

Law as Integrity and Law as Identity: Legal Reasoning, State Intervention, and Public Policies

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Taking both ordinary regulations and constitutional principles in account, is state intervention in the market through public policies legitimate? The legitimate use of public policies, as far as state intervention is concerned, will be analyzed taking into consideration legal procedures and the necessary legal interpretation. Methodologically, the theoretical object of this research is to conciliate the idea of law as integrity, developed by Dworkin, with the idea of law as identity, complemented by Taylor's idea of identity and Bankowski's idea of living lawfully. In fact, the methodological approach consists of reconstructing a system of analytical concepts based on a moral reading of legal rules and constitutional principles rooted within contemporary legal theory. The final object is to figure out new means of interpreting legal economic regulations and finding new ground for the legitimate evaluation of public policies.

A. Introduction

To accomplish any kind of public intervention in any type of market economy, it is essential to understand how the construction of public policies can effectively have an impact on the natural process of market rationale. In this context, an important question must be raised: Is state intervention through the use of public policies in the market legitimate, taking into account both ordinary regulations and constitutional principles? Obviously, the legitimate use of public policies, as far as state intervention is concerned, will be analyzed taking into consideration the legal procedures and the necessary legal interpretation.

Nevertheless, it is rather incongruent to establish procedures for public policies, disregarding how this can influence Constitutional interpretation, not only by administrative officials, but also by judicial courts. In this context, it must be clarified, from the very beginning, that the aim of this research is not to investigate how judges justify their decisions, but how public policies play an essential role in the construction of a specific reading of the Constitution which will influence the formulation of different pieces of legislation as well as the limits of judicial interpretation. As a matter of fact, the nature

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of this research is to invert the methodology of analysis. Instead of understanding the nature of the adjudication process and how judges manifest their Constitutional views through different decisions, the main objective is to deconstruct the idea of a one-dimensional as well as an official interpretation of a Constitution. The idea of clarifying Constitutional ideology requires an inverted mechanism of analysis, which will pinpoint the multiple political and moral forces capable of affecting the process of judicial decision-making. Basically, the purpose is, by deconstructing the way public policies are implemented, to apply a deeper sense of morality in the construction of legal procedures and legislative content, constantly regarding the nature of a Constitutional counter-majority principle of democracy and fundamental rights.

The main purpose of this paper is to reconstruct the meaning of public policies taking into account how effectively they can interact with a Constitution (counter-majority principle and fundamental rights), legislation, and interpretation of norms as a means of reconfiguring the nature of state intervention. It is not a matter of reinstating an interventionist economic perspective, but it is a proposal for the reinterpretation of administrative and judicial action towards correcting market failures as far as social and economic rights are concerned. Indeed, social and economic rights are not basically elaborated according to Constitutional interpretation by judges and courts, but it is the Constitutional force of principles through public policies that implements those fundamental rights.

Methodologically, the theoretical objective of this research is to conciliate the idea of law as integrity, developed by Dworkin, with the idea of law as identity, complemented by Taylor's idea of moral identity and Bankowski's idea of living lawfully. In fact, the methodological approach consists of reconstructing a system of analytical concepts based on contemporary legal theory in which an attempt is made to develop a more consistent idea of moral reading of legal rules and constitutional principles, taking into account the influence of administrative action in the construction of a Constitutional ideology.

In order to apply this methodological tool, it is necessary to re-evaluate Dworkin's idea of integrity in Law, adding substantial moral content to *the dimension of fit*,¹ not only from the viewpoint of the qualitative distinction of value in Taylor's proposal but also from the viewpoint of living lawfully as in Bankowski's legal theory.

From this methodological approach, the first part of this paper is dedicated to analyzing and reconstructing the theoretical references while considering similarities among Dworkin's, Taylor's, and Bankowski's theories. Secondly, the objective is to reconfigure the

¹ RONALD M. DWORKIN, *LAW'S EMPIRE* 230 (1986) (according to Dworkin, the dimension of fit consists of settling for an interpretation "that captures most of the text, conceding that it is not wholly successful"; in fact, it may be a type of "general explanatory power.").

theoretical fundamentals of public policies and how they can be effectively used as a means of reconstructing the nature and the essence of public intervention, considering Constitutional interpretation. The final intent is to suggest new means of interpreting legal economic regulations and finding new grounds for the legitimate evaluation of public policies, not only by administrative officials, but also by judicial courts.

