

# Politics as a legal category: a few considerations on the limits of public law adjudication

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# Politics as a Legal Category
## A Few Considerations on the Limits of Public Law Adjudication

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## *Public Law and Politics*

> "The lawyer scholar is still a lawyer. Lawyers are, ought to be, and must be, defenders of courts. Courts rely for their institutional legitimacy on their reputations for independence and neutrality. If courts are political that fact needs to be hidden by the judges themselves and by those who are dependent on courts."
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> Martin SHAPIRO, Alec STONE SWEET[1]

Public law and political science have a lot in common, since for both disciplines politics is a defining phenomenon and an epistemic category of the highest relevance[2]. What separates starkly the two fields of knowledge is the diametrically opposed position which they adopt towards this common point of reference. Whereas political scientists would embrace politics, since they "do not have the duty to defend courts that lawyers have, and they do have an inclination to celebrate rather than disguise politics when they see it, in court as well as elsewhere"[3], public lawyers in the academia (save perhaps for the various "legal realist" schools), contrariwise, seek to the utmost to drive a wedge between politics and public law proper[4].

The academic preoccupation with the law-politics distinction mirrors a practical necessity in public law adjudication. Public law is characterized as "political law", a qualification often used with the lack of reflexivity usually entailed by commonplaces. By the same token, one also accepts as self-evident the notion that adjudication should not be, in a rule of law state, political. Indeed, about the worst label that can be attached to a constitutional or supreme court decision is to call it "politicized"[5].

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[1] *On Law, Politics, and Judicialization*, Oxford University Press, Oxford, 2002.

[2] Comparing these two divergent standpoints in relation to politics is a good introduction to this discussion, given that, as it has been rightly pointed out, both the relationship between academic disciplines (law and political science) and the relationship between legal and political theories are methodologically sound ways of approaching the relationship between *law* and *politics* as such. See Adam TOMKINS, "In Defence of the Political Constitution", *Oxford Journal of Legal Studies,* vol. 22, no. 1, Spring 2002, pp. 157-175.

[3] Martin SHAPIRO, Alec STONE SWEET, *On Law, Politics, and Judicialization*, op. cit., p. 6.

[4] By "political" decision, I understand any decision that cannot, *by its nature*, be arrived at in a judicial proceeding, by a judicial manner, i.e., rational determination.

[5] Anecdotically, in the course of my career thus far, I have encountered many European or North American public law professors who, when they wanted to cast unalloyed contempt on an argument, invariably deemed it "politicized" or "ideologized".

The two issues are in an antinomical relation only apparently. Public law deserves its legal status to the extent that the judiciary is politically independent and neutral. Judicial independence and neutrality, beautifully captured by Montesquieu`s aphorism about "the power of judging…[which] amounts to nothing"[1] or by the famous Hamiltonian reference to "the least dangerous branch", showcase in equal measure the Janus-faced character of the judiciary as a branch of government: political weakness or vulnerability on the one hand and – on the other – the strength deriving from its legitimacy as a "forum of principle"[2].

In institutional terms, judicial independence is safeguarded by a number of well-known constitutional or organic law-level guarantees with respect to appointments, security of tenures of office, prohibitions against diminishment of revenue, various forms of protecting judges from at-will political removal. These technical matters fall outside the argumentative scope and obvious space limitations of the present study. Suffice it to point out that in England, whose history is usually taken to unfold the paradigmatic story of constitutionalism, one of the main pre-revolutionary points of contention between the Stuarts and the parliamentary party was the independence of the judiciary. First recognized during Charles I, who conceded in 1642, however reluctantly, to respect the appointment of judges "during good behavior" (*quamdiu se bene gesserint*), the principle gained constitutional preeminence when, during the Glorious Revolution, William and Mary accepted judicial independence as a condition for their accession to the throne. In the Heads of Grievances, the issue is itemized as

> "making judges' commissions *quamdiu se bene gesserint*, and for ascertaining and establishing their salaries, to be paid out of the public revenue only; and for preventing their being removed and suspended from the execution of their offices, unless by due course of law".

These practices were finally raised to statutory-constitutional status, being enacted in the 1701 Act of Settlement[3].

To restate the point, while public law is "political law" (especially if related and contrasted to its traditional counterpart, private law), the "political" qualification does not undermine its legal status insofar as constitutional and administrative adjudication as well as the body of scholarship which conceptualizes and evaluates the theoretical consistency and justification of these practices succeed in demarcating what is properly legal from the domain of politics proper[4]. This disjunction is, of course, by no means an easy one to draw.

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[1] "Des trois puissances dont nous avons parlé, celle de juger est en quelque façon nulle."

[2] Ronald M. DWORKIN, "The Forum of Principle- Constitutional Adjudication and Democratic Theory", *New York University Law Review,* vol. 56, 1977, pp. 469-518.

[3] 12& 13 W. II, c. 2 (1701). See, on these issues, Rudolph GNEIST, *The History of the English Constitution*, Ph.A. Ashworth transl., G.P. Putnam`s Sons, New York, 1886 and F.W. MAITLAND, *The Constitutional History of England*, Cambridge University Press, Cambridge, 1963.

[4] While I am not unmindful of the way in which a Constitution and "constitutional moments" structure the preconditions of politics, here I assume a constitutional order already "constituted", where the constitutional politics/constitutional law distinction has already been transcended. See, for good treatments of the interrelation law/politics on this more foundational level, Bruce ACKERMAN, "Constitutional Politics/Constitutional Law," *Yale Law Journal,* vol. 99, no. 3, December 1989, pp. 453-549 and Martin LOUGHLIN, "Constitutional Theory: A 25th Anniversary Essay", *Oxford Journal of Legal Studies,* vol. 25, no. 2, Summer 2005, pp. 183-202. Also see, related, Dieter GRIMM, "Integration by Constitution", *International Journal of Constitutional Law,* vol. 3, nos. 2&3, May 2005, pp. 193-208.

