

LEGAL POSITIVISM'S LEGITIMATE HEIR?

Fernando Atria, *La forma del derecho*, Marcial Pons, Madrid, 2016, 465 pp.

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1. Introduction

La forma del derecho [The Form of Law] is a book of great scope and ambition that constitutes without any doubt a highly original, engaging and insightful contribution to contemporary legal theory. It leaves almost no major jurisprudential theme untouched and about all of them it has something novel and interesting to say. *La forma*, furthermore, aspires not only to provide a better answer to the problems that currently hold the attention of legal theorists but it purports to reorient jurisprudential debates and change the issues that animate them. Legal theory, it claims, is primarily focused on issues that are at best irrelevant, while downplaying others that are critical to the understanding of modern law. If its main conclusions are right, legal theorists should not only be concerned with different questions but change the way they go about answering them. No wonder then that Roberto Gargarella, a well-qualified observer of Latin American legal thought, has hailed *La forma* as “possibly the most important book published in Latin America, in the area of legal philosophy” in the last three decades (Gargarella 2016).

There are four major threads in the argument running through the whole book. After articulating (I) a radical critique of widespread assumptions in contemporary jurisprudence about what are the key questions and the main aims of the field, the book tries to characterize (II) the kind of legal theory that would revitalize jurisprudence and make it matter again, which, it claims, (III) must be grounded upon a theory of the institutional structure of the state. Finally, it argues that for an adequate theory of law and the institutional structure of the state to make sense at all requires us, in turn, to endorse (IV) a particular conception of politics and democracy. In

the following pages, I will critically reconstruct the overall arc of the argument with a view to demonstrating why one should accept most of its premises but reject many of its conclusions. In particular, I will try to show that while Atria's negative assessment of contemporary legal positivism is convincing, he does not take far enough his own views about how to revitalize this tradition.

2. *The Dead End of Legal Positivism and the Retrieval of its Raison D'Être*

La forma starts by showing how the dominant conception in contemporary legal theory, i.e. analytical legal positivism, has lost a sense of itself after Dworkin's challenge to Hartian jurisprudence and became absorbed by the *family dispute* between hard (or exclusive) and soft (or inclusive) conceptions of legal positivism. Contemporary legal positivism, it argues, has become so obsessed by the separability thesis that has retreated to a primarily *conceptual* theory that claims that, even if in no existing legal system the law can be identified (or applied) without relying on moral criteria, there could be a legal system separate from morals —i.e. it could be thought to be so without self-contradiction. But, the argument goes, if legal positivism becomes nothing more than the thesis that there is a conceptual separation —be it necessary (hard) or contingent (soft)— between law and morals, without considering whether and how enlightening that is for understanding existing legal systems and their mode of operation, it is difficult to see why such a theory would be of interest to anyone. This problem is brought into sharp relief by the expansion of constitutional adjudication in contemporary legal systems. As the importance of judicial review of legislation —and with it the importance of morally charged concepts (i.e. “cruel and unusual punishment”, “human dignity”, “equality”, etc.) for the identification of valid or applicable law— grows, the empirical content of a legal positivism centered on the separability thesis diminishes, becoming ever more conceptual and theoretical (Atria 2016, pp. 29–48). Some contemporary legal positivists have even come to boast of the superficiality and practical irrelevance of their jurisprudential work (pp. 66, 90–94).

The *irony of legal positivism*, Atria remarks, is now plain for everyone to see. The original thrust of the insistence on the importance of distinguishing what the law *is* from what it *ought to be* was to bring legal thinking closer to practice and make theory answerable to fact. Positivism was born out of the conviction of the need to pay more heed to what really happens, i.e. not to what judges, lawyers

and jurists say (or think) they do, but to what they actually do when they use the law to argue and decide particular cases. This is clearly shown by Bentham's critique of the common law and the legal profession of his time ("Judge & Co."). What horrified Bentham was not only that laws were far too numerous and obscure and that judicial procedures and rules of evidence were artificial and arbitrary, but the ease with which English lawyers held and propagated the belief that these laws and traditional legal forms were not man-made, that they were natural and based on reason as it has been applied to particular questions from times-immemorial. This mystification, that remade traditional law and legal institutions into a true natural order that evolved gradually through the English people's history, shielded them from rational critique and reform despite all their evils and abuses. Legal positivism, therefore, was born as an attempt to *demystify* law and legal institution by showing that they were man-made, the product of human will, something created not discovered. This was crucial because the demystification of law had the important consequence that it opened it to scrutiny, criticism and reform (Atria 2016, pp. 49–66).

Bentham's radical critique of common law was in this sense the preface to his no less radical program of legal reform, for which he coined a new concept: *codification*. Once it is recognized that law is artificial, an expression of human will, it becomes clear that the evils and abuses inherent in a judge-made system of law like the common law might only be rectified by transitioning towards a statutory-based system, where the judiciary and, more generally the application of the law, was made subject to a deliberately created and rationally structured legislation (pp. 104–111, 220–221). Moreover, Atria argues, the original driving force of legal positivism was to promote and reinforce an *ethos* that respected the authority of legislation and to stabilize the displacement of pre-modern judge-made law by modern legislated law (pp. 66, 95–96). Legal positivism constituted a deliberate attempt to articulate and defend a distinctively *modern conception of law* —i.e. a primarily legislated law whose highest expression was codification— which required an accompanying, distinctively modern conception of the judicial function. Contrary to what contemporary legal positivists maintain, a truly positivist theory of law must be committed to a conception of the application of the law that bolsters up the authority of legislation, viz. to a *formal* conception of legal reasoning and legal interpretation. Therefore, Atria concludes, we need to *rescue* the tradition of legal positivism, to restate again, although in a more sophisticated way, a theory that understands that

legislation constitutes the most *consummate expression* of modern law (pp. 29, 111–118, 168–169, 219–237).

