultimately answer to the citizens (Rawls 1993, 232).

As an expression of the principles mentioned beforehand, there can be the case of the recognition of the difference between common and higher law. In addition, there can also be concluded that there need be guaranties that ensure that the aforementioned provisos (traits) are honoured. For instance, a judicial review (Constitutional Court) can be useful in safeguarding against rash and momentous decisions brought about by chance or by a specific political context (Rawls 1993, 233). Also, finally, a Constitutional Court has the authority to find answers to fundamental constitutional questions through interpretation (Rawls 1993, 237).

4. Originalism vs. Living Constitutionalism

This debate started and still continues due to a very significant question: what is the Constitution after all? Is it just a document that was made to be adapted to diverse contexts for the people it stands for or is it a set-in-concrete document, whose values must be taken as the constituents intended them to be taken?

The debate can be traced to twentieth century constitutional arguments, centred on the discontent of strict constructionists with the incorporation of personal biases into the interpretation of constitutional articles. However, on the other side of the debate, living constitutionalist asked how can decisions be given on constitutional issues, supposedly static in nature, so as not to affect the original intention of the makers of the Constitution (Graber 2013, 67). In other terms, originalism does not seem positively preoccupied with the present and thus missed immense opportunities to aid in creating a good society for its inhabitants (McGinnis and Rappaport 2013, 1).

The dynamic of this debate is not supremely complex, although the divide between the two parties makes a good amount of impact on issues of interpretation.

Originalism takes into account a fixed meaning of the Constitution. It considers the original text to be charged with authority, in that it carries a binding legal character (Goldford 2005, 91). That is, taking whatever other example, a law cannot be interpreted according to a court's will due to the fact that it is legally established. That is, it has a clear scope and an unambiguous mode of treating with the issues at hand. The interpretation of this virtual law, then, is one that is quite limited, according to these parameters.

More specifically, originalism relies on the interpretation of constitutional provisos according to the language and context (normative or otherwise) of those that created the Constitution. The reason for that is that later generations than that of the creators may not attribute strange values, looked upon as partisan values, to the specific amendments they interpret. (Goldford 2005, 91). On the other hand, living constitutionalism relies on the shifting nature of the values of the citizens whose authority financed the whole constitutional construction. This is why the adaptation of amendments (articles) of the Constitution can be interpreted, because the almost-sacred link between creators (in the continuous sense) and the document cannot be severed at the first generation. A Constitution, in this account, must adapt to new values in society and serve its creators (Balkin 2011, 277).

5. Matter-of-fact discussion

Can we find significance between the last parts of the essay an empirical case? I think we might, if we conceive of Constitutions as acts necessary to preserve the sovereignty of the people and the rightful authority (in want of a better term, legitimacy) of a government. Already past the point of creating a Constitution, it is also relevant that the people retain a grip on their fates as members of a community. In other words, some interpretations (originalist) cannot give coherent explanations for brusque "derailments" from an already set document. That is why the living constitutionalist interpretation can do much more for the point of explanation: because it includes the input of some current of opinion, contrary as it may have been to some stances, that can suitably alter some aspect of such an important document. Moreover, it also heeds the need for a judicial review, a Constitutional Court, that can

be charged with the difficult task of interpreting the Constitution and the preservation of a certain equilibrium.

The case of "Brown vs. the Board of Education of Topeka, Kansas" (National Archives n.d.) is a paradigmatic example of constitutional interpretation. It concerns the equal treatment of racial minorities and it has its origins in the state-backed segregation of public schools. The first step towards the recognition of equal status of citizens was made through the transformation of slavery into an illegality, in 1865, done through the 13th Amendment. It stated that ""Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." (Library of Congress n.d.). The 14th amendment, which lay at the centre of the Brown vs. Board of Education controversy, gave all citizens the right to be recognised as equal subjects of the law. It stipulates that no person may be denied "life, liberty or property, without due process of law" or that it is possible to "deny to any person within its jurisdiction the equal protection of the laws." (Library of Congress n.d.).