B. Law as Integrity and Law as Identity

Integrity in law has been largely explored in order to critically reconstruct the idea of legal interpretation. In this context, much effort has been made to fill in theoretical gaps resulting from the positivistic approach disseminated in the beginning of 20th century as a major conquest in legal theory. In order to reconstruct legal interpretation and complement the theory of law as integrity, the idea of identity in law has developed according to Taylor's social theory and Bankowski's legal theory. First, the main characteristics of law as integrity are highlighted so as to give a general view of the concepts of integrity, political morality, and personified community. Second, Charles Taylor's moral theory is briefly presented as a complementary methodological tool in order to grasp the meaning of moral identity and its practical effects in the individual's life.² Finally, Bankowski, in his legal theory, pinpoints the mutual implication between legality and morality, as well as integrity and identity.³ To sum up, the concept of identity in law can only be legally construed taking into account Bankowski's idea of living lawfully.⁴

1. Dworkin's Idea of Law as Integrity

What does integrity in law mean? A lot of scholars and critics have made a great effort towards understanding what Dworkin means by "integrity in law."⁵ *Law's Empire* is an attempt to reformulate and reconceptualize the positivistic idea of law as well as criticize the pragmatic (economic) influence on the application of law.⁶ Under the axiom of *Taking Rights Seriously*,⁷ Dworkin presents a series of hard cases in which it is necessary to reconstruct the traditional legal interpretation of a Constitution, statutes, and common law. Surprisingly, the author will prove that major reconstruction of the act of interpreting legal instruments is essential so as to achieve integrity in law. As a matter of fact, integrity

² CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

³ See ZENON BANKOWSKI, *LIVING LAWFULLY: LOVE IN LAW AND LAW IN LOVE* (2001).

⁴ *Id.* at 22.

⁵ See, e.g., SCOTT HERSHOVITZ, *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* v-vii (2006); RONALD DWORKIN, *DWORKIN AND HIS CRITICS WITH REPLIES BY DWORKIN* xiii-xxiii (Justine Burley ed., 2005).

⁶ DWORKIN, *supra* note 1, *passim*.

⁷ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

in law requires not only a logical analysis of legislation and adjudication but also moral political coherence and judicial consistency in applying and operating with legal documents. Obviously, while applying the law, it should be taken into account both the dimension of fit and the moral background of a *personified community*.⁸ These two technical concepts identify the original aim of Dworkin's legal theory. Institutionally, he intends to complement the positivistic original proposal, adding the political moral dimension as a means of justifying the application of a certain legal norm to a specific case. Dworkin emphasizes that accepting the interpretive ideal of integrity consists in "trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community."⁹ Through careful analysis of this theoretical statement, a lot can be deduced from the author's conception of the act of legislating and adjudicating. First, integrity requires the comprehension of a set of principles about people's rights and obligations. Second, he acknowledges the personification of a community. Third, he institutionalizes a constructive interpretation.

First, integrity means that the act of attributing rights and obligations to people in a certain community needs to be coherently articulated, not only by officials (public administrators and judges) but also by individuals. This coherent set of principles is not predefined as something metaphysically conceived. It is transcendently formulated, but it is much more universally, abstractly proposed. Nevertheless, a coherent set of principles may be deduced, according to Dworkin, from universal values as well as from legal practice.¹⁰ In fact, there is no preconceived separation between morality and legality.¹¹ Plainly, this coherency requires strict methodological analysis of legal practice, norms, moral values, and their mutual implication. So as to achieve this coherency in law, the idea of "a personified community, as a working personification"¹² is necessary to identify political integrity. In this vein, the community, because of political integrity, expresses principles of its own, distinct from its officials and its citizens. This assertion validates the rational process of critical reconstruction in law, taking into account the mutual interference between principles of a community and empirical data extracted from real cases (legal practice). In this context, the act of attributing rights and duties to people is constantly recreated by the reciprocal influence between legal practice and principles of a personified community.

⁸ DWORKIN, *supra* note 1, at 167–75.

⁹ *Id.* at 255.

¹⁰ *Id.* at 188, 225–28.

¹¹ RONALD M. DWORKIN, *JUSTICE IN ROBES* 34 (2006).

¹² DWORKIN, *supra* note 1, at 172.