Although Atria's criticism against contemporary versions of legal positivism are for the most part persuasive, his reconstruction of the tradition of legal positivism is problematic. It is true that Bentham's project was primarily critical rather than descriptive. Although he insisted on the importance of distinguishing between expository jurisprudence (about what the law is) and censorial jurisprudence (about what it ought to be), Bentham's science of legislation was first and foremost a critique and a program of reform of both the common law and the English constitution. Taking the principle of utility as the measure of all legal and political arrangements, he rejected the view that local custom and the common law were embodied wisdom and challenged the aristocratic principle of government, making a large imprint on nineteenth century reformation of English legal and political institutions.¹ But when it comes to the formation of legal thought and scholarship during the nineteenth century, it was one of his disciples, not Bentham himself, who was more influential and this is decisive for a more balanced understanding of the tradition of legal positivism. In contrast to Bentham, Austin wanted to elaborate a scientific expository jurisprudence that was empiricist, in the sense that it dispensed with normative considerations, and analytical, in the sense that it aimed to expound the law by systematically classifying its elements and clarifying basic legal concepts. It was Austinian descriptivist-analytical jurisprudence —rather than Bentham's critical-reformist program— that provided Victorian academic lawyers (A.V. Dicey, P.F. Pollock, W.R. Anson, etc.) with a valuable strategy for finding both a role for legal scholarship in the eyes of the legal profession and a place for it among university subjects, thereby inaugurating the *expository tradition* that dominated English legal studies for over century.²

Put briefly, Atria's reconstruction of the tradition of legal positivism and its influence on legal thought is highly selective and

¹ For an overview of the influence of Benthamite-thinking on the reform of legal institutions, see Hart 1982 (pp. 29–39); on the reform of government, Loughlin 1996 (pp. 29–39).

² For an early statement of the differences between Bentham's and Austin's jurisprudential projects highlighting the influence of the latter on English legal scholarship and suggesting a return to Bentham's science of legislation, see Jennings 1938. For well-known critical reconstructions of the formation and influence of the expository tradition, see Sugarman 1983, and 1986; Twining 1987. For a later, more nuanced, reconsideration of this critique, see Twining 1994 (pp. 130–46).

unbalanced. In fact, the frailty of his reconstruction of the historical trajectory of legal positivism is further shown by a key step taken in the narrative without much in the way of explanation from Bentham's jurisprudential project to nineteenth-century Continental European (mostly French and German) legal thought (Atria 2016, pp. 101–131, 219–229). This sort of criticism, however pedantic it might seem, is especially pertinent given that I agree with Atria in that a significant flaw of contemporary analytical legal theory is that it lacks, for the most part, an adequate grasp of both the intellectual history of the field and of the history of legal institutions. Leaving aside how well it gets historical facts, one should concede, on the other hand, that the book's proposal for revitalizing legal positivism by reconceiving it as a distinctively modern theory of law is quite appealing, particularly as it aspires to make it relevant to legal practice. But in order to revitalize legal positivism and, more concretely, to articulate a jurisprudence that is really adequate to the distinctive nature of modern law, Atria argues, it is necessary to reconsider its object and methods.

On his account, legal positivism constitutes a specifically modern theory of law in the sense that it attempts to articulate conceptually and bolster up that which is distinctive about modern law, i.e. the pride of place that legislation is given within legal thought and practice. There is no ideal and practical program that better reflects the spirit of modern law than the nineteenth-century codification movement and, therefore, it is unsurprising that Atria pays particular attention to French post-codification legal thought and practice. In fact, he argues, by looking to French post-codification legal thought and practice it can be shown with particular clarity that the process that leads to modern law must be accompanied by a formal style of legal reasoning and interpretation. Only by having a rather strict conception of the subjection of legal reasoning and interpretation to statutory texts, one that pays particular tribute to the authority of legislation, can the pride of place that legislation has acquired be stabilized. As French post-codification legal thought and practice evinces, to become an institutional reality modern law must be buttressed by a formal—even perhaps, during an initial period, *formalist*—conception of the judicial function.³

³ Atria justifies these claims by offering an interesting analysis—following François Gény—of the trajectory of the *Tribunal de Cassation* and the *réfère législatif* (pp. 124–131). It is rather odd that Atria uses as the conceptual framework of reference for discussing legal interpretation the theory articulated by F.K. von

