e.
publica
public law journal

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Vol. 13 No. 1 (V.01-24)
April 2026
e-publica.pt

ISSN 2183-184x

Funded by:

Co-funded by
the European Union

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e-Publica **Vol. 13** No. 1, April 2026 (V.01-24)

CONVERTING THE EXTRAORDINARY INTO THE ORDINARY: NOTES ON THE THEORY AND PRACTICE OF CONSTITUTIONAL INTERPRETATION[1]

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Abstract: In different ways in different traditions, constitutional interpretation has meant converting the extraordinary into the ordinary. When faced with constitutions that are extraordinary from a legal perspective, given their exceptional political and moral significance, constitutional judges have tended to convert them into *ordinary* constitutional *law* by remaining faithful to standard forms of legal reasoning. These forms are different in the common law tradition, on the one hand, and in the civil law tradition, on the other. Neither of these traditions can be modelled by appealing to this or that theory of law (whether positivist or anti-positivist, whether inclusively or exclusively positivist). Rather, they correspond to discourses that shape in complex terms—and in evolving terms as well—what it means to be a judge bound by *the law* and therefore what it means to reason *legally*. When acting accordingly, constitutional judges strive to be unexceptional inhabitants of the "province of lawyers".

Keywords: Constitutional Interpretation; Common Law Tradition; Civil Law Tradition; Legal Reasoning.

Resumo: De diferentes modos em distintas tradições, a interpretação constitucional significou uma conversão do extraordinário no ordinário. Perante constituições que são extraordinárias numa perspetiva jurídica, dada a sua extraordinária significação moral e política, os juízes constitucionais tenderam a convertê-las em *direito* constitucional *ordinário*, permanecendo fieis a formas aceites de racionalidade jurídica. Estas formas

1. The author would like to thank Dimitrios Kyritsis and the other participants of the 2025 meeting of the Constitutional Theory Network for their helpful comments on an earlier version of this paper.

This article was included by invitation. It was not subject to blind peer review and was evaluated by the Editorial Board.

The author acknowledges national funding provided by FCT – Fundação para a Ciência e a Tecnologia, I.P., under project UID/04310/2025.

Submission: 09/03/2026

são distintas na tradição de *common law*, por um lado, e na tradição continental, por outro. Nenhuma destas tradições pode ser modelada por apelo a esta ou àquela teoria do direito (seja positivista ou antipositivista, seja inclusiva ou exclusivamente positivista). As mesmas correspondem, antes, a discursos que moldam em termos complexos – e também em termos evolutivos – o que significa ser um juiz subordinado ao direito e consequentemente o que significa raciocinar *juridicamente*. Quando agem em concordância, os juízes constitucionais procuram ser residentes comuns da "província dos juristas".

Palavras-chave: Interpretação Constitucional; Tradição da Common Law; Tradição Continental; Racionalidade Jurídica.

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1. Taming the extraordinary: Our Lady amongst the pagans

1.1.

As they address constitutional interpretation, the following lines begin from an unlikely starting point: the resistance of the common law constitutional tradition to conceiving the rule of law in terms that refer it to law in some "extraordinary" or "public" sense. Indeed, in this tradition, the rule of law means the rule of *common* law, i.e., of *ordinary* law[2]. According to the ingrained discourse, this resistance amounts to a rejection of continental conceptions of modern public law (*droit politique* or *Staatsrecht*), regarded as "political phraseology of foreign countries" (Dicey, 2013: 51).

For the likes of Dicey, by rejecting such paganism, the English have denied sovereign power as an extraordinary (extravagant) power, which can be exercised according to criteria different from those established by ordinary

2. On this resistance, see Walters (2020: 226 ff.).

law. The English do acknowledge parliamentary sovereignty but it is believed to have a source altogether different from public law: it was generated by "Our Lady, the Common Law",[3] under whose sight it therefore exists, the immaculate conception being proved by legal precedent[4].

In an arrangement meant to ensure the rule of ordinary legal life ("Our Lady" herself), rather than to allow for the extraordinary, constitutional law is but ordinary law. Other constitutional norms, alongside parliamentary sovereignty, are identifiable if they are so "in the ordinary legal way" (Walters, 2020:374). And of course, orderly democratic life is part of the arrangement, it being unthreatening to the ordinariness of law, whose rule it is meant to favour (Dicey, 2013: 180-181).

