The unwritten presuppositions of constitutional law and constitutional interpretation

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1. Introduction

The title of my paper refers to two controversial concepts in juridical science and jus-philosophical reflection: constitutional law and its interpretation. Both are in fact the object of a plurality of different and conflicting juridical theories and doctrines and assume different and contrasting conceptions of law. Notwithstanding this plurality of views, «constitutional law» is inextricably linked to its interpretation, since the application of a legal system requires its interpretation. Furthermore, these two concepts are intimately connected with the theory of the separation of powers and, finally, with the concept of sovereignty itself. In this work, I will argue that constitutionalism cannot be deprived of a dialectical interpretative method.[1]

By "dialectical interpretation" I mean the relationship between written and unwritten law, constitutional law and its presuppositions, or - in the words of Montesquieu - between the «letter» and the «spirit» of the law.[2] This dialectical perspective shuns monistic conceptions and has an impact on the doctrine of the separation of powers, since the judiciary power is not perceived as a mere prosecution of the will of the legislature and the «letter of the law», but as an interpreter of both the letter and the spirit of the law. Therefore, the interpreter is thus required to take into account both the written law and its premises of an ideal and historical nature.

In this work, I will discuss the presence of this dialectical method in the juridical philosophy and interpretation of constitutional law, raising the question of whether it is consubstantial with the «Wesen und Wert» («essence and value») of today's democratic systems. The affirmative

[1] In the Italian philosphical debate, the dialectical interpretative method was supported at an early stage by Vittorio Frosini. About Frosini see V. Frosini, *La lettera e lo spirito della legge*, Milano, Giuffrè, 1998[3]. Reference to A. Merlino, *L'idealismo giuridico di Vittorio Frosini*, with a preface by T.E. Frosini, Il Formichiere, Foligno, 2020.

[2] Concerning the separation of powers in Montesquieu I refer to A. Merlino, *Montesquieu. Eine Perspektive*, mit einer Einleitung von M.J. Rainer, Berlin-Boston, De Gruyter, 2020 and Id., *Interpretazioni di Montesquieu*, with a preface by D. Quaglioni, Foligno, Il Formichiere, 2018. In these two books, I have argued that Montesquieu's interpretation as the first advocate of the principle of the "judge-mouth of the law" is reductive and that the French jurist instead advocated the idea of a judiciary power as a counter-power in the institutional framework of divided sovranity, *partagée*.

answer will further demonstrate that today's juridical systems are not abstracted from their history, but on the contrary inserted in a long «tradition». The latter expression is to be interpreted in the sense ascribed by jurists such as Harold J. Berman[3], Winfried Brugger[4], Paolo Grossi.[5] For these authors, the reference to tradition does not mean the ambition to «recompose the shattered»[6] («das Zerschlagene zusammenfügen»), that is to re-establish the past or reaffirm its juridical doctrines. By contrast, the reference to tradition expresses the attempt to seek in the past a spark that can enlighten the present in order to interpret it and thus transform it into the future.[7]

This idea was aptly expressed by the German jurist and philosopher Winfried Brugger in the image of the «anthropological cross of law».[8] According to this metaphor, the jurist stands at the centre of a cross. At either end of the horizontal axis of the cross is the past on one side and the future on the other. Instead, at the ends of the vertical axis are the ideal of law (upwards) and reality, with its demands, impulses and needs (downwards). The jurist is at the centre and in the hour of decision falls into unilateral and therefore misleading choices if he does not consider all these four perspectives.[9] Similarly, the Italian jurist Paolo Grossi used the image of the «point» and the «line»: according to Grossi, the jurist must not only consider the law in its present

[3] H.J. Berman, *Law and Revolution, I. The Formation of the Western Legal Tradition*, Cambridge (Mass.) und London, University Press, 1983 e *Law and Revolution, II. The Impact of the Protestant Reformations on the Western Legal Tradition*, Cambridge (Mass.) und London, Harvard University Press, 2003.