It is at this critical juncture that Atria moves from the rejection of the conceptualist understanding of legal positivism to one that aims to explain *actually existent* legal systems and is committed to a distinctively modern conception of law. Let us look more closely at this crucial step. Modern law, it is argued, is more than just an idea, it is a *set of actually existent institutions* (pp. 95–96, 230). The methodological blindspot of those who, like contemporary analytical positivists, espouse a one-dimensional conceptual analysis is that they seem to have forgotten that “what we are trying to understand are not concepts but institutions. Institutions do not flow from concepts, but concepts from institutions” (p. 99). Put differently, Atria is elaborating an *institutional* theory of law that claims that in order to understand or grasp legal concepts we need to understand or explain the institutions from which they flow. Only if we take this further step —i.e. going beyond *pure conceptual reflection* in order to consider *actually existing institutions*— are we in a position to understand or grasp what a legal concept means. Atria intends, in this manner, to provide a methodological basis for his institutional theory via a *general theory of legal concepts*, a theory that is general in the sense that it not only applies to the concept of “law” itself but to all legal concepts —from “legislation”, “adjudication” and “administration” down to “marriage”, “contracts”, “wills”, “property”, “torts”, etc.

3. *From Analytical Positivism to Institutionalism*

Atria’s theory of legal concepts takes as its starting point the premise that to answer the question of what a certain legal concept *means* is to inquire about the *nature* of “law”, “legislation”, “contracts”, and so on. What the meaning of the legal concept is will depend on the (theory of the) nature of the thing or object to which the concept *refers* (pp. 133–136). This particular way of framing semantic

Savigny in his *System of the Modern Roman Law* which is not a characteristically post-codification legal work but one of Pandect-science, and, moreover, Savigny was a famous opponent of codification and highly critical of the idea of conceiving law as primarily a product of legislation. The natural and more obvious case in point for Atria’s argument would have been the French Exegetical School (Caenegem 1992, pp. 13–14, 147–151, 155–159; Stein 1999, pp. 115–123). It is true, however, that Savigny (although in this particular matter widely misunderstood) was enormously influential in the whole family of the civil law tradition (as it shown by the Chilean dominant doctrine of legal interpretation) and that Savigny’s theory of interpretation is in some important respects closer to contemporary legal methodology than to pre-codification understanding of interpretation (Bascuñán 2014).

problems (with its strong metaphysical overtones) is explained by the fact that Atria's theory of legal concepts is inspired by —and to an important extent is a response to— Michael S. Moore's attempt to elaborate a semantics for a truly *general* jurisprudence taking as its cue the “new” or “causal” theory of reference developed by Saul Kripke, Hilary Putnam and others. Moore's project, in this sense, is an attempt to extend the *modal revolution* in analytical philosophy to jurisprudence and by that means to articulate a moral realist natural law theory.⁴ Although *La forma* does not spend much time explaining the relevant background, some preliminary remarks are necessary if we are to appreciate the full force of the argument.

Moore's point of departure is the observation that the natural sciences theorize particulars that are divided into kinds (e.g. “water”) because that reflects the *structure* of the natural world (e.g. “water is H₂O”) rather than human interests or actions, such that they constitute *natural kinds* in the sense that they “have a nature that makes them kinds even if no human makes use of that nature or even discovers or labels it” (Moore 2000, p. 311). Our scientific theories, it is argued, are not about what speakers mean (think or believe) when they refer to something using some classificatory term, they are about the *essential nature* of the objects they study; they aim to identify *metaphysic not analytical necessities*, that is to say, necessary truths that depend on the way the world is and not on linguistic conventions —“Water is H₂O” is a “metaphysically necessary truth because something wouldn't be water if it weren't H₂O” (Moore 2000, p. 305). *Nominal kinds*, in contrast, correspond to kinds of particulars that are grouped together only because we have attached a common label to them, i.e. there is no other unifying element than that they are referred to by that linguistic expression (they have no essential nature). Given that the law is not a natural kind, this line of reasoning seems to lead to the conclusion that law is a nominal kind and, thereby, to the dispiriting view that jurisprudence is nothing more than the study of what is *called* “law” by competent speakers of a language community at some time and place, making impossible the very idea of a truly *general* jurisprudence and any sort of cross-cultural studies about law (Moore 2000, p. 311).

Moore argues that if law is to have an essence and something like a truly general jurisprudence be possible, law must be a *functional kind*. A functional kind corresponds to a class of objects whose uni-

⁴ Here I am adapting for my purposes Brandom's concept of a “modal revolution” in the history of the analytical philosophy (Brandom 2008, pp. 29, 91–95).

fying nature derives not from its *structure* but from its *function*, viz. particulars that are the kind of thing they are (e.g. a “heart”, a “stomach”) not primarily because they have a certain shape or composition, but because they have a certain function (e.g. blood circulation, first-stage processing of nutrients). Accordingly, to explain the nature of this kind of thing, the enquirer must ascertain a distinctive *good* to which that kind of thing is *causally* connected, i.e. to understand what kind of thing it *is*, one needs to understand what it is good *for*. This sort of functionalist inquiry can be applied recursively as these particulars can be integrated into larger functionally specified sub-systems (e.g. digestive system, circulatory system) that, in turn, together form an overall system (e.g. human body) which is also functionally specified (e.g. human health) (Moore 2000, pp. 311–318). If law has a functional rather than a structural essence, the beginning of wisdom in the field of jurisprudence is the insight that in order to understand the nature of law the enquirer needs to identify its end or goal, a good that law uniquely serves —be it the governance of human conduct through rules (Fuller), the promotion of the common good (Finnis), integrity (Dworkin), etc. (Moore 2000, pp. 318–29). The same applies, in turn, to the understanding of both a particular branch of the law (e.g. criminal law, torts, contracts, etc.), for one needs to identify the good that it can achieve (e.g. retributive justice, corrective justice, promissory obligations, etc.) in order to give an account of its nature (Moore 2010, pp. 18–23), and legal concepts (e.g. causation, punitive sanction, damages, etc.), whose nature can be explained only by inquiring into the moral significance of its structural features or properties (Moore 2009).