Somehow correcting Diceyan orthodoxy, Walters warns us against considering the existence of public law to have been denied by common lawyers. Rather, "public law was tamed and subsumed within the ordinary or common law" (Walters, 2020: 241). One must indeed acknowledge—and keeping pace with the pertinent imagery—that parliamentary sovereignty is not fatherless, i.e., one cannot deny the role played by the juridical-political doctrine of sovereignty (and later by democracy) in the insemination of "Our Lady". Without considering this convoluted genealogy, one could not make sense of parliamentary sovereignty as it is, in its *extraordinary* dimension, *before* its "practical limitations", i.e., one could not say at the same time—as Dicey actually does (2013: 28, 180 ff.)—that "the King in Parliament can do everything" and that "parliamentary sovereignty favours the rule of law"[5].

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3. In the words of Frederick Pollock, cited in Criscuoli (1981: 305-306).

4. The precedent establishing "The King in Parliament" as a legal concept, with the courts only recognizing as "laws" those issued by "the King and both Houses acting together", see Walters (2020: 165, 212 ff.).

5. One should note that the decisive role played by the public law doctrine of sovereignty (of the "father") in the British constitutional tradition appears to be even more irrepressible if one considers the "prerogative" as something that stands alongside "parliamentary sovereignty". Namely, those powers of the Executive concerning international relations and believed to pertain to the "prerogative" (like ius representationis, ius tractum or ius ad bellum) are "external public law" powers as the latter developed in modern Europe (public law being a statist public law concerned with the "internal" and the "external" manifestations of sovereignty). Thus, the United Kingdom is no less a state at this level (one generated by "public law") than any other "continental" state (with the difference that the latter, when converted into constitutional states, did not conceive such powers as pertaining to a "prerogative" of the Executive, conceiving them instead as full constitutional powers to be exercised under international law – the successor of "external public law"). On the development

It is also that genealogy that allows one to understand the essential role that legal interpretation plays as a force converting the extraordinary into the ordinary. That is, where they appear as extravagant to "Our Lady", the then extraordinary acts of the "King in Parliament" are to be "subsumed within the ordinary or common law". This may well be the only form of constitutional interpretation that is thinkable in the context—"constitutional" therefore meaning "genealogical", i.e., interpretation of statutes, which can only be binding as part of the common law, in light of its rule, and therefore must be determined according to "common law rules of construction"[6].

The political theology—in its negative and anticipatory meaning[7]—that dominated the continent after the French revolution is different. The task of taming public law—of taming the extraordinary power that is formulated by the corresponding discourse—was pursued not through its subsumption within ordinary law, but through the revolutionary pronouncement of the constitution *as extraordinary*, i.e., as the solemn expression of national sovereignty. The extraordinary character of the latter does not turn it into a threat: the meaning of national sovereignty as a constituent power, as that of the constitution in itself, is *negative*. That is, its intent—as announced by Articles 3 and 16 of the *Declaration of the Rights of Man and of the Citizen*—resides *exclusively* in the conversion of all powers of the state into *ordinary* powers, constituted powers[8].

Thus, in both the British and in the continental cases, even though through discourses that are very different, what was at stake in constitutionalism was a reformulation of the doctrine of the state in the direction of converting the extraordinary into the ordinary—that is, of transforming the doctrine of the state into constitutional doctrine. In the continental case, that conversion evidently created difficulties regarding the concept of constitutional interpretation, considering that it is interpretation of the extraordinary (and

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of the doctrine of "external sovereignty" in "external public law", see Barbas Homem (2009: 44 ff.).

6. For a clarifying example in the formulation of such rules, see the paper delivered by Hon. Justice Susan Kenny at the University of Melbourne. Constitutional Role of the Judge: Statutory Interpretation. Kenny SJ, 2013. Available at: https://www.fedcourt.gov.au

7. For further developments, see Luís Pereira Coutinho (2020: 73 ff.).

8. See Carré de Malberg (2004) whose understanding summarizes the contributions of Siéyès, the 1789 and the French doctrinaires of the July Monarchy into a coherent whole.

not of ordinary laws in light of ordinary law as in the British case). If constitutional interpretation, as interpretation of the extraordinary, meant its constant irruption into the ordinary—and not its conversion *into the ordinary*—then the very *negative* meaning of national sovereignty, and therefore of the constitution, would be compromised. This fundamental challenge was—and still is—addressed by the theory and practice of constitutional interpretation, as shall be seen.

1.2.