Second, according to Dworkin, a community, due to the fidelity to a coherent set of its own principles, has a duty of impartiality towards its members.¹³ This working personification of a community can also be defined by the obligation of having equal, mutual, and pervasive concern for all who share, not only the same worldview, but also different cultural, personal, and social backgrounds. The idea of a personified community, proposed by Dworkin, as a mechanism of redefining real moral values, the political institutional background, and the natural interaction among them, all of which serve to critically reconstruct a specific norm in order to apply it to a certain case, is also responsible for providing institutional support for the formation and the reorientation of a coherent set of principles. This moral reading of a coherent set of principles seems to be problematic at first. However, it sheds light on an important perspective of legal theory and may be conceived as a relevant step towards the legal openness proposed by Bankowski.¹⁴

Third, Dworkin incorporates an emphatic critical reconstruction that is considered to be an effective methodological mechanism for resolving legal problems.¹⁵ He indicates that it is possible to reconstruct the core and the content of legal principles while extracting the most appropriate meaning of political institutions, existing moral values, and legal doctrine. In fact, he relates “the dimension of fit” to the moral values as a means of critically reconstructing legal interpretation and, thus, applying it to easy and hard cases.¹⁶ As a matter of fact, here lies the relevant scope of Dworkin’s legal theory, that is, the institutionalization of a creative and constructive interpretation. This kind of interpretation assumes that critical reconstruction of norms and facts suggests a necessary process of innovation in law. Innovation in legal practice requires logical analysis (*positivistic approach*) of norms (dimension of fit) reincorporated in an environment constituted by moral choices, which distinctly construe the elements and purposes of a personified community.

On the one hand, the metaphor of a “chain novel”¹⁷ is used by Dworkin so as to explain how legal norms and judicial precedents can be part of a story which should be reconstructed creatively by officials whose purpose is to apply law in its best light, taking into account previous interpretations that must be consistently reintegrated to their newer interpretive perspective. On the other hand, Dworkin does not explain how moral values can be objectively applied to the process of critical reconfiguration of juridical principles in legal practice. The quest for an objective answer, in judicial conflicts as well as the idea of legal closure, may be jeopardized by the use of moral values as a means of reconstructing

¹³ *Id.* at 213.

¹⁴ BANKOWSKI, *supra* note 3, at 186–90.

¹⁵ DWORKIN, *supra* note 1, at 225.

¹⁶ *Id.* at 230.

¹⁷ *Id.* at 229–32.

legal principles in judicial or administrative practice. Four questions may arise: (1) Is it really relevant to obtain objectivity in judicial and administrative practice at the time decisions are taken? (2) How far can moral values interfere in the supposed objectivity of legal and judicial decisions? Is this interference deleterious to the construction of an impartial procedure of legislation and adjudication? (3) Does the metaphor of “a chain novel” implicate the actual renewal of legal decisions? (4) How can the idea of integrity be fused with the idea of identity?

II. The Idea of Law as Identity

So as to identify the core of these questions, it is necessary to acknowledge the idea of identity in law, in accordance with Charles Taylor’s moral theory as well as with Zenon Bankowski’s theory of living lawfully. First, it is paramount to readdress the content of the first two questions taking into account the idea of identity in Taylor’s social theory. Second, the Bankowskian idea of living lawfully will complement the Dworkian theory of integrity as a method of reconfiguring the moral component in the legal equation.

1. Taylor’s Idea of Moral Identity

Taylor advocates that “to understand our moral world we have to see not only what ideas and pictures underlie our sense of respect for others but also those which underpin our notions of a full life.”¹⁸ If we ponder for a while about this specific statement, we will naturally perceive a double reflection of how morality works in our daily choices. In this vein, notions of respect for others and self-respect are part of a process of moral analysis, which combines two significant questions involving the bilateral attribution of rights and duties: (1) What does a full life mean? (2) Do legal doctrine, legal norms, and legal practice, as we know them, sufficiently enable different people with diverse purposes to live a full life?

These two basic questions reveal a distinct method of analysis according to which it is essential to reconstruct the idea of a “qualitative distinction of worth” used as a basis to verify the moral relevance of a certain decision in life. Defining the meaning of life, as far as morality is concerned, necessitates a sense of self-respect and respect for others. The identity of a self is borne out by a “web of interlocution”, as defined by Taylor.¹⁹ This means that the existence of a self presupposes a net of communication in which the conditions of dialoguing with others will give sense to one’s life and to one’s self-definition. In this context, it is important to perceive how the idea of a full life will be grasped. As the definition of a self is intertwined with the communicative relationship one achieves in a certain community, the development of one’s identity is tantamount to the level of strong

¹⁸ TAYLOR, *supra* note 2, at 14.