It is here, Atria contends, that one should ask whether this functionalist reorientation of legal theory stretches the argument too far. Privileging to such a degree functional considerations over structural features in our conception of law and legal concepts as Moore proposes, might lead one to pay insufficient attention to the fact that what is distinctive about modern law —i.e. the pride of place given to legislation— requires that any legal theory must explain (and bolster up) the *formalism* of law. That is why the key to the field of jurisprudence is rather the recognition of the *institutional nature* of modern law and legal concepts (pp. 133–136) and this implies that the explananda (i.e. what we are trying to understand) are institutions that, given the formalism of modern law, *operate autonomously* relying on structural features. The institutional (or positive) dimension of modern law requires that in its operation legal institutions must be *blind* to —or *autonomous* from— any function or purpose they are

supposed to serve: valid laws (and valid judicial rulings) are taken as valid because it has been so decided by competent authorities, however (un)wise or (un)reasonable such decisions turn out to be under the light of the functions or purposes of the institution. Put in Hobbesian terms, the truth about modern law that positivism captures is that *auctoritas non veritas facit legem* (pp. 50–53, 146–147). The true insight of functionalist jurisprudence, however, is that in order to understand law and legal institutions (to which legal concepts *refer*) we need to ascertain which among its multiple features are *central* to them —i.e. to specify which, from among all the properties that they exhibit, are those that make them the kind of thing they are— and that can only be done by considering their function. To make sense of the structural features of law and legal institutions, viz. to have a conception of (and elaborate theory about) them, it is necessary to grasp their underlying function —functional considerations are, thus, *explanatorily fundamental* (p. 149). This implies, Atria argues, that one needs to distinguish between what is necessary for the *operation* of law and legal concepts (institutions) and their *conditions of intelligibility* (p. 147).

What is distinctive about this approach is its insistence on the fact that legal institutions, given their formal nature, must be largely insensitive in their operation to the function they serve. Actually, Atria's contention is stronger: legal institutions contribute to the achievement of their functions precisely *by means of* their formal nature. Because in their operation legal institutions rely primarily on their structural features and are relatively insensitive to their function —it is mediated by those structural features— these institutions make more probable the achievement of the latter (which otherwise would be highly improbable). Let's take legislation as example. Legislation aims to enable us to establish with certainty those norms of conduct whose general observance is in everyone's interest in circumstances where there is (or might be) widespread and persistent disagreement about what actually is in everyone's interest. In order to enable us to establish what norms we should follow, legislation provides us with a decision-making mechanism that makes it more probable both to identify with certainty those norms despite persistent disagreement —i.e. they are legally valid if they have been approved following the established procedure— and that those norms reflect everyone's interest —i.e. they are the product of a deliberative and participatory procedure wherein the interests of all are voiced and taken into account. This means that legislation enables us to identify, using only *formal criteria of validity*, norms that are

(as likely as they can be in our conditions) the expression of the *will of the people* about how to rule themselves, i.e. the institution of legislation makes probable the highly improbable practice of self-government (pp. 146–148, 177–187).

This explanatory strategy, Atria claims, can be extended to all those legal concepts (contract, property, wills, delict, sanction, etc.) that are not purely conventional (i.e. nominal kinds), that is, the semantic content of all substantial legal concepts is to be explained according to this model. This bold claim invites one to inquire first whether the argument incurs in overgeneralization. Indeed, one should wonder whether concept/institutions like “legislation”, “administration” and “adjudication” can really be conceptualized following the same explanatory strategy as that used for explaining concepts like “contract”, “wills”, “property”, “tort”, etc. As it is quite obvious, the former concepts refer to “institutions” in a stronger and deeper sense than the latter to the extent that they are not only referring to the operative facts of some legal norm unleashing certain legal consequences (i.e. “institutional facts”), but also to what Santi Romano called “organizations” (i.e. an “entity or social body”, a real effective unity with social agency), i.e. there is not only legislation but a legislature, not only administrative action but an administration, not only adjudication but a judiciary.⁵ Atria incurs in the same mistake that Massimo La Torre observed in other contemporary institutional theorists like Neil MacCormick and Ota Weinberger, i.e. he confuses “institutions” with “legal institutions” (La Torre 1993, p. 195).