[4] W. Brugger, *Das antropologische Kreuz der Entscheidung in Politik und Recht*, 2., erweiterte Auflage, Baden-Baden, Nomos, 2008.

[5] P. Grossi, *Prima lezione di diritto*, Roma-Bari, Laterza, 2006.

[6] The expression «recomposing the shattered» is W. Benjamin's, *Über den Begriff der Geschichte* (1940), in *Werke und Nachlass – Kritische Gesamtausgabe*, Bd. 19, hrsg. von G. Raulet, Suhrkamp, Berlin, 2010, S. 43. For Benjamin, making history means taking possession of a memory as it flashes «in the instant of danger»: «Vergangenes historisch artikulieren heißt nicht, es erkennen ›wie es denn eigentlich gewesen ist‹. Es heißt, sich einer Erinnerung bemächtigen, wie sie im Augenblick einer Gefahr aufblitzt. Dem historischen Materialismus geht es darum, ein Bild der Vergangenheit festzuhalten, wie es sich im Augenblick der Gefahr dem historischen Subjekt unversehens einstellt. Die Gefahr droht sowohl dem Bestand der Tradition wie ihren Empfängern. Für beide ist sie ein und dieselbe: sich zum Werkzeug der herrschenden Klasse herzugeben. In jeder Epoche muß versucht werden, die Überlieferung von neuem dem Konformismus abzugewinnen, der im Begriff steht, sie zu überwältigen. Der Messias kommt ja nicht nur als der Erlöser; er kommt als der Überwinder des Antichrist. Nur dem Geschichtsschreiber wohnt die Gabe bei, im Vergangenen den Funken der Hoffnung anzufachen, der davon durchdrungen ist: auch die Toten werden vor dem Feind, wenn er siegt, nicht sicher sein. Und dieser Feind hat zu siegen nicht aufgehört».
These pages on the concept of history were given by Benjamin to Hannah Arendt shortly before the author's death in 1940. Benjamin's reflections inspired H. Arendt's book, *Between Past and Future: Six Exercises in Political Thought*, New York, The Viking Press, 1961.

[7] From the perspective of the dialectical relationship between „Recht" und „Geschichte" see S. Kirste, *Die Zeitlichkeit des positiven Rechts und die Geschichtlichkeit des Rechtsbewußtseins Momente der Ideengeschichte und Grundzüge einer systematischen Begründung*, Berlin, Duncker & Humblot, 1998.

[8] See S. Kirste, *Die „Rose im Kreuze der Gegenwart" und das „antopologische Kreuz der Entscheidung" – das Bild des Kreuzes bei Hegel und Brugger*, in *Über das antropologische Kreuz der Entscheidung*, hrsg. von H. Joas und M. Jung, Baden-Baden, Nomos, 2008, pp. 67-94.

[9] W. Brugger, *Das antropologische Kreuz der Entscheidung in Politik und Recht*, cit., pp. 40-43.

manifestations (the point), but also its position on the timeline; the interpreter must not only adhere to the letter of the Constitution, but seek «the unexpressed and living values in the underlying constitutional order».[10]

Reference will thereby be made to the fact that more recent constitutionalism has recognized the existence of unwritten presuppositions of constitutional law. The latter represent the fundamental values that have developed in an «open society» and are inseparable from a system that aims to be democratic.[11] The existence of such premises requires a corresponding theory of interpretation. Some theories of interpretation will thus be expounded, which have departed from the literal criterion to contemplate beyond the letter also the unwritten presuppositions of the Constitutions. Their arguments will be compared with those of the advocates of a literal interpretation of the law. The two opinions presuppose a precise conception of the role of the judge-interpreter and thus invoke the configuration of judicial power, the separation of powers and, with them, the doctrine of sovereignty. A second part of this work will be devoted to the relationship between the theory of interpretation and the separation of powers, in which we will see which of the two positions outlined above expresses the meaning of Montesquieu's doctrine (and, with it, of the tradition in the sense mentioned above).