¹⁹ *Id.* at 36.

evaluation²⁰ one is capable of nurturing in daily life while making the relevant behavioral and attitudinal choices in society. Leading a full life, therefore, demands a natural competence in dealing with hard moral dilemmas by being able to make qualitative distinctions of value. Considering that the identity of a self is constituted by a moral stance related to a certain space (locality) while communicating with others, it is logical to impose certain attitudinal respect when taking relevant moral decisions. From this viewpoint, there is a strict relationship among self-respect, respect for others, and the way one leads a full life, a life that is worth living. As a matter of fact, here lies the internalization of a command, which obliges someone to respect the dignity of others. The idea of strong evaluation becomes a significant component of a full life in progress for, depending on the level of moral commitment, it is possible to verify whether one is capable of morally and strongly evaluating one's own behavior, attitude, and life-decisions.

The second question, which can be derived from the social theory developed by Taylor, is not part of this author's arguments. In fact, it is merely proposed here as a valid argument to be incorporated as part of a critical legal theory. This means a complete change in the definition of legal tools in order to reconceptualize the nature of legal arguments as far as rights and duties are distributed among citizens in a considerably more complex society. Identity in law is not part of Taylor's arguments. Actually, it is deduced from the moral conception of human identity.²¹ It tends to signify a complementary perspective to Dworkin's incomplete moral proposal of law as integrity. Moreover, Dworkin's theory of integrity in law demands a more substantial study on the nature of moral arguments.²² In this context, it is crucial to re-evaluate the moral content and moral attitude of officials who are supposed to put integrity in law into action. It does not suffice to establish an abstract moral substratum in order to implant the idea of a fraternal attitude, as proposed by Dworkin.²³

2. Bankowski's Idea of Living Lawfully

The basic role of identity in law is to reconfigure and to concretize this moral substratum by reassuring that a qualitative distinction of worth should be part of law making and adjudication as a necessary step towards the establishment of strong moral evaluation in every aspect of legal practice. Identity in law is a concept, which needs to be understood as a means of transforming the rules and the principles according to the complex manifestations of social relations. The dimension of fit needs to be reconstructed, not only

²⁰ CHARLES TAYLOR, HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS VOLUME I 34 (1985).

²¹ TAYLOR, *supra* note 2, at 14.

²² See DWORKIN, *supra* note 1.

²³ *Id.* at 413.

taking as a point of departure the idea of a personified community, but also taking into account the Bankowskian idea of living lawfully.

First, it is important to explain the nature of Zenon Bankowski's work. Bankowski focuses his work on the idea of an ethical and theological approach of the intertwining of social and legal theory.²⁴ He intends to reconstruct legal reasoning, considering social relations and their influence on the interpretation of law. Bankowski's work may sound biased, as far as the theological element is concerned, none the less, this paper intends to demonstrate that Bankowski aims to reformulate the nature of legal theory with the main objective of establishing a natural balance between "law and love." He does not rule out the positivistic view; in fact, he even reinforces it.²⁵ He does add moral content, which can be reconstructed in accordance with his work on biblical parables in the New Testament.²⁶ Bankowski's idea of "living lawfully" is to be considered the expected reconciliation between the validity of the positivistic interpretation and the essence and the essentiality of a moral dimension of legal hermeneutics. Bankowski's legal theory deals with the paradox between legalism and legality, reconstructing the idea of legality from the interaction among the moral components of a legal equation, such as, love, compassion, mercy, etc.²⁷ Reflexively, Bankowski puts forward quite an unconventional proposal for legal theory, without disregarding the positivistic contribution to legal interpretation.

Living lawfully, in Bankowski's words, "implies both a question of how I should live in my relations with my fellows and how society should be organized."²⁸ In this sense, the author presents a legal theoretical proposal that reinforces the intertwining of identity and integrity. Moreover, he reveals the relevance of a study, which emphasizes the qualitative distinction of value from the viewpoint of individual choices as far as legal reasoning is concerned. It is not only a sociological view of the construction of moral identity, like Taylor's, but it is a legal perspective in which Bankowski elaborates truly creative criteria for the interpretation of legal documents. Utilizing parabolic reasoning, Bankowski reconfigures the idea of living under the law diverging from the exclusive legal closure approach without disregarding the importance of "the so-called dimension of fit."²⁹ As a matter of fact, the author synthesizes in his book *Living Lawfully* an original legal theory whose essential elements are "Gillian Rose's idea of the middle," parabolic reasoning, soap

²⁴ UNIVERSITY OF EDINBURGH SCHOOL OF LAW, Academic Staff: Zenon Bankowski, http://www.law.ed.ac.uk/staff/zenonbankowski_21.aspx (last visited June 8, 2013).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ BANKOWSKI, *supra* note 3, at 9.