Constitutional and administrative courts have themselves evolved, across jurisdictions, a number of fairly common techniques which permit the *prima facie* avoidance of head-on collisions with politics. Among them, one can point out as a representative example the vast body of "justiciability" adjudication doctrines that the Supreme Court of the United States has developed around the "Case or Controversy" requirement of Art. III in the Constitution (understood to bar the solution of constitutional and administrative issues which do not arise out of a concrete and actual controversy between litigants): standing, mootness, ripeness, the refusal to answer "political questions" or to deliver advisory opinions to the other branches of government. Equally relevant, although in a less direct way, is the refusal or reluctance of constitutional courts to apply constitutional guarantees to government agents acting extraterritorially[1]. While this problem is more apparent as expounded by the American developments, where the Constitution has been from the onset, after the early landmark decision in *Marbury v. Madison*[2] "welded judicial review to the political axiom of limited government"[3], regarded as a law whose interpretation falls, just as it is the case with any other law, on the Judiciary Department, it is yet by no means idiosyncratic. The identification and consequent avoidance of politics in constitutional and administrative adjudication is a concern which cuts across constitutional systems and can be encountered, as a matter of kind though perhaps not of degree, in Continental jurisdictions as well. To wit, commenting on the fact that the German Constitutional Court did not expound,

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[1] See for instance *In re Yamashita*, 327 U.S. 1 (1946), holding that jury trial protections do not apply to a prisoner of war tried by a military tribunal outside the United States, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), similar, and *United States v. Verdugo-Urquidez* 494 U.S. 259 (1990), holding that the Fourth Amendment guarantees against "unreasonable searches and seizures" do not apply to a Mexican drug lord whose house had been searched in Mexico by DEA agents acting in cooperation with Mexican federal police, without a U.S. court warrant. It is unclear to what extent the holdings of these extraterritoriality decisions have been put in question by the recent Guantánamo-related decisions in *Rasul v. Bush* and *Al-Odah v. United States* 124 S. Ct. 2686 (2004). The peculiarity of the Guantánamo situation does not, nonetheless, warrant any simple answer. Probably the most relevant example in the field of administrative law proper is the so-called "entry fiction" doctrine, according to which being physically on American soil is considered legally fictitious before one has passed through immigration control. Equally relevant, even though not from a judicial practice benchmark, is the Australian federal Parliament`s decision to declare certain coastal areas as part of Australia only in terms of international law and not in what concerns the application of domestic legislation, in order to stave off illegal immigration (namely, to avoid lengthy judicial postponement of deportation proceedings). Problematic as these developments may be, they go to shed light at the multifarious problems at hand.

[2] 5 U.S. 137 (Cranch) (1803). The understanding that the Constitution would need to be a judicially enforceable charter arguably predates the decision; an argument much akin to Justice Marshall`s in Marbury can be found in Alexander HAMILTON, *The Federalist*, no. 78, in *The Federalist Papers*, edited and with an introduction by Clinton Rossiter, Penguin Books-Mentor, 1961. For a good exposition of the American "constitutional exceptionalism" and an insightful comparison of American and early European constitutionalism, see Martin A. ROGOFF, "A Comparison of Constitutionalism in France and the United States", *Maine Law Review,* vol. 49, 1997, pp. 21-84/ pp. 31-32: "In America the idea of constitutionalism is intimately attached to, and in fact inseparable from, the actual written constitution of the country. Constitutionalism is not a vague concept calling for the separation and limitation of public power, the rights of the governed, and adherence to certain time-honored procedures, customs, and values. It has rather an immediacy and a tangibility, and an association with a particular document, which is usually lacking even in other constitutional democracies".

[3] Henry P. MONAGHAN, "*Marbury* and the Administrative State", *Columbia Law Review,* vol. 83, January 1983, pp. 1-34/p. 32.

unlike its American counterpart, a "political-question doctrine", the comparative constitutional law scholar David P. Currie observed that, nonetheless, this formal omission is "a matter more of semantics than of substance", since

> "[i]t is entirely consistent with a judicial duty to say what the law is to conclude that the law commits a particular issue to the *discretion* or determination of another branch of government. The German court has done so a number of times, and it is not clear that our political question doctrine means anything more"[1] [emphasis supplied].

Discretion is indeed the key word. Politics in legal terms is defined or conceptualized as discretion. Conversely, the existence of places uncontrolled by law, i.e., by a judicial (re)determination of the decisional outcome – and thus controlled by politics – translates into the extent to which a place for discretion is recognized in adjudication. From a judicial perspective, discretion means lack of a precise legal rule or principle to control the resolution of a certain situation brought before a court and the consequent recognition by the judge that the solution of a given matter in contention must of necessity be left to judgment by the political branches of government, through the characteristically political means: voting or executive/administrative discretionary decision.

From an adjudication-oriented perspective, the judges' refusal to interfere with politics by recognizing political discretion embraces two main forms, (1) judicial deference to policy-making or administrative discretion and (2) a deferential judicial attitude towards Politics proper (or, to use Carl Schmitt`s established jargon, "the political"), as best instantiated in an exercise of sovereignty by the Executive, in the field of Locke's "federative power". The two areas of political discretion, "small p and large P politics"[2] if one will, are distinct as a matter of kind and not degree. They so appear both as a matter of practices and in terms of conceptual justification. The latter dimension of the necessity for a law-politics disjunction is well suggested by Carl Schmitt's characteristically cryptic observations that the exception has "juristic significance" and that "[t]he assertion that the exception is truly appropriate for the juristic definition of sovereignty has a systematic, legal-logical foundation"[3].