Furthermore, only legal institutions (e.g. property, contract, wills, tort, tax, etc.) can be easily taken to be no more than legal concepts and, thus, for explaining them one needs perhaps nothing more than a legal semantics. Atria, like *old legal institutionalists* (e.g. Romano, Maurice Hauriou, etc.), rejects the conception of the law as system of norms and other conceptualist methodological commitments, but he remains, like *new legal institutionalists*, too closely tied to an-

⁵ As Romano remarks, one should distinguish the use of the word *institution* “in its proper meaning” from “the other, quite frequent but merely figurative sense. Accordingly, when in language of everyday life we speak of e.g. the institution of the press, or in legal parlance of the institution, or more often, of the institution [*istituto*] of donation, trade, etc., we do not mean to refer to an actual social entity, but, in the first case, to the concomitant manifestation of particular, disjointed and often divergent forces, and, in the second case, to the various relationships or distinct norms that are conceptually glued together because of the common shape of their typical characters” (Romano 2017, p. 17).

alytical legal theory as this attempt to ground methodologically an institutional theory of law upon a general theory of legal concepts suggests. If one were to recast Atria's theory of legal concepts as an explanatory strategy for understanding institutions in its proper sense, his legal theory would come to relate more closely to the views held by old institutionalists and other concrete order thinkers than to those of new institutionalists. This seems to be confirmed by his further contention that any adequate theory of modern law must be based on a theory of the institutional structure of the state. In fact, when applied to institutions proper, Atria's views about the relations between structural features and function can be adequately translated into Hauriou's view of institutions as a composite of both organized power and directing idea, wherein the directing idea has a certain primacy in the understanding of institutional change (Loughlin 2017, pp. xv–xviii). Actually, the dynamics of institutional formation and decline that Atria defends—which he exemplifies in the cycle of adjudication (pp. 108–11, 219–48)—also chimes far better with old institutionalism than with a theory of legal concepts. Finally, all this seems to be further ratified by the fact that someone might disagree considerably with the sort of theory of legal concepts that Atria defends—e.g. one might believe, as Brandom has shown, that one should privilege *inference* over *reference* in the order of semantic explanation and that conceptual content derives primarily from the *inferential role* that concepts play in our discourse (Brandom 2000, pp. 1–2)—⁶ and nonetheless agree without significant amendments with the kind of institutional theory it is supposed to underpin methodologically.

4. *Jurisprudence and the Institutional Structure of the State*

One of the most important institutional insights of *La forma* is contained in the criticism it articulates against the widespread adoption of a *court-centered* perspective in contemporary jurisprudence, be it positivist, realist or non-positivist. This tendency to overstate the standpoint of adjudication and, thereby, to marginalize legislation in our understanding of law has taken form via three alternative theses: (1) that law-applying institutions have a sort of conceptual priority over law-making institutions (pp. 160–166), (2) that looking to what judges really do has an empirical priority when describing how law actually operates (pp. 134–135) and (3) that jurisprudence is the

⁶ For an attempt to show that Hart espoused a similar sort of semantic inferentialism by examining his theory of rights, *vid.* Tschorne 2014.

silent prologue to any judicial decision (p. 317). What is interesting in Atria's critique of court-centered jurisprudence is that he does not simply claim that it is unbalanced in the sense that illuminates some aspects of modern law (i.e. the role of courts in legal systems) at the cost of obscuring others (i.e. the place of legislation). Given his foregoing thesis that what is distinctive about modern law is the pride of place it gives to legislation, it might come as no surprise that Atria objects against this sort of jurisprudence that it underplays this central structural feature of modern law. But the argument is stronger than this. It contends that a court-centred jurisprudence is incapable even of providing an adequate account of the nature of adjudication. The blindspot of this sort of legal theory is, Atria points out, that the *nature* of adjudication changed with the transition from pre-modern to modern law, that is to say, what it means to apply the law becomes something utterly different once legislation was given such pride of place in legal thought and practice. A theory of adjudication must be in this sense relational; without an adequate understanding of the nature of legislation and the place it has within contemporary legal systems one cannot understand the nature of adjudication (pp. 135–136, 159–169).

In a remarkable move, Atria takes this line of reasoning a step further and claims that in order to elaborate a sophisticated theory of the nature of adjudication it is necessary to take into account both legislation and administration as both these institutions have evolved into their modern shape together and due to their inter-relations. This means, in consequence, that in order to have an adequate theory of modern law it is necessary to elaborate a theory of the institutional *structure or form of the state* as a whole —a *holistic* theory (pp. 21–22, 99, 159). Once it is taken as a starting point that what is distinctive about modern law is the centrality it gives to legislation, it becomes evident that the key to the understanding of both adjudication and administration is that they constitute two alternative institutional articulations of the subjection of power to law(s) and of the application of the law(s) (p. 96). If this is correct, the stark contrast between the structural features of the judiciary and the administration becomes all the more remarkable. While the judiciary is organized upon the principle of *independence* which translates into a series of normative protections of the position of judges —i.e. which insulates them from improper influence of government, public opinion, other judges and the parties— in order to ensure the *immediate subjection* to the laws, the administration is organized in accordance with the *commissarial* principle, viz. it has to act in accordance to

the laws *under the direction of government* whose instructions are transmitted through a hierarchical chain of command or delegation, from the head of government and his ministers down to the most humble civil servant. This means, in terms of their function, that while the judiciary must be understood as an institution that has no other end than to apply impartially the law to particular cases, the administration has to implement government policies within the limits set by the laws (Atria 2016, pp. 189–218).