²⁹ *Id.* at 189–90.

opera narratives, the importance of the journey rather than the destination, paying attention to the story, the differentiated union, the human condition of vulnerability, and the openness of the legal system.³⁰ Most of these words are self-explanatory. Nevertheless, they all seem to have specific theoretical meanings which demonstrate the accuracy of Bankowski's legal reasoning. In order to do his theory justice, a brief explanation of these legal terms will be presented below, at the same time a synthesis of his arguments will serve as a theoretical point of departure for the reconstruction of a critical legal theory founded on the tension and fusion between integrity and identity.

Bankowski intends to apply Rose's thesis about the middle to the ethics of legal decision. The middle, according to Bankowski is "an anxious place. It is an anxious place because risk always accompanies it."³¹ This signifies that decisions should be taken and no one can flee from the responsibility of taking them or even escape to a fictitious place of certainty and safety founded on a rulebook-solves-it-all model of society. Living in this anxious place means abandoning the security of a comfortable world where there are no shades of grey. According to Bankowski, "this concentration on law and the rules can tend to make us forget that it is we who make the rules and we that can change them. We see ourselves instead as technicians of rules that we do not and cannot challenge."³² How can we change this legal practice based on the technicality of rules? Does this challenge implied by Bankowski mean the undesirable subversion of certainty, civility, and safety? Working on the tension between legalism and legality, Bankowski proves that the sole search for certainty and the apparent safety provided by rules may turn a pretense democracy into tyranny, for "legalism is indeed the vice of this narrow government of rules, unleavened by aspiration or ideal."³³

Focusing on this tension between law and love, legalism, and legality, Bankowski reveals a solid theoretical definition of duty and aspiration, which serves to corroborate the necessary interaction between legal rules and ideals. Taking the Good Samaritan parable as an example, Bankowski tries to redefine the relation between legal rules and aspiration (love). Bankowski explains that Jesus, through parables, tries to reconstruct as well as transform the law without corrupting the legal system.³⁴ The parable of *The Good Samaritan* is not only about the definition of who is to be considered your neighbor or the exact way you can treat the other in a neighborly fashion, but it is about taking the risk of the encounter which translates the exact meaning of abandoning your comfort zone.

³⁰ *Id.* at 76–77.

³¹ *Id.* at 166.

³² *Id.* at 48.

³³ *Id.* at 59.

³⁴ BANKOWSKI, *supra* note 3, at 99–101.

Bankowski demonstrates that the other, in the parable, is not the Jew who had been assaulted and injured, but the Samaritan who, in spite of knowing the risks of the road between Jerusalem and Jericho, left the caravan in order to help the injured man. Aware of his vulnerability, the Samaritan acknowledges the other's vulnerability and, in doing this, he places himself in a risky situation away from the supposed safety of his own usual vulnerable place. Quoting Bankowski, "parables define and throw us on to a journey away from safe definitions—they are the way we talk of the tensions and risks of the encounter of law and love."³⁵ In fact, Bankowski's use of biblical content may be criticized; taking into account the state of art in Social Sciences that is founded on the disenchantment of the world caused by the process of rationalization typical of contemporary western societies. Nonetheless, the use of "parabolic reasoning" is a relevant methodological tool that serves to incorporate in the institutionalization process of a normative order, the interpretive criteria forged in the tension between love and law. It does not represent a return to an enchanted world underpinned by mystical and religious arguments, yet it sheds new light on the process of grasping, interpreting, and, above all, reflexively reconstructing both the legal system and its legal arguments. The *parabolic reasoning* elucidated by Bankowski is not merely a transposition of the religious content of what was the message of love of Jesus. The author intends to extract from the mechanism of parables a specific criterion of legal interpretation. The parabolic reasoning is, therefore, a methodological instrument, which effectively neutralizes the "semantic sting," that is, the strictly semantic interpretation of legal terms.³⁶