This is not to deny the fact that, *in the abstract*, an assertion of discretion immediately creates an unavoidable dilemma. The "horns" of the dilemma are well captured by a passage from Justice Coke's 1598 decision for the Court of Common Pleas in the *Rooke's Case*. The case dealt with an action by one Rooke against the Commissioners of Sewers, which had assessed his property (a long stretch of land adjacent to the banks of the river Thames) disproportionately, even though owners of inland properties also profited from the public works that had secured the banks against flooding. Rooke sued, the Commissioners argued that their governing statute gave them unfettered discretion with regard to assessment of property, and Coke decided for the plaintiff, reasoning, in pertinent part, as follows:

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[1] David P. CURRIE, *The Constitution of the Federal Republic of Germany*, Chicago University Press, Chicago, 1994, pp. 170-171.

[2] See David DYZENHAUS, "The Left and the Question of Law", *Canadian Journal of Law and Jurisprudence,* vol. 17, January 2004, pp. 7-30, for an explanation and critique of the matter.

[3] Carl SCHMITT, *Political Theology-Four Chapters on the Concept of Sovereignty*, G. Schwab transl., The MIT Press, Cambridge, Mass. and London, England, c1985, pp. 5-6.

> "And notwithstanding the said words of the said Commission give authority to the Commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and Law. For discretion is a science or understanding to discern between falsity and truth, between right and wrong, and between shadows and substance, between equity and colorable glosses and pretenses, *and not to doe according to their wills and private affections*; for as one saith, *Talis discretio discretionem confundit*"[1].

Not to let oneself ensnared by this great lawyer's captivating style, one should notice that the true problem occurs only when a judge does not have a principled, rational background against which to review the discretion of the executive/administration, so that the decision becomes in turn the reflection of *his own* "will and private affection", a simple change of venue for the exercise of discretion, without the accountability ensured by the contemporary check on the political branches, i.e. voting.

At the closing of this section, it should be restated that this paper is not an attempt to compare and contrast how different constitutional systems insulate the judiciary from politics by means of institutional design arrangements safeguarding judicial independence (e.g., provisions in the Constitution and organic legislation establishing a body such as the Romanian Superior Council of Magistrates). Nor is it an elaboration on the methods used by judges across jurisdictions, when deciding public law cases, in order to limit, insofar as possible, judicial inroads into the field of politics proper, and thus to ensure judicial neutrality (e.g., self-imposed rules to limit the access to the court of "ideological" claimants with a purely "abstract" interest in a given matter, such as the ones arrived at by the U.S. Supreme Court in "standing" cases). My current quest is at the same time more limited in its scope and more foundational in terms of its object. Such technicalities as those mentioned above presuppose the existence of systemic conceptual distinctions between the domain of politics and the field of law. My present study is an incipient inquiry into these underlying law/politics delineations.

## *Classical Distinctions*

> "Le gouvernement en dehors de sa sphère ne doit avoir aucun pouvoir; dans sa sphère il ne saurait en avoir trop."
> Benjamin CONSTANT[2]

> "The state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law, teaches… that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions."
> John LOCKE[3]

Classical constitutionalist theory and practice coagulated, in terms of both conceptual justification and corresponding practices, around a number of coherent bright-line foundational distinctions. These constitutive differentiations between

[1] C.J. COKE, *Rooke`s Case* 5 Co. Rep. 99b (1598) [first emphasis supplied].
[2] *Écrits et discours politiques.*
[3] *The Second Treatise of Civil Government* (1690).

legally controlled domains and areas of state action governed by political decision rendered the separation between law and politics easier to both conceptualize and maintain in public law adjudication.

In passing, accepting that every legal and political theory is underpinned by a certain anthropological profession of faith, one could remark that these conceptual and practical law/politics differentiations correspond to a moderate pragmatic-skeptical conception about human nature. This moderate foundational skepticism is well exemplified by the Alexander Hamilton`s observation that: "The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude"[1]. In the same vein, James Madison wrote that while "[t]here is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature, which justify a certain portion of esteem and confidence"[2].

In this vein, it must be emphasized that judicial decision-making is one of the most rationalized forms of social action[3]. By contrast, a political decision, being a choice determined by considerations of contextual opportunity or resulting from the sheer aggregation of a number of votes, is not charged in the same manner and to the same extent by requirements of rationality. Admitting, therefore, that there are limits intrinsic to adjudication embraces a tragic form. The confrontation with our constitutive limits (and their acceptance) always partakes of the nature of tragedy[4].

The classical distinctions mentioned above are very well showcased, as a matter of conceptual justification, by John Locke's theory of separation of powers. His *Second Treatise* is a good heuristic choice not only because unfolding the logic of his distinctions between various forms of state action allows us to go to the roots of the matter without having to review and compare historical-legal evolutions across jurisdictions; such comparison would, needless to say, easily turn this article into a monograph. More importantly, Locke is in many ways the theoretical father of modern constitutionalism also because his version of the separation of powers doctrine is of a normative, rather than constitutive or procedural nature[5], and presents itself almost in an adjudicatory form.

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[1] Alexander HAMILTON, *The Federalist,* no. 76, in *The Federalist Papers*, cit.

[2] James MADISON, *The Federalist,* no. 55, in *The Federalist Papers*, cit. At the antipode of this moderately skeptical conception about human nature is the cast of mind described by Michael Oakeshott as "rationalism in politics". See Michael OAKESHOTT, *Rationalism in Politics and Other Essays*, Liberty Fund, Indianapolis, 1991 (c1962). An equally scathing and intuitive criticism (and perhaps an even more pleasurable read) can be found in Dostoyevsky`s *The Possessed*.