The conception of modern constitutional law as *extraordinary law*—"fundamental law" in a modern sense (Loughlin, 2010:288 ff.)—emerged in America through its manifestation as the solemn expression of "We, the People" and was apparently confirmed by the institution of judicial review. The emerging problem, though, was whether an extraordinary law was "amenable to judicial application, interpretation, and enforcement" (Loughlin, 2010: 291-292). In fact, the risk would be to turn the judge, placed before highly general constitutional provisions, into an actor escaping ordinary forms of legal reasoning (everyday rules of construction, in other words), who would therefore be deeply involved in the moral or political terrain. In that case, "fundamental law" would be a form of "political right" or "constitutional morality", with the judge asserting himself as the true voice of the "general will".

Before such risk, "there was certainly no expectation that the judiciary would ever have a role in determining conflicting interpretations of general constitutional provisions" (Loughlin, 2010: 292). One could say that *Marbury v. Madison* altered that expectation but perhaps that would be too strong a statement. Indeed, the understanding of judicial review (and of constitutional interpretation) that emerged in the said decision did not conceive of it as an extraordinary demonstration of rightfulness, political or otherwise, but as an ordinary *legal* exercise. In the words of Martin Loughlin:

> "Marshall instilled a general perception of the Constitution as a kind of supreme *ordinary* law. This transformation was accomplished by a threefold strategy: first, by eliminating from court judgements any background assumptions based on traditions of fundamental law or natural law; secondly, when undertaking judicial review, by using a style of judgement that

> treated constitutional interpretation as close textual analysis; and, thirdly, by abandoning the practice of *seriatim* opinions, replacing it with a single opinion of the court. (...) Through Marshall's work, not only was the ancient of the constitution as fundamental law buried; so too was the idea that the modern constitution was a form of *droit politique*. Instead, *the Constitution was transformed into a new type of positive law*, and the judiciary took on the duty, through *the forensic processes of judicial review*, of determining its meaning and enforcing its provisions" (Loughlin, 2010: 292-293; Italics added).

Many have considered, in Diceyan vein, that the presentation of the Constitution as "supreme *ordinary* law"—and of constitutional interpretation as ordinary *legal* interpretation—corresponds to a vindication of the common law tradition. That is, the American constitution was thus extricated from the realm of the extraordinary, becoming instead "a legally embedded written Constitution" to be determined in "formalist" terms that have nothing to do with notions such as "political right" or "general will" (Walters, 2020: 350). In fact, with the Constitution being seen as "ordinary law"—one which amounts only to a set of discrete legal restraints—the idea of constitutional interpretation as an exclusive "province of lawyers" became plausible. The latter are a body of unexceptional professionals "who may have no special insight into justice or politics", but deal instead with everyday legal sources, determining norms according to established rules of construction[9]. Most importantly, they have "a rational dislike to break with the past"[10].

It is above my means to confirm whether the Diceyan view more accurately captures the American constitutional practice in its many stages of evolution. But if one takes that view for granted, then—even in this other context, although in different terms—constitutional interpretation meant an exercise of conversion of the extraordinary (the constitution as approved by "We, the People") into ordinary constitutional *law*.

It must nonetheless be acknowledged that, in the dramatization of the American constitution and its interpretation (*rectius*, its "moral reading")

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9. See Eisgruber, cited in Loughlin (2010: 296).

10. See Dicey, cited in Walters (2020: 349).

developed in these last decades by Dworkin and his followers—in terms somehow intended at legitimating the practice of the Supreme Court during the tenures of Chief Justices Warren and Burger—it has become hardly conceivable to speak of "legally embeddedness" in the abovementioned terms.

In fact, in Dworkin's staging, the ordinariness of constitutional interpretation as "the province of lawyers" apparently gives way to the extraordinary seriousness of "rights", which identify the law, now taken to be "our abstract and ethereal sovereign" (Dworkin, 1986: VI). A "forum of principle" makes it actual on behalf of the "general will", which is explicitly summoned and identified with a "community of principle" (Dworkin, 1990: 20). The action is thus dominated by a judge who takes the pagan shape of Hercules. One cannot miss the chasm that exists between the abrasive Hercules and the distinguished "Our Lady" revered by common lawyers. "Integrity" does not come to the rescue of the latter, "fit" not really working as a counterweight to "political morality" but as its bending servant: there can be no mistake that "legal reasoning", now undistinguishable from moral reasoning, is aimed at "results" (Dworkin 2006: 258 ff.). Thus, "constitutional interpretation", far from being a force converting the extraordinary into the ordinary, appears as the continuous guise of the extraordinary, standing above and reshaping the ordinary at coups of "reason", as unbinding as they are irresistible[11].