Despite how familiar —unproblematic even— this institutional contrast between the judiciary and the administration might sound, Atria reminds us that there is an influential school that has as a distinctive trait the negation of precisely this difference. As a reaction to what it takes to be the naïve conception of adjudication inherited from legal formalism, pragmatism characteristically tried to emphasize that laws —and legal norms more generally— always turn out to be insufficiently determined to decide particular cases. Observing that, as a matter of fact, judges have always a margin of interpretation or degree of discretion when applying the law in their rulings, pragmatists thought it necessary to ensure that the exercise of this power to decide particular cases promoted valuable social ends. The judiciary, the argument goes, is not really different from other branches of government in the sense that it should exercise its powers in accordance with policies that optimize social welfare without flouting the (wide) limits set by the law. The problem with pragmatism, Atria argues, is that it makes unintelligible the institutional structure of the judiciary. If judges are to pursue, like the administration, policies that advance general interests, why then are they not subjected to the same conditions of legitimacy? Why are they not made politically responsible like ministers and other political governmental officials? In fact, Atria points out, when judges begin to behave like pragmatists suggest, and become *activists*, the principle of independence is progressively eroded and in time courts start increasingly to resemble the administration —in their practices if not their institutional structure— and, consequently, they become politicized (pp. 229–234, 248–250).

As will be seen presently, according to Atria, the need to distinguish between judges and activists and the consequences of the politicization of court-like institutions are particularly significant for the debate on judicial review of legislation. Before moving onto that, however, it is important to note that Atria's conception of the administration and the high-handed manner he deals with pragmatism seem to be curiously unhistorical and static for someone who proposes an

institutional theory of law and criticizes so strongly the conceptualism of contemporary analytical jurisprudence. The rather traditional reconstruction he offers of the institutional structure of the state seems more appropriate to the nineteenth-century liberal state than to the administrative state of the twentieth century and the distinctive kind of public law thought that emerged with it. During the 1920s and 1930s, the growth of the administration—viz. the expansion of delegated legislation and administrative tribunals in Britain and of administrative agencies in the United States—challenged the established conception of the separation of powers and of the primacy of a common law based on the freedom of contract and untrammelled property rights. Against the increasing resistance to the rise of the *administrative state* opposed by the judiciary and traditional legal thought (i.e. Victorian and pre-New Deal), innovative public lawyers elaborated a pragmatist sort of legal theory—e.g. functionalism in the U.K., progressive legal theory in the U.S.—that reconsidered key legal conceptions and revised our conception of the law to render them more adequate to the new social needs and the new role of the state (Loughlin 2014; Sunstein 1993, pp. 4–6, 18–23).

What is more, the unitary and hierarchically structured image of the administration that Atria puts forward does not chime well with the contemporary regulatory state. The displacement of the transmission belt view of administrative legitimation (i.e. principle of legality) and command-and-control regulation by *new governance* principles (e.g. participation, transparency, accountability, etc.) and *network* regulatory techniques (e.g. cooperation systems, hybrid organizations and self-regulation) has led many contemporary legal theorists to wonder whether it is necessary to *decenter* our conception of law and to abandon a state-centered perspective that traditional public law—and with it, Atria—assumes (Black 2001, 2002). Once the state is seen as simply one among many interdependent and yet autonomous actors in a regulatory space, the legal pluralist kind of approach assumed by old institutionalist scholars like S. Romano becomes more appealing. An old institutionalist looking to the contemporary world would also probably remark that Atria's account pays no attention to those disparate developments at the transnational and international level that are also questioning the privileged place that the state retains in our image of law and the understanding of the legal structure of public power, which some argue is leading us to a post-national or post-sovereign condition. Whatever one might make of these phenomena and others that dominate the law-beyond-the-state or global law debates (Walker 2015), to totally disregard them not

only reveals Atria's conception of the administration to be inaccurate and outmoded, but constitutes a manifest shortcoming for a theory of law that pretends to be about actually existing institutions and offer a holistic account of the structure of the state. More importantly perhaps, as will be suggested in the next section, this leads Atria to misdiagnose democracy's contemporary ills.

5. *Neo-Constitutionalism and the Crisis of Legislation:
Towards a Political Theology?*

That modern law and, with it, democracy are waning is not only a theme that runs through the book, but to inquire why and how is perhaps the single most important motivation driving the whole enterprise. On Atria's account, the main institutional and cultural challenge that contemporary democracy is facing is that of constitutional adjudication and neo-constitutionalism. More particularly, these complementary phenomena have contributed to the dethronement of legislation from the central place it has held since the coming into being of modern law, which is, in turn, an essential element of the institutional arrangements that sustain democratic self-government. What is worse, we seem to be losing our grip on the political vocabulary, viz. the conceptual repertoire, that is necessary in order to see why our democratic institutions are dwindling and how we might regain our ability to understand them. If modern law required an institutional theory of law that is committed to the centrality of legislation, the theory of democracy requires, further, a *political theology*. As I will try to show, Atria's arguments are persuasive but his conclusions are highly problematic. There are good reasons to suspect that *La forma* misidentifies the main challenges to democracy and that the kind of political theory it proposes is not entirely consistent with the tenets of an institutional theory of law.