[3] "Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. *A decision which is the product of reasoned argument must be prepared itself to meet the test of reason.* This higher responsibility toward rationality is at once the strength and the *weakness* of adjudication as a form of social ordering". Lon FULLER, "The Forms and Limits of Adjudication", *Harvard Law Review*, vol. 92, December 1978, pp. 353-409.

[4] See Gabriel LIICEANU, *Tragicul: O fenomenologie a limitei și depășirii*, Humanitas, București, 2005, and *Despre limită*, Humanitas, București, 2005.

[5] The "constitutive" or "procedural" versions of the separation of powers doctrine are of a more dynamic nature and revolve around the idea of balance, whether a balance of classes (the "mixed government" theories) or the less historically contingent, more modern version, of

In this way, his theory anticipates by more than a century the modern logic of a written Constitution as the enforceable legal barrier between the government and the individual. The fact that Locke is not interested in the very concrete, pragmatic concern raised by power unchecked by counterpoising power, finds also its justification, perhaps, in the finality with which the Civil War had already settled the struggles over sovereignty between the Crown and the Parliament. What had been a crucial matter for Hobbes in 1651, when the stakes were sharply visible and the possibility of ultimate divisive conflict was still acutely present, had become by and large a moot issue by 1688. The Glorious Revolution would be an unproblematic re-assertion of an already given answer.

Be the reason what it may, it should be re-emphasized that, for Locke, writing on the assumptions of limited government and public authority as a trust, the limitations on the exercise of state power are normative rather than constitutive and present themselves in a judicial template. For Locke, the key concern is always arbitrariness or discretion and not tyranny or despotism[1] or rather, tyranny as a concrete problem related to the actual possibility of aggrandizement of a ruler or an institution to unlimited power becomes arbitrariness as a justice-related concern of the discrete individual[2]. This template is best shorthanded by the Lockean statement that "where law ends, there tyranny begins". Namely, since the state appears in his rendition as a sum of limited competences, for Locke the question is always: "Who will be the judge?" in case of trespass or misuse of public power. Given the centrality of this question, the different answers with which it is met are all the more important. In this respect, the analytical distinction of state functions is of the utmost importance for the present project and pause must be taken at this juncture for a more searching inquiry.

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"checks-and-balances" which prevent tyranny by the interplay of institutionally designed blocks and counterpoises. "Mixed government" theories are usually exemplified through the description given by the Greek historian Polybius to the Republican Roman Constitution, whereas the modern version of balance theories is usually attributed to Montesquieu's 1748 *Spirit of Laws*. See, for instance, Kurt von FRITZ, *The Theory of the Mixed Constitution in Antiquity: A Critical Analysis of Polybius' Political Ideas*, Columbia University Press, New York, 1954 and Michael MENDLE, *Dangerous Positions-Mixed Government, the Estates of the Realm, and the Answer to the xix propositions*, University of Alabama Press, Alabama, 1985. A history of the separation of powers doctrines, with taxonomies and thorough distinctions is provided in the classical English language studies, M.J.C. VILE, *Constitutionalism and the Separation of Powers*, Clarendon Press, Oxford, 1967 and W.G. GWYN, *The Meaning of the Separation of Powers*, Tulane University Press, New Orleans, 1965. The latter work focuses more specifically on English developments and draws more clearly the distinction between the balance and normative/rule of law separation of powers theories.

[1] "Absolute Arbitrary Power" is defined as the "Governing *without settled standing Laws*". John LOCKE, *Second Treatise of Civil Government*, Hackett Publishing, 1980 (1690), Indianapolis, C.B. Macpherson, ed., Sec. 137.

[2] That is to say, unless tyranny would be perceived as discretion writ large. This sort of perception is, nonetheless, not in line with either the constitutionalist theories under review here or with specific constitutionalist developments, but rather corresponds to a specific kind of dogmatic and abstract normativism. The latter, in Jürgen Habermas's apt characterization, is associated with "[t]he bourgeois idea of the law-based state, namely, the binding of all state activity to a system of norms legitimated by public opinion (a system that had no gaps, if possible), already aimed at abolishing the state as a system of domination altogether. Acts of sovereignty were considered apocryphal per se". In *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, The MIT Press, Cambridge, Mass., 1991, p. 82.

Locke distinguishes four "powers"[1]. The "legislative" is the power to prescribe "settled standing laws…stated rules of right and property"[2]. These material (or substantive) limitations on legislation are crucial since, while Locke's legislature is the "supreme power of the commonwealth…sacred and unalterable in the hands where the community have once placed it"[3], its supremacy is bound by the normative limitations placed on it, "the legislative being only a fiduciary power to act for certain ends"[4]. A law simply loses its character once enacted in particularized form or outside the subject matter jurisdiction of the legislature. The distinction between "established, promulgated, standing laws", regarding property and liberty and "arbitrary, extemporary dictates and resolutions" is crucial and ubiquitously re-stated throughout the entire work.

The executive power is the mere subsumption of general rules to particular cases, a "*ministerial* and subordinate power"[5] [emphasis supplied]. True, a distinction between function and organ or branch of power is provided. In "moderate monarchies" it is necessary that "the legislative power and executive power are in distinct hands"[6]. Yet, this apportionment of functions among distinct branches or organs is not predicated primarily upon the necessity of fragmenting power but rather proceeds on the assumption that legislation, given the limited trust that is the government, logically constitutes *an exceptional activity* and therefore, when the legislature is not in session, there is a need for a "power always in being". Put simply, there is no need for continuous law-making yet the laws, once made, need as a matter of course to be always enforced[7]. The executive is categorized as "ministerial" in nature since, once legislation is premised as normative in nature and non-discretionary (addresses the individual, in a general form, limited to a clearly delineated subject-matter legislative jurisdiction), its application is unproblematic, constituting almost a practical syllogism, in which the major premise is the legislative rule, the factual background constituting the minor premise, whereas the conclusion follows logically as an application of law to facts.