Bankowski captures the essence of the parable of *The Good Samaritan* from the perspective of legal reasoning. Indeed, it is easy to perceive that a lawyer is testing the ability of Jesus to apply the Law leading him to translate the meaning of a legal assertion. Ancient Law stated, "Love the Lord your God with all your heart, with all your soul, with all your strength, and with all your mind, and your neighbor as yourself."³⁷ In spite of knowing the legal essence of the statement, the lawyer insisted on having a clear definition of the word "neighbor" from Jesus. In this context, the parable serves as a methodological structure of interpretation, which expresses the impossibility of taking legal terms, such as, neighbor, at face value. Interpretively, Jesus reconstructs the sense and the meaning of the Law, without disregarding the tension between law and love, legality and morality. Parabolic reasoning, as defined by Bankowski, has a profound significance as a method of interpretation of legal rules, for it is the result of a thorough legal argumentation in which the force and the meaning of legal terms beyond a strictly semantic perspective can be detected through an argumentative methodology of attributing sense to legal terms based

³⁵ *Id.* at 177.

³⁶ *Id.* at 174–80.

³⁷ *Id.* at 99 (quoting *Luke* 10:27).

on social grounds.³⁸ Therefore, the argumentative nature of parabolic reasoning requires a qualitative distinction of worth so as to guide the interpreter in his search for the most accurate legal practice of juridical interpretation.

But it must be asked how this kind of qualitative distinction of value, through parabolic reasoning and legal openness, will be institutionalized in the construction of legal practice. It is indeed a rather difficult question. The purpose here is not to put forth the best answer, but to think reflectively about the huge influence morality may produce on legislation and adjudication. Bankowski elucidates and rationalizes this relation with a brilliant metaphor:

I want to give from myself and my goods to someone else. To do so I have to open my house wherein these goods are kept and let the recipient in to take them. In that act I am thereby including him and taking the risk that his entry might change me, and my house in ways I do not know. To give, I always have to open myself—even locking my house and stepping outside to give is already exposing myself to the donee. On the other hand, fearful of this risk, I might not give at all or might only give on condition I get something [sic] same back—one way I will be able to control for [sic] that risk is by making sure the recipient is the same as me and so I can reasonably expect something the same back. I have got so far and I do not want to go any further—from now on progression will be more of the same.³⁹

Is it possible to reconstruct moral evaluation in legal practice objectively? Obviously, the answer to this question is that maintaining objectivity in applying law is a difficult task, considering that morality is a component element in this equation. Nevertheless, it is fundamental that officials should apply law taking into account a necessary balance between legality and morality, law and love, in spite of the risks involved in this legal maneuver. Jurists must understand the nature of their interpretative role as well as the risks of being blind to their social environment or to their explicit societal demands. As Bankowski warns, “society can only be sustained by continuous explosion of acts of love which both sustain that society and determine the acts of love.”⁴⁰ Identity in law is a means of providing this continuous explosion of love in legal practice or in what may result as the exercise of a bureaucratic function of fitting the norm to the case in question.

³⁸ *Id.* at 174–80.

³⁹ *Id.* at 204–05.

⁴⁰ BANKOWSKI, *supra* note 3, at 101.

This perspective of critical thinking is the turning point, which adds a moral component and openness to what is known as legal closure. It is indeed risky to reconfigure legal interpretation in accordance with this fundamental tension between law and love, as described by Bankowski.⁴¹ On the contrary, it is a journey that is worth taking so as to revitalize the traditional facet of legal interpretation. It is fundamental to pay attention to the story, to the particularity of each case, as Bankowski advises.⁴² And each case may lead the interpreter to a new terrain in which it is necessary to evaluate the traditional legal logic, adding new interpretive criteria, as a means of critically reconstructing the normative order. From this perspective, it is crucial to replace the chain novel metaphor with soap opera narratives, as presented by Bankowski, considering that the latter implies the addition of new episodes, which represent a break in the chronological sequence of events and, thus, demand more creativity of the interpreter while analyzing the plot and its derivatives. Minor disruptions and break of paradigms will be part of legal analysis though controlled by “the traditional dimension of fit” or logical legal deduction.⁴³

This fusion between integrity and identity is not part of a preconceived idea of the *lifeworld*⁴⁴ that a certain individual conjectures; nonetheless, it is part of a complex social system in which universal communitarian values, both distinct from individuals’ moral conceptions and embodied in each individual as part of a fraternal project, constitute the conditions that make the exercise of human identity, as well as human dignity, possible. At first, this may seem deceptively obvious, yet it requires an elaborate formulation of morality that must internalize communitarian and universal values simultaneously derived from a critical reconstruction of identity. Finally, complementing the nature of fit with moral justification in accordance with the idea of living lawfully will contribute to a more reflexively reconstructed mechanism of legal interpretation.