The basic premises of the argument are relatively familiar. There is an internal connection between the modern conception of law and the democratic ideal. There seems to be a short step from the idea that the law is artificial—an expression of human will—to the democratic idea that only laws that one imposes on oneself are *legitimate* laws. Conversely, this ideal of self-government might just as easily be seen as evolutionarily linked first with a mode of legal experience that emphasizes the centrality of deliberatively created law (i.e. legislation) which then is generalized into the principle of *popular sovereignty*; i.e. to be legitimate, an exercise of political power must be an expression of—or in some sense derived from—the *will of*

the people (Atria 2016, pp. 169–175). The structural features of the process of democratic legislation (e.g. representative assembly, deliberative public process, majority rule, etc.) are oriented to making probable that approved norms take into account everyone's interests and thereby be (putatively) consented to by all. In fact, it is only by such a procedure, that something like the general interest can be identified and that is why it provides us with the only *formal* criteria for identifying the will of the people (pp. 177–187). By subjecting judicial and administrative power to the laws, in turn, the modern principle of legality combined with the distinctive institutional structures of the judiciary and the executive ensure that all state power can be seen directly or indirectly as the expression of the will of the people (pp. 189–218).

The idea that the centrality of legislation is constitutive of our image of law and democracy, Atria acknowledges, is called into question by the expansion of judicial review of legislation and neo-constitutionalism. So much so, he argues, that one should perhaps question instead whether this institution is compatible with democracy. The expansion of judicial review of legislation has meant that in most contemporary legal systems the validity of a law depends increasingly not only on formal criteria —i.e. that it has been approved by a competent authority according to the established procedure— but also on substantive criteria —i.e. to be valid, laws must be compatible with fundamental rights and other constitutional principles. The process of expansion of constitutional adjudication, which is celebrated by neo-constitutional thinkers as a great achievement —viz. the subjection of politics to law, of will to reason— has brought with it a significant erosion of the *formalism* of modern law. This *de-formalization* of law and legal reasoning is tantamount, first, to returning to a pre-modern conception of the law wherein positive law is valid only in so far it does not violate some sort of self-evident truth (pp. 67–75). Constitutional adjudication and neo-constitutionalism lead, secondly, to an undemocratic government by judges. Going beyond the run-of-the-mill argument that objects to the counter-majoritarian nature of judicial review, Atria argues that the real problem lies in that the *constitution* is not amenable to adjudication and, consequently, even if constitutional adjudication exhibits the ordinary institutional features of courts and judicial proceedings, the resulting institution will not, in the long run, operate like them. This is why the remarkable degree of politicization observable in the case law, composition and process of appointment to the American

Supreme Court, the center of one the oldest and most prestigious traditions of judicial review, is something to be expected (pp. 329–341).

The reason why the very idea of constitutional adjudication is an oxymoron, a *contradiction in terms* (p. 254), is because it is based on the mistaken assimilation of the constitution to ordinary legislation that derives from the common view that the constitution is a just set of laws that are more difficult to amend and usually more vague and indeterminate. On the contrary, Atria argues, constitutions —by their very nature— cannot be *impartially* applied like ordinary legal norms are. All substantial constitutional principles are essentially *polemical* in the sense that although we all agree that they embody fundamental commitments that are constitutive of our political community (human dignity, liberty, equality, etc.), the determination of the content of those commitments is the substance of democratic political debate, the matter of ordinary political disagreement. Of course, there is a sense in which these commitments set the limits of democratic debate. The outright infringement of these commitments —e.g. if a faction begins to deny the equal dignity of the members another social group— might justify civil war, violent resistance or, in less dramatic cases, civil disobedience. But for the most part, constitutional adjudication is not about conflicts between two parties one which denies and another which affirms a constitutional principle. The interposition of a court in conflicts of this scale will most probably turn out to be unable to contain them (pp. 261–262). Constitutional adjudication is primarily about conflicts between parties that hold *rival conceptions of shared constitutional principles* and this implies that the rulings of constitutional courts in such matters of constitutional principle necessarily render them *partisan*. There is no substantial difference between the opinion of a constitutional court about, for example, the consequences of the right to education for whether (and how) primary schools may select their students and those held by a socialist, a liberal, a conservative (etc.) on the same debate. The *continuity* between juridical and political questions in matters constitutional, Atria concludes, demonstrates that the constitution cannot be applied impartially and, therefore, judicially (pp. 251–300).

Once one realizes this, it is easy to see that the substance of democratic politics is the debate between rival conceptions about what is the meaning of our constitutive commitments as a political community which, in turn, is not different from the question of what is in everyone's interest. The institutional mechanism to adopt collective decisions about what is required by the *general interest*

is parliamentary legislation. Democracy, more particularly, supposes that there is a representative assembly that takes —through a deliberative procedure— the most important political decisions and, thus, expresses the *will of the people*, which then is to be implemented by the administration and impartially applied by the courts. The pride of place that legislation enjoys in both modern law and democratic government is, thereby, normatively explained by the fact that it is the *primary institutional place where the will of the people takes shape*. The problem is that the institution of parliamentary legislation seems to have lost most of its vitality and prestige and perhaps constitutional adjudication and neo-constitutionalism are nothing but the markers that the era of democracy is reaching its end (pp. 343–357).