The further functional breakdown is, conceptually, also indebted to and revolves around the generality-impartiality version of the rule of law which pervades and dominates the logic of his entire work. The federative and prerogative "powers"

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[1]Raymond Carré de Malberg considered the term "power" somewhat misleading in this context: "Au fond, la doctrine de Locke se ramène donc à une simple *théorie de distinction des fonctions*: sous la réserve que le roi ne peut à lui seul faire la loi et est souvent soumis à cette dernière, ce n'est pas encore une doctrine de franche separation des pouvoirs" [emphasis supplied]. Raymond CARRÉ DE MALBERG, *Contributions à la Théorie générale de l`État*, tome deuxième, Sirey, Paris, 1922, p. 3. Also see Ernest BARKER's "Introduction" to Otto von GIERKE, *Natural Law and the Theory of Society*, 1500 to 1800, Cambridge University Press, Cambridge, The Macmillan Company, New York, 1934, p. xci: "[Locke] simply seeks to distinguish, in thought, between the different functions of political authority. He is dealing with the logical analysis of functions, rather than with the practical question of separation (or union) of the organs which exercise those functions". In Gierke`s view, Locke offers an essentially "*normative* view of separation of powers" [emphasis added].

[2] Sec. 137.

[3] Sec. 137.

[4] M.J.C. VILE, *Constitutionalism and the Separation of Powers*, Clarendon Press, Oxford, 1967, p. 63, discussing Locke's theory of separation of powers: "The legislative authority is the authority *to act in a particular way*".

[5] Sec. 152.

[6] Sec. 159.

[7] Sec. 153: "It is not necessary, no, nor so much as convenient, that the legislative should be always in being; but absolutely necessary that the executive power should, because there is not always need of new laws to be made, but always need of execution of the laws that are made".

are the result of Locke's insightful observation that the exercise of political power will inevitably bear on issues which, *by their very nature*, cannot be predetermined by rules, once the content, purpose, and scope of legislation has been delineated. Since the body politic as a whole is still in the state of nature in its relation to other commonwealths, what foreigners do cannot be accurately predicted or effectively regulated and thus "their actions and the variations of designs and interests" cannot be normatively encompassed by a rule of conduct[1]. Therefore, the federative power is functionally distinguished from performance of ministerial or administrative tasks:

> "This therefore contains the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the common-wealth, and may be called federative, if any one pleases. So be the thing understood, I am indifferent as to the name"[2].

The power of prerogative is also analytically and functionally dependent on the notion of legislation, qualitatively defined, since prerogative is nothing more than "[the] power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it"[3]. Locke`s definition of the "prerogative" is an amalgam of (1) a historical dimension, derived from the permeation of the normative argument with English historical contingencies deriving from the attributes of the contemporaneous English royal prerogative[4]; (2) the related justification of emergency powers (dispatch in the actions of government is needed when the legislative is not in session or the executive must act in respect to "things […] which the law can by no means provide for"); (3) a restatement-equivalent of the Aristotelian notion of equity *(epíeikeia)*, according to which the inflexibility and occasional severity of rules must be mitigated and particularized for considerations of justice in individual cases, since a rule, precisely as a consequence of its generality and impartiality, cannot foresee all future occurrences and thus exceptions and derogations or ad-

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[1] As a matter of political and legal theory, this distinction is usually explained in natural law (the contractarian tradition; the argument comes forth most clearly, though with different emphasis, in both Locke and Hobbes) by the fact that, while the creation of civil government presupposes the giving up of each member's natural right to wage war within the political community (consequently, all-out conflict is contained within), without, states as such remain in the state of nature (which is *potentially* a state of war). Blackstone seized on this principle, and adduced it to strengthen the argument, in addition to historical (the Crown's residuum of power) and prudential (need for unity and strength) considerations: "For it is held by all the writers on the law of nature, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power". William BLACKSTONE's *Commentaries on the Laws of England*. Facsimile of the First Edition, vol. 1, Chicago University Press, Chicago & London, 1979, p. 249.

[2] Sec. 146. For our purposes, the following citation from Sec. 147 is of particular interest: "And though this federative power in the well or ill management of it be of great moment to the common-wealth, yet it is much less capable to be directed by antecedent, standing, positive laws, than the executive; and so must necessarily be left to the prudence and wisdom of those, whose hands it is in, to be managed for the public good: for the laws that concern subjects one amongst another, being to direct their actions, may well enough precede them. But what is to be done in reference to foreigners, depending much upon their actions, and the variations of designs and interests, must be left in great part to the prudence of those, who have this power committed to them, to be managed by the best of their skill, for the advantage of the commonwealth".

[3] See Chapter XIV, "Of Prerogative".

[4] For instance, the convening and dissolution of Parliament was historically an important part of royal prerogative. The authoritative commentary on the mater is William BLACKSTONE, *Commentaries on the Laws of England*, cit., Ch. 7, "Of the King's Prerogative".

ditions must be made to the law, in favor of the law itself[1]; (4) the equivalent of the modern notion of "policy-making discretion".