Finally, it will be argued that even in formal constitutions, strongly inspired by legal positivism, there is room for the recognition of unwritten premises of constitutionalism. This will provide arguments for the central thesis of this work, namely that democratic constitutional systems are inextricably tied to unwritten presuppositions, which necessarily require a dialectical method of interpretation.

2. The science of public law and the recognition of the unwritten presuppositions of constitutional law.

The German constitutionalist Peter Häberle has written of a «Wertsystem der Verfassung», a «system of values» implicit in a Constitution. In his view, a Constitution «does not end with the

[10] P. Grossi, *Storicità del diritto*, Napoli, Jovene, 2006, p. 9. In this way Grossi «the historian of law has, in my opinion, the primary function of acting as the critical conscience of the positive law jurist. He is dealing with that fixed point on the line, which is the law in force, and often, by isolating and immobilising it, he is too eager to render it absolute. The historian of law must remind him of the elementary but saving truth that this point is not something detached and detachable, but rather well inserted in a line that originates before, continues to the present day and even continues into the future».

[11] I use the expression open society in the meaning attributed to it by P. Häberle, *Die offene Gesellschaft der Verfassungsinterpreten*, «JZ», 10, 1975, pp. 297-305.

Constituent Assembly» but continues to live in the values and evolution of an «open society» that is pluralist and democratic.[12]

According to Häberle, these values form the basis of a system and even a «Menschenbild» that is essential to contemporary mass democracies. Human rights, first and foremost, are an expression of these values.[13]

The Italian constitutionalist Gustavo Zagrebelsky argued that «what is truly fundamental, for that very reason, can never be postulated but must always be presupposed».[14]

As Häberle, Zagrebelsky was also convinced that certain principles and fundamental rights were not at the exclusive disposal of the legislator. According to him, the law (the «place», *positum*) was not the sole source of law, but only one of the sources, alongside the principles presupposed.

Albeit from a very different perspective, in his book *Die Entstehung des Staates als Vorgang der Säkularisation* Ernst-Wolfgang Böckenförde had argued that «the liberal [freiheitlich] secularized State lives on presuppositions it cannot guarantee».[15] Leaving aside Böckenförde's well-known critique of constitutionalism as a system of values («Werteordnung»), this statement is fundamental, because it implicitly recognizes a part of the juridical system that exists outside the State system and is therefore pre-constitutional in nature.

The jurist Bartolomé Clavero adopted a similar viewpoint, arguing that no constitution was written on «virgin parchments».[16] With this expression, Clavero recognises historical presuppositions and values as a writing hidden under the literal veneer of constitutional charters. In the early Nineties Clavero was already expressing the idea of a common European constitutional tradition, which would later be formulated in Article 6 of the Treaty on European Union, according to which «traditions common to the Member States» are the source of

[12] *Ibidem*, p. 300 (personal translation).

[13] P. Häberle, *Das Menschenbild im Verfassungsstaat*, 2., ergänzte Auflage, Berlin, Duncker & Humblot, 2001, pp. 17-28.

[14] G. Zagrebelsky, *Il diritto mite*, Torino, Einaudi, 1992, pp. 1-2. Zagrebelsky was inspired by Häberle and was a translator of his *Recht und Wahrheit*, Baden-Baden, Nomos, 1995, Italian translation *Diritto e verità*, Torino, Einaudi, 2000. See especially the chapter on principles, ways and procedures of the constitutional State as a forum for the pluralism of ideas (pp. 85-97). According to Häberle, the pluralism of the constitutional State should not be confused with relativism. In the constitutional State, there are indeed «fundamental principles» that are not at the disposal of political power.

[15] E.-W. Böckenförde, *Die Entstehung des Staates als Vorgang der Säkularisation*, in *Säkularisation und Utopie. Ebracher Studien. Ernst Forsthoff zum 65. Geburtstag*, Stuttgart, Kohlhammer, 1967, pp. 75-94: «Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann».