The criticism of Dworkin's spectacle—and there was fierce criticism—was not, of course, based on the untimely *kitsch* that inevitably results from the outstanding means used by the *metteur en scène*, even if a case could indeed be made in that direction. Beyond mere aesthetics, one cannot but be surprised by such means, particularly from a perspective which refuses to speak lightly of the "general will" and would most certainly prefer to leave Hercules out of the picture when speaking of state powers—the judicial power included, never forgetting how "terrible" it may actually be "amongst men" (Montesquieu 1989: Book 11, Chapter 6).

Strangely, in the American context, the disturbingly *positive* political theology implied remained unacknowledged, with few notable exceptions[12]. Those who remained lucid—and therefore unimpressed—tended to

11. On this latter aspect, see Smith (2015: 21 ff.).

12. Most importantly that of Smith (2018: 14-15, 232 ff.).

concentrate instead in Dworkin's utter inattentiveness, both to the ordinary workings of politics, and to the ordinary workings of law. Regarding the former, many noted that "communities of principle" only exist at the metaphysical level, and therefore ordinary democracies cannot be perceived as having delegated to pagan heroes the settlement of disagreement, that of course if they are to remain *liberal* democracies[13]. As to law, Hart and his followers insisted that it is not "abstract and ethereal", but rather exists in the mouths of lawyers, whose utterances are always based on concrete sources even when "rights" (or "principles") are referred to—and when they are, nothing is meant "in its greatest possible extent"[14].

One can read this latter insistence as a defence of the ordinariness of legal reasoning against its transformation into an exceptional form of political or moral reasoning. But however strong the Hartian case may be, it seems not to have been very influential in American practice. In fact, it must be acknowledged that the practice of the Warren and the Burger Courts was, to a great extent, captured by Dworkin. It must also be acknowledged that another group of adversaries of Dworkin—a more powerful group than the Hartians, in a very worldly sense—seems to have prevailed in present times.

The latter group did not restrict itself to denouncing the many frailties of Dworkin's artifice. It decided instead to play the political-theological game *contra* Dworkin either ignoring or not that the corresponding terms are "patently impossible to men of intellectual probity"[15]. And what could be summoned against the extraordinary means invoked by Dworkin—and the corresponding legitimation of the Warren and Burger Courts—but the unparalleled American "origins"[16]? In Pliny the Younger's perennial terms, "one cannot but be surprised, that take any single day in Rome, the reckoning comes out right; and yet, if you take them in the lump, the

13. This is a common theme in Dworkin's critics interested in democracy and disagreement, however different their contexts and angles are. See, of course, Ely (1980) and Waldron (1999).

14. See, for example, MacCormick (1978: 154 ff.); Alexander (2015: 15 ff.).

15. On the inevitable compromise of "probity" when political theorists do not restrict themselves to the acknowledgment of the "noble lies" presiding over the lives of cities but engage instead in "myth creation", see Strauss (1989: 25-26).

16. In Vermeule's words (2022: 92), "originalism arose out of a concrete political and rhetorical context in which it struggled with an enemy, an antonym – in this case, the progressive legal theorizing of the Warren and Burger Courts".

reckoning comes out wrong." In any case, and however interesting the whole process may be to those interested in political theology, it is better to leave the American "war of the gods" to the Americans. With Pliny the Younger, once again: "Do, I beg of you, as soon as ever you can, turn your back on the din, the idle chatter, and the frivolous occupations of Rome, and give yourself up to study"[17].

2. Kelsen's legal orthodoxy: the ordinariness of constitutional interpretation

2.1.

In the continental context, the affirmation of the constitution as law—as constitutional law, thus enforceable by a court—was accompanied by a keen effort to ensure that constitutional interpretation did not surpass the realm of the ordinary, i.e., of *legal* reasoning, as something entirely different from moral or political reasoning.

In Kelsen, the effort was centred on the assertion of the ordinariness of legal validity, even when it is the validity of a constitution which cannot be confused with an ordinary law. Indeed, all forms of political right (or constitutional morality) are radically repressed, namely doctrines invoking an exceptional "constituent power" or summoning a "general will". Attention is instead dedicated to the ordinary practice of lawyers, who, by determining superior norms, take inferior norms as valid. It is based on that practice that the "legal scientist" becomes capable of presupposing a *Grundnorm* which validates the "first historical constitution" (Kelsen, 1967).