Hence, in the case of the legislative power and its ministerial "execution", both the trespass of the legislator and that of the executive/administrator can be evaluated more easily and along a coherent and principled baseline of assessment (general rules of life, liberty, and property). By the same token, in the case of the latter two powers, the federative and the prerogative, since their exercise is contingent on unforeseen events which cannot be predetermined by a legislative rule, the only evaluation on their exercise can be one political in nature. True enough, Locke insists relentlessly that, even though a rule cannot, by necessity, be arrived at to control the discretion inherent in the exercise of the prerogative and the federative powers, this inevitably ensuing leeway cannot mean that these kinds of attributions are to be exercised arbitrarily, since discretion is only warranted by public purpose: it is to be exercised "for the public good". Yet, as one can see, what is in the public good, unless a clear principle guides and constrains the evaluation itself, is in no way self-evident or open to rational determination[2].

Actual practices paralleled these distinctions between legal and discretionary. For instance, classical legal adjudication and doctrine, both on the Continent and to an even greater measure in the Anglo-Saxon world, posited the attitude of a judge on a distinction between state encroachment or invasion of the protected sphere of life, property, and liberty (where liberty included freedom of contract) and state provision of benefits (right/privilege distinction). Likewise, the classical framework made the difference between domestic administration of the law (legal) and political exercises of state power (by their nature discretionary). The more something would be either in the nature of a privilege or political in nature, the more the decision would automatically be classified as discretionary and the Executive/administration would be allowed to control the decisional outcome with minimal judicial interference with the administrative determination, in respect of (1) the interpretation of the governing legal provisions, (2) the factual consistency or correctness of the result and (3) the procedure followed in arriving at a given decision (due process or "natural justice" guarantees). It is exemplary in this respect to note, in passing, that the term as such of "administrative law" was producing a certain degree of unease or perplexity in Anglo-Saxon lawyers, so much so that, as late as the early 1900's, the great English constitutionalist Albert Venn Dicey could claim that England and countries deriving their civilization from it knew no such thing:

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[1] The fact that positive laws can never encompass *ex ante* the variety of circumstances in its application – and the corresponding human strife to anticipate this problem – was first noted by Plato, in the *Statesman* (294): "The differences of men and actions, and the endless irregular movements of human things, do not admit of any universal and simple rule…But the law is always striving to make one…."

[2] To wit, Carl Schmitt, perhaps the most acute critic of liberalism, observed with characteristic acumen this tension or rather ambivalence in Locke`s argument, namely that the latter treats the notion "public good" as if it attained a non-problematic and self-evident, objective meaning: "La théorie de l'État issue de la réaction nobiliaire a refusé de prendre en considération l'existence d'un intérêt pour la décision comme telle, et a vu dans le 'peuple' l'instance à l`intérieur de laquelle aucun doute ne peut surgir sur ce qui est juste et dans l`intérêt public. Elle croit que, sur ce point, il existe une conviction générale, identique et immédiate, de tous le citoyens. Cela est particulièrement clair dans la conception anglaise". Carl SCHMITT, *La Dictature*, transl. M. Köller & D. Séglard, Éditions du Seuil, Paris, 2000, pp. 40-41 (commenting on Sec. 240 in the *Second Treatise*).

> "The absence from our language of any satisfactory equivalent for the expression *droit administratif* is significant; the want of a name arises at bottom from our non-recognition of the thing itself. In England and in countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles on which it rests are in truth unknown"[1].

A paradigmatic example of the judicial treatment of policy-making discretion is offered by a Massachusetts case from the turn of the nineteenth century, *McAuliffe v. City of New Bedford*, in which a policeman fired by the local mayor on account for soliciting funds for political purposes in defiance of the city police regulations, challenged the decision both in terms of substance (arguing that he was exercising his constitutionally protected right to free speech) and procedure (arguing that he was owed more than his interviews with the mayor, i.e., specifications of the charges against him, opportunity to rebut them, advance notice of the decision to fire him, reasons stated). In a characteristically terse and eloquent opinion for the Court, Oliver Wendell Holmes did away, without much ceremony, with both the substantive and the procedural claims:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here"[2].

As one can readily see, the categorization of a given claim in terms of privilege (a government license, a public job, any kind of government largesse) immediately determined the level and standard of review with respect to the substance of the decision. In terms of procedure, the conclusion follows logically from there since, as Bentham put it, procedure is mere "adjective law", dependent on the determined noun: the more important the right or interest claimed, the more procedural safeguards will attach to it. The converse is also true, since the level of proceduralization will inevitably affect the outcome of a decision.

The Politics/law distinction is well presented by the administrative law practice evolved by the French *Conseil d'État* around the doctrine of "acts of government" (*actes de gouvernement*), according to which administrative action with a "political object" (*mobile politique*) would be automatically classified as unreviewable. Equally relevant is the reluctance or refusal of courts to interfere with administrative actions in the field of immigration. In this respect, it should be pointed out that this domain of state action as such is particularly worthy of attention, to the extent that immigration practices within a given jurisdiction are often dealing with "microcosmic manifestations of the greater conflict or potential for conflict without and so eminently fit for disposal by unfettered executive discretion"[3]. Thus, for instance, in

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[1] A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, Liberty Fund, Indianapolis, 1982 (1915), p. 215.

[2] *McAuliffe v. Mayor of City of New Bedford*, 29 N.E. 517, 517-518 (1892).

[3] David DYZENHAUS, "The Left and the Question of Law", cit., p. 10. I am quoting this passage from David Dyzenhaus's work because and to the extent that the argument as such is

the American case *Mahler v. Eby*, the United States Supreme Court found constitutional a formula to deport aliens based on administrative determination of "undesirability", against a challenge of unconstitutionality based on non-delegation:

> "Nor is the act invalid as delegating legislative power to the Secretary of Labor. The sovereign power to expel aliens is political, and is vested in the political branches of government"[1].