[16] B. Clavero, *«Territorios forales»: una pagina spagnola del palinsesto europeo*, in *Le autonomie e l'Europa*, edited by P. Schiera, Bologna, Il Mulino, 1993, pp. 15-44.

«fundamental rights», which are in force as general principles. In an ideal dialogue with Clavero, it has been written that «even our Constitution, which as part of the process of tradition is a living, working body and not a corpse on the table of anatomical dissection, is a document of culture: a document of a gigantic effort to make an age of barbarism unrepeatable, since it was born as a reaction to the destruction of an entire order».[17]

The acknowledgement of unwritten presuppositions implies a dialectic between written constitutional law and unwritten presuppositions, which is intrinsic to the juridical system and thus susceptible to interpretation. Monist legal theories are opposed to this dialectical position. The former conceives the legal system in only one dimension and exclude principles from perspective. Monist legal theories have repercussions on the theory of interpretation.

3. Monism and theory of interpretation

The dialectic between norms and principles was denied by legal positivism in its two variations of normativism and decisionalism.

Hans Kelsen, the most important representative of normativism and father of the *reine Rechtslehre*, had reduced law to a written norm and had argued that justice was «an irrational ideal».[18] According to him, for the jurist justice could not be the object of scientific knowledge, as it goes beyond positive law. Despite its purity and value skepticism, Kelsen's doctrine had left the issue of interpretation open. In the juridical architecture of the *Stufenbau* (the stepwise construction of the legal system) he aspired to determine who had the right to interpret on the basis of a norm, while neglecting the question of how to interpret.[19]

An Italian disciple of Kelsen, the philosopher of law Norberto Bobbio, had slavishly followed the lessons of the pure doctrine of law, with one exception: for Bobbio, Kelsen had omitted a theory of interpretation consistent with his normativism. In his view, this gap had to be filled by integrating the pure doctrine of law with the lesson of the analytical school of language.[20] Together with authors such as Uberto Scarpelli and Giovanni Tarello, Bobbio argued that the interpreter

[17] See D. Quaglioni, *La sovranità nella Costituzione* in *Lezioni sui principi fondamentali della Costituzione*, edited by C. Casonato, Giappichelli, Torino, 2010, p. 14.

[18] H. Kelsen, *Das Problem der Gerechtigkeit,* Anhang zu Reine Rechtslehre, zweite, vollständig neu bearbeitete und erweiterte Auflage, Wien, Deuticke, 1960, p. 400.

[19] See pages of the *General Theory of Law and State* (Cambridge, Harvard University Press, 1945) concerning legal interpretation.

[20] N. Bobbio, *Scienza del diritto e analisi del linguaggio*, «Rivista di diritto e procedura civile», 1950, pp. 342-367.

should examine the semantic meaning of the written law in order to reconstruct and then apply the legislator's expressed intent.[21]

A similar viewpoint is supported by Matthias Klatt.[22] Klatt, as well as Helmut Rüßmann, distinguishes between interpretation and enhancement of the law (*Rechtsfortbildung*). Interpretation is directed at the letter of the law and is therefore literal interpretation. The enhancement of the law implies a creative process and requires more argumentative effort. However, the first remains the "true" interpretation.

This view is conditioned by the postulate of the interpreter's subjection to the law (*Postulat der Gesetzesbindung*). It is based on a fundamental argument: the law is deemed to be the expression of popular sovereignty and the legislative power is understood as the holder of this sovereignty. From this perspective, the legislative power is superior to the judiciary power, since the former, unlike the latter, claims greater democratic legitimacy. For this reason, the interpreter must be bound.