One must, of course, concede that Kelsen could not possibly have relied merely on the ordinary practice of lawyers when the *Pure Theory of Law* was conceived. As Carré de Malberg rightly pointed out in this context, the "theory of law by degrees" could not be taken as descriptive at a moment in which the French (as Europeans in general) had no conception of the invalidity of ordinary laws in light of constitutions (Carré de Malberg, 1933: 56 ff.). It therefore appears to be undeniable that the *Pure Theory* emerged

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17. See Pliny the Younger. Letters. English translation by J. B. Firth, Book 1, Letter 9 (to Minicius Fundanus). Available at: https://www.attalus.org/old/pliny1.html

in Europe as a "prophetic theory"[18]. Its meaning truly lied, in the words of Pierre-Marie Raynal, in "a categorical opposition to any and all developments that aim to explain [the validity of the law] in terms of values" (Raynal, 2019: 104).

In any case, whether descriptively or "prophetically", the ordinariness of law as legality—its safeguard against the intrusion of what is extraordinary—is what is asserted by Kelsen. Correspondingly, the positive effect of the presupposed *Grundnorm* (the validity of the constitution) *is entirely subsumed within its negative effect*. The latter is that there is no legal validity but that which corresponds to legality—including constitutionality *as nothing but legality*. In other words, working as a metarule of recognition of positive law (nothing but positive law), the *Grundnorm* also works as a principle of legal positivity (there is no law, constitutional law included, which is not strictly positive law) (Ferrajoli, 2008: 46).

In this vein, the reasoning of lawyers who recognize valid norms in legal practice (in other words, who interpret the constitution) is not (or is not to be) contaminated by any considerations external to legality (namely considerations of politics or morality). That is, the internal point of view of lawyers is a strictly *legal* point of view—a "legal-technical point of view", in Kelsen's words (Kelsen, 2015a: 29)—and must remain that way. This is precisely the reason why, for Kelsen, the principle of legal positivity imposes requirements on the framers of constitutions themselves. The latter are to establish *pedigree* criteria of validity, and not political or moral criteria which could compromise the autonomy of legality (the autonomy of legal reasoning as strictly *legal*).

In Kelsen's words, constitutions are not to include proclamations inviting the legislator to conform with "justice, equity, equality, liberty, morality, etc.". And in case they do—thus pretending to transcend the ordinariness of legal reasoning, of law as it validly is in "the province of lawyers"—those dispositions are to be taken as mere political "guidelines". Indeed, lacking the qualities that rend them determinable at the level of proper legal interpretation (i.e., being meaningless from a "legal-technical point of view"), the said dispositions cannot be considered to be relevant for judges. They

18. Hersch Lauterpacht, cited in Carrino (2020: 280).

are to be taken instead as not "legally binding" on the latter and "directed towards the organs that are tasked with the creation of law" [19].

It is important to mention that Kelsen is not often associated with the theory of legal interpretation. In fact, some consider he did not develop any theory at this level; others consider that he developed a "sceptical" or "nihilist" theory, which thus denies the possibility of any method capable of insuring the objectivity of legal interpretation[20]. From my perspective, neither of these views is accurate. It is true that Kelsen states that "there simply is no method (that can be characterized as a method of positive law), by which only one of several meanings of a norm may gain the distinction of being the 'only' correct one" (Kelsen, 1967: 352). But one should note that that statement is immediately followed by a proviso: "there simply is no method… provided, of course, that several possible interpretations are available" (Kelsen, 1967: 352).

Thus, what Kelsen is in fact defending regarding legal interpretation is that there are limits to the legal method when we are before open-textured enunciates (understood here as enunciates using concepts regarding which different conceptions exist). Indeed, to say—as Kelsen does—that the legal method cannot lead us to the definition of "one possibility within the frame" does not mean to deny that the legal method is essential in determining "the frame". Therefore, rather than denying the legal method, Kelsen is defining the limits of the legal method (of interpretation that is properly *legal*).

For Kelsen, the limits of legal method (of proper legal interpretation) are those which define the limits of constitutional interpretation by the judge, and therefore of constitutional law (which thus remains nothing but supreme *ordinary* law). It would be a mistake to say that Kelsen is contradicting his own "positivism", even though he considers that there are enunciates of the constitutional text that must be disregarded by the judge. Remember that

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19. It should be mentioned that Kelsen did not remain coherent throughout his work on the strict legal nature of constitutional judges' reasoning, this mandating them to ignore moral or "political guidelines" included in constitutional texts and thus abstaining from interfering in the conflicts arising from them. Indeed, if Kelsen was adamant that this should be the case in the text that was just cited (originally dated from 1929), in his later debate with Carl Schmitt, he considered there to be only a "quantitative" difference between legislation and constitutional adjudication, thus admitting that the latter could also have a "political" character as to the type of reasoning involved (Kelsen, 2015b: 184 ff.).