What explains the crisis of democratic legislation, Atria contends, is that the image of politics that parliamentary institutions presuppose is increasingly implausible. Today there is a widespread *cynical* view of politics that argues that what takes place in the political process is a *negotiation* between *factions* vying to foist their *particular interests* onto the decisions of public authorities, rather than a deliberation about our common good. The idea that legislation and politics is about our general interests or that it expresses the people's will, the argument goes, is no more than a myth to be dispelled. This is why, Atria believes, one should ask at this point whether we are *living under dead ideas* (pp. 359–391). When confronted by this question, the line of argument of *La forma* adopts an exhortative and ironic register. Just as legal theory is based on an *act of faith* in that we must assume that although actually existing institutions are formal, they have a nature that is made intelligible by a transcendent (i.e. pre-institutional) function which explains their formation and evolution (Atria 2016, pp. 230–231), when it comes to modern law as a whole we need to assume that it expresses —however, imperfectly and tentatively— the will of the people. There is no other way to institutionally articulate the will of the people than the fallible procedure of democratic legislation and this means that we need to believe in actually existing parliamentary institutions, even in the knowledge that they are defective and fall short from being what they purport to be. If we are ever going to live like self-governing people, we need to *ironically commit* ourselves to the institutions of parliamentary legislation, knowing that they are nothing but a pale and disfigured *anticipation* of truly political lives. A theory of modern law and democracy that is not radically skeptic must have, in consequence, the same eschatological structure of *theological* arguments (pp. 379–465).

Even in this extremely compressed reconstruction, I think it is possible to have a sense of how wide-ranging and attractive are the theory of politics and democracy outlined in *La forma*. Atria's objections to the standard view of constitutional adjudication and neo-constitutionalism are particularly engaging and compelling. Let me close this discussion by considering two main problems that beset this last thread of the book's argument. First, it should be noticed that when it encourages us to adopt a politico-theological outlook committed to the self-legitimizing claims of existing institutions *La forma* seems to betray a fundamental tenet of the tradition of legal positivism it purports to revitalize. As Atria himself noticed in the discussion of Bentham's critique of the common law, legal positivism aimed to provide a *demystified* account of law and legal practice, one that dispensed with the appeal to transcendental or metaphysical entities. Secondly, and perhaps more importantly, his discussion of—and the prominent place he gives to—constitutional adjudication and neo-constitutionalism seems to be inconsistent with the institutional turn that is defended in other parts of the book. It is quite a stretch to deem the expansion of constitutional adjudication and neo-constitutionalism to be (even one of) the main challenge(s) to the modern conception of law and contemporary democracy or, to that effect, to the centrality of legislation. A more consistently institutional approach, it seems to me, would have focused the discussion more on the role of Parliament rather than parliamentary legislation. In fact, once one examines the actual role that Parliaments play in contemporary constitutional orders, it becomes clear that it is very unconvincing to simply assume that legislating is—or, even, ought to be—their primary function. Even in the case of the British constitution, which is the oldest tradition of parliamentary democracy and where arguably Parliamentary sovereignty still remains a fundamental constitutional principle, Parliament cannot be seen as primarily a legislature. As many authorized commentators of the British constitution have observed (Walter Bagehot, W.I. Jennings, J.A.G. Griffith, etc.), law-making in general (e.g. secondary legislation) and even the legislative process itself has long been dominated by the executive. The role of Parliament has not been to legislate, but to offer through various mechanisms—ministerial responsibility, parliamentary questions, committee reports, among others—a forum for debating, defending and criticizing government policy (Griffith 1951; Tomkins 2003).

More generally, if *La forma* had paid more attention to Parliaments than to legislation and offered a more adequate image of

contemporary administration, it would have come to appreciate that a more serious challenge to contemporary democracy derives from the rise of executive power observable in most constitutional orders. In particular, it would have put much more emphasis on the disempowering effect that social acceleration has on time-consuming deliberative bodies and reflective publics. The switch to the kind of *reactive politics* that predominates in late capitalist societies that are prone to recurrent economic and security crises, explains the migration of decision-making powers from the slow-moving and divisive mechanisms of deliberative politics to private businesses, the courts and the executive branch of government. This movement towards a world of *administration without sovereignty* seems to be further reinforced by the effects that transnational economic and political forms of governance have on state-based political self-determination in our post-national conditions (Somek 2014, pp. 176–243).

6. Coda

The position of the critic is always considerably easier than that of the author and this is particularly true in the case of books that undertake projects of the scale of *La forma*. Despite the many disagreements that unavoidably any reader will have with a book as bold and controversial as this one, to encounter a book like this is a rare treat. There are few books that manage to say this much on so many central questions in legal and political theory and there are fewer still that try to do so articulating a unified explanation of how everything hangs together. Moreover, leaving to one side dissents on matters of detail, it is difficult to disregard Atria's persuasive general arguments for abandoning the sterile obsession with conceptual analysis of much contemporary jurisprudence and adopt instead a sort of jurisprudence that is more decidedly institutional and explicitly grounded on a theory of the state. Actually, as I hope to have shown, a great deal of the criticism that one should make of *La forma* is that it does not push the institutionalist turn it proposes far enough.

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