Such an argument therefore assumes a precise conception of the separation of powers (with legislative power above the other two powers, the executive and especially the judiciary) and a conception of popular sovereignty concentrated in the body expressing the will of the people. The latter originates in the legal theory of Jean-Jaques Rousseau, formulated in his well-known *Le contrat social* (1762). According to Rousseau, sovereignty is transmitted to a representative assembly and, through the fiction of the social contract, this assembly exercises it, thus expressing the *volonté générale*.

A similar justification of the absoluteness of State power was advocated by the British philosopher Thomas Hobbes. For Hobbes, the individual cedes to the Leviathan-State the right to exercise absolute sovereignty. By taking this fiction seriously, the State absorbs the wills of individual subjects and the State will imply the fictitious adherence of the individual.

Both of these fictions imply the subjection of individuals to the State and thus the subordination of rights to the collective. Thus, subjects have no rights of their own. They cannot offer any form of resistance to the law of the State if it violates one of their rights.

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[21] In this regard, see V. Frosini, *La lettera e lo spirito della legge*, Milano, Giuffrè, 19983, p. 11.

[22] M. Klatt, *Theorie der Wortlautgrenze. Semantische Normativität in der juristischen Argumentation*, Baden-Baden, Nomos, 2004. See H. Rüßmann, *Sprache und Recht. Sprachtheoretische Bemerkungen zum Gesetzesbindungpostulat*, in *Sprache und Welterfahrung*, hrsg. von J. Zimmermann, München, W. Fink, 1978, pp. 208-233. Compare with H.-J. Koch, *Das Postulat der Gestzesbindung im Lichte sprachlicher sprachphilosophischer Überlegungen*. Aus Anlaß der Tagung „Recht uns Sprache" der bundesdeutschen IVR-Sektion vom 3. Bis 5.10.1974 in Mainz, «Archiv für Rechts- und Sozialphilosophie», 1975, pp. 27-41.

The monistic theories of interpretation are built on an authoritative argument, which they trace back to the juridical thought of Montesquieu, the noble father of the theory of the separation of powers in the modern sense, the one who would have conceived of the judge-interpreter as the «mouth of the law» or - more precisely - as a repeater of the will engraved on the lips of the legislator, in the letter, in the words of the law.[23] However, this argument is scarcely cogent, since Montesquieu had a dialectical and by no means monist conception of the legal system. For him, the legislature and the judiciary power were both titular of sovereignty: the judiciary (parliaments) had the power to refuse to approve laws (so called «ordinances») if they were in conflict with the fundamental principles of the judicial system in force in France at the time.[24] From a purely historical and philosophical point of view, Montesquieu's theory of interpretation is by no means monist, but rather dialectical, since it contemplates both norms and principles, both the letter and the spirit of the law, and thus contradicts theories that limit interpretation to the «language» and «letter» of the law.[25]

4. Theories of interpretation and division of powers

The fundamental argument of the monistic theories of interpretation or literal interpretation can be refuted by returning to its source: the doctrine of Montesquieu.

With the theory of the division of powers, Montesquieu never claimed to reduce the judiciary power to the «mouth of the law», but rather to affirm a constitutional countervailing power and a dialectical interpretative method that corresponds to the juridical tradition. According to this «Montesquieu interpretation», the judiciary and the legislature power both participate in a sovereignty that is «divided» and not contracted, monistically, in the single dimension of the law.[26]

This doctrine has been reaffirmed by recent philosophical reflection on constitutional law. In his *Begriff und Geltung des Rechts*, the German jurist Robert Alexy re-established the dialectic between written norms and principles with the so-called *Verbindungsthese*. According to Alexy, an extremely unfair law - that is, a law that violates human rights and human dignity - is not law (in

[23] Montesquieu, *De l'Esprit des lois*, XI, VI, cit., p. 404: «Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur».
[24] See A. Merlino, *Interpretazioni di Montesquieu*, cit., pp. 22-30.
[25] In this regard, see S. Rotta, *Il pensiero politico francese da Bayle a Montesquieu*, in *Storia delle idee politiche economiche sociali*, vol. IV: L'età moderna, Torino, Utet, 1975, pp. 177-236.
[26] This is not the context in which to demonstrate this claim. However, I refer to A. Merlino, *Montesquieu. Eine Perspektive*, cit.