## *Contemporary Law/Politics Dilemmas. Adjudication as Policy-Making and Adjudication as Moral Melodrama*

"Nothing is stable. Nothing absolute.
All is fluid and changeable.
There is an endless 'becoming'."
Benjamin CARDOZO[2]

"With the ascendancy of law as right we do not therefore reach the end of history, or an escape from politics. Instead, this legalization of politics has led primarily to a politicization of law."
Martin LOUGHLIN[3]

As the constitutive distinctions of classic constitutionalism blurred, adjudication became politicized to the same extent that politics became legalized or "judicialized".

The distinction between administrative policy-making discretion and adjudication which corresponded to the classical difference between right and privilege could not survive the modern administrative-welfare state (*Sozialstaat*, *État-providence*). This delineation had been essentially fused at the hip with a concept of legislation which would become rapidly untenable. Namely, the law can be characterized as a rule of law if legislation is in fact limited to the regulation of questions of right as between individuals (torts, property, contracts) or claims of wrong by the state against an individual (criminal law)[4]. The limitation of legislation and thus of

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very well problematized and presented in his rendition. My general position on the matters discussed here is opposed to that argued by Professor Dyzenhaus.

[1] *Mahler v. Eby* 264 U.S. 32, 40 (1924) (opinion of the Court, per Taft, C.J.). Also see *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (sovereign [inherent] power to exclude upheld); *Fong Yue Ting v. United States* 149 U.S. 698 (1893) (sovereign power to deport upheld).

[2] *The Nature of the Judicial Process*, Yale University Press, New Haven, 1921.

[3] *Sword and Scales: An Examination of the Relationship between Law and Politics*, Hart Publishing, Oxford, 2000.

[4] Richard B. STEWART, Cass SUNSTEIN, "Public Programs and Private Rights", *Harvard Law Review*, vol. 95, no. 6, April 1982, pp. 1193-1322/ pp. 1232-1233: "*The reservation of a major share of economic life to a system structured through private litigation was a key element in the separation of powers scheme* [...] The grant of extensive lawmaking authority to administrative bodies deprived the courts of much of their established dominion, granted vast responsibilities to bureaucratic entities not anticipated in the Constitution, and undermined the separation of powers" [emphasis supplied].

the state constituted in the logic of classical constitutionalism the barrier between private and public; its demise has to a certain extent led to the permeation of adjudication with the policy-making characteristics of administrative discretion.

In his 1987 classic, *Constitutional Law in the Age of Balancing*[1], Alexander Aleinikoff noted that, for over forty years already, the post-New Deal birth and growth of the American welfare state and the blurring of the principled legal lines between public and private had led to an exponential proliferation of rights on the one hand and – on the other hand and correlatively – to the relativization and to an instrumentalist re-conceptualization of rights as social interests to be balanced against each other. Aleinikoff observed that this sort of interpretive judicial methodology (*balancing*, *Interessenabwägung*) de-legitimates adjudication, since it hides an essentially political exercise under the thin veil of false pretenses of flexibility and objectivity. Rights cannot be rationally balanced in a judicial proceeding, since they lack a common denominator, a neutral point of reference against the background of which the balance could be struck. As Justice Antonin Scalia, a fervent opponent of the use of balancing techniques in American practice, noted with characteristic wit and causticity: "[T]he scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy"[2].

The politicization of adjudication is fused at the hip with another contemporary evolution, an abstract moralization of public law adjudication. Namely, the mirror image of judicial policy-making is the moralization and legalization of Politics which results from importing into public law and transposing *tale quale* in this field exactly the same considerations of justice and equity which characterize as a matter of course legal relations in the field of private law, with no heed being paid to the differences of context. Indeed, whereas classical public law had an ontologically tragic nature, the modern quest for rational answers in a legalized key to all problems and events partakes more of the melodramatic genre. From a melodramatic perspective, tragedy seems irrational, just like, in a legal paradigm, too much attachment to the most *rational* human decision-making form, namely adjudication, makes political solutions seem *irrational*. But then, as Lon Fuller pointed out, one should always bear in mind that: "[The] higher responsibility toward rationality is at once the strength and the *weakness* of adjudication as a form of social ordering"[3] [emphasis in original]. Thus, the tragedy/melodrama difference I am describing relates to the burden of rationality which is placed by the judge on the executive/administrator in public law adjudication, i.e., the extent to which adjudication is limited in scope by the existence of spaces and fields of state action which cannot be legally, that is to say judicially, controlled and so have to be left to

[1] T. Alexander ALEINIKOFF, "Constitutional Law in the Age of Balancing,", *Yale Law Journal*, vol. 96, no. 5, April 1987, pp. 943-1005.

[2] *Bendix Autolite v. Midwesco Enterprises* 486 U.S. 888 (1988), p. 897. The phenomenon of balancing, even though it is exemplified here through the intermediary of American developments, is not an American legal peculiarity but a common modern evolution. See, for an example of European "balancing" of fundamental rights, *Otto-Preminger Institute v. Austria* 19 Eur. Hum. Rts. Rep. 34 (1994), Judgment of the European Court of Human Rights. The *Otto-Preminger* case shows just as well the problems with balacing as an unprincipled and essentially political adjucative exercise and the causes which led to the necessity for judicial balancing (legislative departure from established principles).

[3] Lon FULLER, "The Forms and Limits of Adjudication", *Harvard Law Review*, vol. 92, December 1978, pp. 353-409/p. 367.

political resolution. The tragic/melodramatic distinction in public law is drawn by the willingness or unwillingness of the judge to recognize the existence of spaces where state action under ambiguous (and thus discretionary) statutory provisions cannot be reduced to principled (reasoned) judicial resolution.