C. Public Policies as a Means of Effectively Reinterpreting State Intervention

Bankowski advocates, “[T]he market and legality are not self-generating and depend upon institutions which are not like them. They depend on acts of love and generosity.”⁴⁵ Taking this statement as a point of departure, it is feasible to acknowledge the right direction of

⁴¹ *Id.* at 108.

⁴² *Id.* at 180–84.

⁴³ *Id.* at 189–190.

⁴⁴ The term is extracted from JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION, VOLUME 1: REASON AND THE RATIONALIZATION OF SOCIETY* (Thomas McCarthy trans., 1985); see also JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION VOLUME 2: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy trans., 1987).

⁴⁵ BANKOWSKI, *supra* note 3, at 101.

state intervention in the market through effective public policies. The legalist approach serves to feed the fear of liberalism, which is characterized by an urge for legal protection as a precondition of implementing certainty and civility according to market rationale. Legalism is based on a one-dimensional perspective of public intervention, that is, exclusively based on the making of secondary and primary rules, in the sense of Hart's positivistic analysis.⁴⁶ The mere act of legislating, either preventing certain types of behavior (primary norms) or establishing legal competences (secondary norms), is enough to solve social conflicts in general. In fact, this is a relevant point of departure; nonetheless public intervention cannot be reduced to this one-dimensional view of legalism.

The process of institutionalization requires a more extensive, though controlled, state intervention in social relations. However, it is important to consider that secondary and primary rules are the founding structures for the construction of a legally oriented framework of an ordinary social institution. Nevertheless, it is not enough to conceive an institution on the exclusive grounds of legality, according to Bankowski.⁴⁷ Moreover, any institution demands a dual component formed by the fusion of integrity and identity: Legal framework and practical information.⁴⁸ An institution becomes legitimate only, and only if, there is space in its structuration for critical and reflective legal reconstruction through explosions of acts of love. Legal rules may establish the basic framework, but the practical information, which forms the core and the content of an institution, requires a full translation of individual's moral identity as well as community values. Grasping the relevance of this fusion of identity and integrity is paramount to the consolidation of an institutional order that will, in time, orient and transform the legal system and social relations.

In this context, it is essential to think of the market as an institution that should be restrained and constituted according to legal limits and social needs. As any other institution, the market tends to be self-referential, which may compromise social and economic rights that are constitutionally guaranteed. With respect to this, new practical information (explosion of acts of love) should interfere in the compact stabilized mass of old information and legal activity that constitute the market as an institution. This new line of critical reconstruction can be exemplified by Bankowski's words: "In a sense we might say that the middle is the unity for it is the space created by moving out of self contained spheres, and where seemingly opposed principles are held in coherent tension. It is there that we can live in and out of law and love."⁴⁹ In fact, the market as a self-contained sphere

⁴⁶ HERBERT L. A. HART, *THE CONCEPT OF LAW* 79–99 (3d ed. 2012).

⁴⁷ BANKOWSKI, *supra* note 3, at 43–59.

⁴⁸ OTA WEINBERGER, *LAW, INSTITUTION AND LEGAL POLITICS: FUNDAMENTAL PROBLEMS OF LEGAL THEORY AND SOCIAL PHILOSOPHY* 21 (1991).

⁴⁹ BANKOWSKI, *supra* note 3, at 113.

cope with opposing principles in constant tension, and, because of this, practical information inserted in this sphere promotes controlled disruptions so as to reconfigure the nature of the institution as a legitimate means that serves to integrate economic and social rights in the same environment. In this context, judicial reasoning in Constitutional matters ought to be revisited for the way in which it has been traditionally applied, as it is inadequate to reconcile the contradictory facets of social and economic rights. This interpretive perspective of identity in law intends to recreate the Constitutional interpretation as well as its effects on the practice of public policies implemented by administrative officials.