German judicial culture, this thesis is known as the «schwache Verbindungsthese» between law and morality).[27] The acknowledgement of a necessary relationship between law and justice implicitly admits the existence of unobjectionable presuppositions, located above the written order and susceptible to interpretation by the judiciary power.[28]

From a juridical methodical point of view («Methodik») Friedrich Müller argued that the law is only a starting point for the interpreter. It does not include any normative content, since normativity is only the outcome of a hermeneutical process and application of law, which requires an active role of the interpreter (Müller's theory is known as «strukturierende Rechtslehre»).[29]

For the Italian jurist Vittorio Frosini, the norm is only a «termine a quo», a starting point, and the jurist-interpreter must be able to read both the letter and the spirit of the law. Frosini, the most lucid interpreter of German legal philosophy, developed his theory of interpretation starting from a rigorous critique of the postulates of Hans Kelsen's *reine Rechtslehre* and of the analytical philosophy of language.[30]

Peter Häberle set the theory of constitutional interpretation in relation to his pluralist conception of an «open society» («offene Gesellschaft»).[31] According to him, a Constitution is not carved in bronze, but lives and evolves even after its promulgation, thanks to the activity of the interpreters «in the broader sense» («im weiteren Sinne»), such as citizens, associations, public authorities, in short, society. This interaction between different interpreters and between law and society composes a common interpretative orientation of constitutional law. For Häberle, constitutional interpretation in the broad sense enables the recognition of fundamental values, alive and operating in a community, and the constitutional interpreter in the narrow sense is an intermediary, who reads the Constitution in its historical evolution. The democratic theory of interpretation establishes an indissoluble link between democracy and fundamental values, which form an «image of man» («Menschenbild»).[32]

[27] See S. Kirste, *Rechtsphilosophie. Einführung*, 2. Auflage, Baden-Baden, Nomos, 2020, pp. 79-143

[28] R. Alexy, *Begriff und Geltung des Rechts*, Freiburg im Breisgau-München, K. Alber Verlag, 1992, Italian translation *Concetto e validità del diritto*, with an Introduction by G. Zagrebelsky, Torino, Einaudi, 1997. Compare with S. Kirste, *Rechtsphilosophie. Einführung*, cit., pp. 109-110 and 129 especially.

[29] F. Müller, *Juristische Methodik*, 2. Auflage, Berlin, 1994, p. 162.

[30] V. Frosini, *La lettera e lo spirito della legge*, Milano, Giuffrè, 1998, p. V and ff.

[31] P. Häberle, *Die offene Gesellschaft der Verfassungsinterpreten*, «JZ», 10, 1975, pp. 297-305.

[32] P. Häberle, *Das Menschenbild im Verfassungsstaat*, 2. Auflage, Berlin, Duncker und Humblot, 2001, pp. 23-24 especially.

The acknowledgement of presupposed values, which have an ideal and historical nature, can apply not only to Constitutions that explicitly refer to them, such as the German Constitution[33], but also to Constitutions inspired by formalist and value-neutral juridical doctrines, such as the Austrian one. The latter is considered to be a «Spielregelverfassung», a charter that stipulates the «rules of the game», not its content. Nevertheless, the most authoritative judicial-philosophical reflection tends to consider even a formalist Constitution, such as the Austrian one, as the bearer of implicit fundamental values, which are not at the disposal of the legislator.[34] It could be argued that the Austrian federal Constitution contains principles that cannot be amended, not even following the procedure for a fundamental amendment («Gesamtänderung») of the Constitution, as provided for in Article 44.3 of the *Bundes-Verfassungsgesetz*.[35] This view is also held by Austrian constitutionalist Ludwig Adamovich, according to whom the Austrian federal Constitution also contains unalterable fundamental principles that can be «objectively interpreted».[36]

The tendency to «objectively interpret» not only norms but also principles has been strengthened with the growing trust in the international order and with the process of European integration, in which the ancient claims of natural law have found formal recognition (I am referring especially to Articles 2 and 6 of the Treaty on European Union).