The most fashionable contemporary justification of this sort of abstract moralism, in the field of legal theory, is represented with rather monotonous prolixity by Ronald Dworkin, who maintains in essence that the judge can and must give a legal answer to any problem brought before him, no matter how insoluble at first sight. We have been wading so far through the obscurantist filth of insoluble dilemmas and quietistic distinctions, seeking to draw the limits of judicial rationality, oblivious to the fact that a rational solution as a matter of law can always be given. The answer is already in the law, embedded in the legal system. Consequently, the paradigmatic Dworkinian judge, called, in his high-flown rhetoric, "Hercules", only has to trot joyously uphill towards it (in Dworkin's less pedestrian formulation, "by justificatory ascent") in order to find a legal response to all questions under the sun. Hence the melodramatic connotations: Dworkin seems to confuse, albeit perhaps unwittingly, the rationality of law with the judicial rationalizations of given ideological predispositions. To wit, reason and common sense dictate (once we choose to listen) that a legal answer cannot be given in "limit situations" such as, for instance, the constitutionality of same-sex marriage, euthanasia, abortion, when the answer has to be discovered by divination from cryptic legal provisions, i.e., "equal protection of the laws" and when this semantic legal vacuity cannot be complemented by a recourse to original purpose or the traditional application of the provision[1].

In terms of context, the problem of statutory vagueness, as the father of modern constitutionalism, John Locke, was keen to point out, may come not from the unwillingness of the judge to disciple the administrator and cut discretion down to size by interpretation of the law. The statutory mandate can perhaps be vague, conversely, due to the fact that the specific type of state activity is, analytically speaking, distinct and cannot be reduced to rules, *because of its nature*.

A relevant example of melodramatic moralism in contemporary judicial practice is represented by a fairly recent Canadian administrative law decision reviewing a denial of a deportation waiver request for "humanitarian and compassionate reasons". In *Baker v. Canada (Minister of Citizenship and Immigration)*[2], the Supreme Court of Canada held that legal errors (decisions involving interpretations of rules of law) and discretionary decisions could be reviewed in terms of substance on the same middle range between correctness and patent unreasonableness standard, one of reasonableness. It also held, procedure-wise, that the common law imposes on all public decision-makers a duty to give reasons[3]. Last but not least, much of

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[1] "I foresee all manner of 'expert' bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D's, with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, 'no-win' political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research." J. Scalia, dissenting in *Mistretta v. U.S.*, 488 U.S. 361 (1989)

[2] [1999] 2 S.C.R. 817.

[3] On this issue, more generally, see, David DYZENHAUS, Evan FOX-DECENT, "Rethinking the Process/Substance Distinction: *Baker v. Canada*", *University of Toronto Law Journal,* vol. 51, Summer 2001, pp. 193-242/p. 198. *Baker* is epitomatic for a wider trend in administrative law; see David DYZENHAUS, Murray HUNT, Michael TAGGART, "The Principle of Legality in

the decisional outcome in the case was controlled by the "interpretative incorporation" into the factors controlling the administrative process of the Convention of the Rights of the Child, ratified but un-incorporated into domestic law by Canada (and thus technically of *no* domestic legal effect whatsoever).

More relevantly, with respect to the distinction between administrative error in interpretation of the law and discretionary decision-making, the Court opined that:

> "It is […] inaccurate to speak of a rigid dichotomy of 'discretionary' or 'non-discretionary' decisions […] There is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legal gaps, and make choices among various options".

Nonetheless, pace widespread contemporary beliefs and tendencies, exercises in re-naming do not change the re-labeled referents; calling tomatoes and cucumbers by the same name does not make the two vegetables identical. In some abstract and very trivial sense, it is true that interpreting legal rules and reviewing an exercise of discretion are not different. Yet, *definitio fit per genus proximum et differentia specifica*. That sort of observation could only be made if adjudication were a semantic exercise proceeding against a background of academic aloofness and contextual void that cannot characterize judicial review. Judges who fail to take account of this difference delegitimize their office and open themselves to the charge that usually attains empty exercises of irresponsible moralism: hypocrisy[1]. It is evident that a certain grasp of reality and a minimal attempt at contextual discrimination still need to have some currency in public law adjudication if government is to go on. A prominent administrative law scholar, David Mullan, who hailed the *Baker* case as revolutionary, would later be nonplussed by a post September 9/11 deportation in *Suresh v. Canada (Minister of Citizenship and Immigration)*[2], where the same test as that applied in *Baker*, the "pragmatic and functional approach" resulted in a very deferential decision. In terms of what has been said so far, it is clear that, to some extent, both the reveling and the dissatisfaction were triggered by the results as such within a sort of *morally instrumental* rather than a *legal* framework of reference. Denying the essentially discretionary nature of such decisions does not make discretion disappear but rather changes the location of its exercise from the executive to the judiciary branch. Whether one wants the judge to be an unaccountable legislator and statesman is, taking the matter from there, a purely private preference.

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Administrative Law: Internationalization as Constitutionalization,", *Oxford University Commonwealth Law Journal* vol. 1, no. 1, June 2001, pp. 5-34.

[1] Thus, Edward Corwin famously characterized as an "evident piece of arrant hypocrisy" Justice Davis's sweeping declamations in the latter's opinion for the Court in the Civil War case of *Ex parte Milligan*: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government". 71 U.S. 2 (4 Wall.), p. 121 (1866). See Edward S. CORWIN, *The President-Office and Powers 1787-1957. History and Analysis of Practice and Opinion*, New York University Press, New York, 1957, pp. 165-166.

[2] [2002] 1 S.C.R. 3. Note that in Suresh there was risk of torture attending deportation, so that important Charter values were also implicated in the decision.