Traditionally, the market works in a self-referential movement in order to exclude the possibility of change in its strategic rationality. Consequently, there is a natural proximity between market rationale and legalism. The certainty and the objectivity of rules stimulated by a legalist approach foster the strategic maneuvers of the market, creating stability and security for the implementation of a certain economic interest. On the contrary, it is necessary to intervene in this scenario so as to fulfill social needs and the redistribution of wealth. In order to achieve these specific goals, it is crucial to develop a logical system of public intervention without disregarding the operational mechanism of the market. Furthermore, it is common knowledge that the institutionalization of universal rights and the liberal concept of an abstract subject of rights are fundamental structures that serve the objectives of a capitalist society based on market rationale. In this context of universalism, the particular can be inserted to play a relevant role. It promotes imbalance in a structured economic institution so as to reinstitute a new line of reasoning through what is known as public policies. The public policies are constituents of a more fluid and flexible legal mechanism, which arises from a legal framework properly reconstructed through the necessary explosion of solidarity. Taking this into account, a virtuous cycle may be responsible for a fundamental change in the way judicial reasoning is conceived in terms of Constitutional interpretation.

A government based on public policies represents a stage of institutional maturity, which consolidates the merger between integrity and identity. Using a structured legal system, a government works its interventional plan so that social and economic rights are effectively put into practice. This signifies a complete change of approach as far as law making is concerned. Instead of criminalizing undesirable behaviors as a means of avoiding social instability, a new agenda of public policies is established so as to guarantee access to a more efficient health care system, a better structured system of public education, and of social assistance. These public policy measures are a subsidiary to the reconstruction of a political institutional framework whose goal is to morally evaluate the mechanisms of law making and the consequences of a legal system, judicial reasoning included. Methodologically, here lies the scope of a creative interpretation of rules and principles embedded in the normative order, which is the practical purpose of Bankowskian legal theory of living lawfully. Armed with a legal arsenal, it is possible to establish public social policies whose main objective is to activate legal principles and the merger of integrity and

identity. Law as identity objectivizes a minor revolution in Constitutional reading which, will cause a structural change in the judicial interpretation of legal norms. Reading the legislative implementation through a new mechanism will certainly contribute to a fundamental turn in the construction of a judicial, and above all, legal reasoning, considering the ideological infrastructure established by a Constitution.

The aim of administrative action has to be the reinforcement of public policies so as to correct the gaps and the failures caused by market structures. In the context of law as identity, public policies play a central role in the reconstruction process of state intervention in the economy, promoting a legitimate institutionalization of public acts that may redirect the objectives of market economy so as to re-establish an environment of protection of social rights, as desired by Constitutional purposes.

Finally, it is non-constructive to interpret public intervention disconnected from a legitimate legal analysis of each possible step towards a systematic intervention in social relations. It is not only a matter of interfering with market goals or exclusive economic purposes; it is a re-structuring of social and juridical relations, which may eventually become intertwined with economic strategies. In this particular sense, the merger of integrity and identity will be the legal condition of the institutionalization of public intervention. As legitimate framework, this fusion of integrity and identity will guide the institution of public intervention in social relations.

D. Conclusions

This paper is the result of qualitative research on the necessary relationship between legal theory and the legal nature of public policies. The purpose here was, first of all, to revisit the idea of law as integrity and, thus, create the idea of law as identity; and secondly, to apply this new theoretical framework to the study of public intervention in the market through public policies, taking into account the Constitutional limits designed by fundamental rights.

Objectively, the theoretical framework, based on the fusion of integrity and identity, was paramount in reformulating a relevant aspect of legal theory. It is not a question of abandoning the positivistic conquest, but it ventilates new interpretive criteria for the act of legislating and adjudicating. This, indeed, represents a change in judicial reasoning and in the making of public policies, taking into account the legitimate juridical principles that establish a solid framework capable of consolidating a more mature legal system. In this context, the institutional character of the legal system serves to reconfigure the nature of public policies as far as state intervention is concerned. As a matter of fact, they are legitimate means of achieving the purpose of effectively promoting social rights as defined by the Constitution.

The agonizing situation of the Welfare State in contemporary western societies may suggest a suspicious evaluation of this specific research. However, the particular crisis of the Welfare State validates the aim of this paper, for it is essential to readdress the discussion of public intervention as far as the nature and the concept of public policies and judicial reasoning are concerned. Institutionalizing new means for state intervention in a reconfigured legal environment is crucial in order to reinvent the idea of a revisited Welfare State. Summing up, public policies can be construed as particular action or as the well-measured effects of a legal practice consciously applied in the context of universally elaborated legal principles in a personified community.

Therefore, the legal study of public policies, considering this qualitative research, reveals a necessary step towards the implementation of a systematic rational process of state intervention whose limits are institutionally conceived taking into account the intertwining of integrity and identity, the universal and the particular, legality and morality, and, above all, law and love.