5. Evidence to support the theories mentioned

In summary, we can state that the theories based on literal interpretation are based on the following arguments.

a) The democratically legitimized legislator has a monopoly on law, since sovereignty belongs to the people, which exercises it through its representatives.

[33] I refer to art. 20.3 of the German Grundgesetz: «Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden».

[34] S. Kirste, *Das B-VG als Werteordnung – Zum Abschied vom Mythos eine wertneutralen Spielregelverfassung?*, «Zör», 75, 2020, pp. 173-194.

[35] For an understanding of the role of principles in the Austrian constitutionalist doctrine, see T. Öhlinger-H. Eberhard, *Verfassungsrecht*, 12. überabeite Auflage, Wien, Facultas, 2019. For a drastically positivist perspective, see H. Mayer, *Bundes-Verfassungsrecht. Kurzkommentar*, Wien, Manz, 2015. According to Mayer, everything can be amended in a Constitution if the procedure envisaged for this purpose (in this case the procedure envisaged in Article 44 B-VG) is observed.

[36] See S. Kirste, *Das B-VG als Werteordnung – Zum Abschied vom Mythos eine wertneutralen Spielregelverfassung?*, cit., p. 178.

b) The interpreter must adhere to the letter because otherwise he would be creating law as the legislator, exceeding his role as the «mouth of the law».

c) Literal interpretation guarantees legal certainty by binding interpretation to the words of the law, according to linguistic criteria.

d) The use of principles expands the boundaries of the judiciary disproportionately, making it an active creator of law.

e) In a democratic system, everything can be modified by amending written law.

Theories supporting a dialectical interpretation are based on the following arguments:

a) Neither the judiciary nor the legislature power are exclusive "creators" of law, since both are bound by unwritten presuppositions of constitutional law.

b) The written norm can only be interpreted if it is set in dialectic with those principles.

c) The judiciary power is not simply the «mouth of the law», since the activity of the interpreter must also consider presuppositions of an ideal and historical nature (as in the image of the anthropological cross of the decision, proposed by Winfried Brugger).

d) The unwritten presuppositions of constitutional law are not modifiable and indeed constitute a constraint on legislative activity.

As we have seen, the theories supporting the dialectical interpretation coincide with the lessons of tradition and even with the theory of the division of powers as formulated by Montesquieu. They express a dialectic that has been lost.

6. Conclusions

The acknowledgement of fundamental principles of the juridical system is tied to a dialectical theory of interpretation that is enshrined in tradition and corresponds to the thinking of Montesquieu, the creator of the division of powers in the modern sense. Such a recognition assumes a conception of sovereignty divided and partitioned in particular between the legislative and judicial powers. In this context, the judiciary does not only abide by the letter of the law, but also by the spirit, namely the prerequisites of democratic systems, without which a democracy could degenerate into democratic tyranny.

The dialectical interpretative method is indebted to tradition but is open to the future, since it is adapted to a historical process in which the ancient ideal of natural law[37] concludes in the affirmation of human rights as an «ideal» to be related to the «real», to return to the image of the «anthropological cross of the decision» evoked at the beginning of this work.

This is a lesson that is especially valuable to us in what Walter Benjamin called «the moment of danger», while new political tendencies are seeking to wretchedly separate democracy and «presuppositions», democratic systems and human rights, «Menschenbild».

[37] S. Kirste, *Natural Law in Germany in the 20th Century*, in *Legal Philosophy in the Twentieth Century: The Civil Law World*, I, edited by E. Pattaro and C. Roversi, Baden-Baden, Nomos, 2008, pp. 1155-1173.