A further amendments, the 15th attempted to set equal and fair conditions for all individuals to exercise their voting capacity: [the] "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." (Library of Congress n.d.). Consequent to this, the first Civil Rights Act, which again called for the equality of citizens in front of the law, was implemented in 1875. However, the Supreme Court modified the scope of the provisions to apply only to the public domain, creating an anti-emancipation current (National Archives n.d.). The year 1909 saw the creation of the National Association for the Advancement of Colored People, first established in order to fight against crude violations of rights for the African-American population. Afterwards, it became focused on deeper integration of this minority. By the 1950s, the NAACP started to support the efforts of desegregation at primary school level. These trials, amongst which: ": Oliver Brown et al. v. Board of Education of Topeka, Shawnee County, Kansas, et al.; Harry Briggs, Jr., et al. v. R.W. Elliott, et al.; Dorothy E. Davis et al. v. County School Board of Prince Edward County, Virginia, et al.; Spottswood Thomas Bolling et al. v. C. Melvin Sharpe et al.; Francis B. Gebhart et al. v. Ethel Louise Belton et al." (National Archives n.d.) were all aimed at the discrimination of African-American schools relative to the rest of the white-member schools. In our

case of interest, however, the Supreme Court decided that "separate but equal" was not an infringement of the 14th amendment and that the decision to maintain segregation in schools was not detrimental, relative to the Constitution (National Archives n.d.).

In 1953, the new Supreme Court judge, Earl Warren, was named exactly due to his envisaged moderate attitude towards desegregation. His effort did not go to waste, as in 1955 the verdict for the Brown II case was announced, marking the recognition of the injustice of racial segregation in schools, the necessary compatibility with the 14th amendment and the immediate instruction to channel all efforts into the desegregation of schools (National Archives n.d.).

6. Conclusions

What are the lines connecting the dots in this case? Firstly, we established that the law has in itself authority. This authority, in turn, is not dependent on the framers' identity. That is a salient point, as it can be argued, to my mind, adversely, that the law holds particular sorts of authority relative to different rulers, framers or contexts. That, surely, would be undesirable. Secondly, we have settled on the issue of the technicality of law. More specifically, how the law can be categorised theoretically. We have stopped at the definition of law as a command that overrules other commands. Superlatively, they may well be a law that overrides (or restrains) other laws, a concept that has been reviewed under the name of ultimate recognition rule (law). This last concept may very well and correctly be substituted for a Constitution, at least in theoretical terms.

Consequently, the origin and scope of a Constitution has been reviewed and the two-tier approach favoured by Ackerman has been favoured for the purposes of this argument. The reason is quite intuitive, given the first step of the discussion. Ackerman's proposal accommodates the idea that there are rules and there are superior rules, to put it plainly. There are the rules made through delegation, the ones of the ordinary legislature and there are the ones of higher order, those emanating directly from the people.

Consequently, I have reviewed Ralws' arguments that can build a stable liberal political regime. That was done in order to shed some light on what legitimately could be expected to occur in political terms if one wanted to reconcile the power of a specific authority, the judicial review, with the sovereignty of the people. It only went to show that there can be strong vestiges of sovereignty within a system such as that implies constitutional review and protection.

The next step was to see what interpretation implies. Surely, as a general point of the essay and not one rather particular to this issue, several assumptions have been taken for granted or used as underlying assumptions. This case is no exception, as I have assumed that interpretation is natural, as opposed to original readings of Constitutions. This is, surely, a grave difference: between interpretation and non-interpretation (understood as input or non-input from judges, say) and originalism and living constitutionalism (understood as what the interpretation will most likely take into account- the original text or inputs relative to a society's context). However, one would need to favour the appropriate living constitutionalist view, as the originalist one does little for the purpose of the argument and, ultimately, for any argument related to sovereignty of a people conceived as continuous and not fragmented and insular.

Finally, I have looked at the case of Brown vs. the Board of Education in order to show that decisions such as those made prior to the appointment of Judge Warren can have tremendous impact on the fate of parts of the population. The assumption is that what Warren did was to connect constitutional amendments to the reality of the 20th century, that is to interpret the 14th amendment according to the spirit of the age that he perceived. An originalist interpretation would not only have been inadequate in terms of consequences, as it was seen beforehand, but also quite unnatural to the whole verdict Warren gave: an originalist interpretation would not have explained lightly the deviation from the anterior verdicts.

To conclude, is it that only a living constitutionalist interpretation of the Constitution can do justice to the sovereignty of the people? Most probably, yes. It is in its definition that it would at least attempt to connect the abstract power of a Constitution with the real people that actually exist and actually have to endure under the constraints of the fundamental law. This cannot be done, according to the account given here and the steps reconstructed. One would only be able to offer, in lieu of a

proper ending, the hypothetical situation in which an originalist interpreter would have given the decision on the Brown II case and its tangent cases.

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