20. For a synthesis of the discussion, see S. Paulson (1990: 136 ff.).

the positivity of law (the ordinariness of constitutional law as a set of *determinable* legal restraints enforced by a judge *acting within the legal method*) is implied in the *Grundnorm* (which only validates validating *positive* law, *and nothing else*). Thus, when excluding *legally undeterminable* restraints from constitutional law, Kelsen is not "expelling positive law from the law". Rather, he is coherently considering that the positivity of law is already "expelled from the law" (and therefore from what can be relevant to the constitutional judge) in cases where the framers of constitutions have spuriously allowed themselves to pronounce mere "political guidelines" (Itzcovich, 2020: 73).

It should be noted, finally, that considering such guidelines as expelled from the law ensures the correspondence between law and democracy. The latter is released by constitutional law in case it remains nothing but law, thus exclusively determinable with the ordinary tools of lawyers.

2.2.

It is quite clear that, neither the theory nor the practice of constitutional review in these last decades fits Kelsen's orthodoxy. Kelsen's strict views are not shared even by those who depart from a positivist understanding of law, the contemporary exponent of which in the continental context is Luigi Ferrajoli. Ferrajoli criticizes Kelsen for having reduced the constitutional discipline of law to questions of "formal validity", thus disregarding those problems of "internal" or "substantial validity" also raised by that discipline. For Ferrajoli, the "paradigm of law" corresponding to the contemporary constitutional state—i.e., to a practice admitting that the constitutional discipline of law extends to the substance or content of law—requires the consideration of those "deontic divergences" which are "internal to positive law" and consequently justify an internal critique of law (Ferrajoli 2016: 67 ff.).

It must be emphasized, however, that Ferrajoli's critique of Kelsen does not imply the abandonment of the fundamental tenets of Kelsenian legal positivism. Indeed, a "deontic divergence" which is "internal to positive law" cannot be confused with an "external deontic divergence between justice and legal validity". To remain internal, a critique of law must develop within the canons of a legal method respectful of conventionally established legal sources (in this case, of the sources of constitutional law). Moreover, that

critique can only be pursued when it is possible to translate the constitutional discipline of law into *rules*, i.e., into norms that can be applied in subsumptive terms. For Ferrajoli, "legal conventionalism"—i.e., the "regulative ideal" according to which legal reasoning aims to extract legal rules from legal sources and at apply them—must be respected when the internal critique of law is pursued. Otherwise, "the judicial power, then degenerated into a creative or discretionary power, loses all its legitimacy" (Ferrajoli, 2011: 38 ff.).

In this context, one can understand that departing from Kelsen's orthodoxy does not mean—*and has not meant in the continental context, neither in theory nor in the relevant constitutional practices*—admitting just any "extraordinariness" to constitutional law or to constitutional judges. No Hercules is to be condoned with, even if some speak of "Les Sages". Rather, the boundaries of "legal conventionalism" must be respected, with any extraordinariness needing to be converted through ordinary *legal* reasoning into ordinary *law*.

This is very much the case in the practice of the German Federal Constitutional Court, to which we now turn our attention.

3. Converting the extraordinary into the ordinary: the German Federal Constitutional Court

3.1.

There can be no doubt that post-war European constitutions, framed in a "post-Holocaust" age, are somehow extraordinary from a legal perspective. What makes them so is the presence in their framing and in the corresponding practices of a political principle (a "principle of action" if one uses Montesquieu's terms ((Montesquieu, 1989: Book 3, ff.). It can be articulated as one of "responsibility before God and before men" in the wording of the preamble of the Bonn constitution. It can also be articulated as "fear", that not implying the despotic implications established by Montesquieu, if one understands "fear" as Judith Shklar did when describing the modern liberal consciousness as haunted by it (Shklar 1998: 3 ff.).

I do not intend in the least to deny the relevance of that sort of consciousness in our political world, nor its expression in many constitutional forms. My claim is that the practice of the German Federal Constitutional

Court (hereinafter, the Court)—unanimously taken as the most influent institution in shaping post-war European constitutionalism—did not acknowledge that consciousness in terms that compromised it as an ordinary *legal* practice. On the contrary, law in its ordinariness was precisely taken as something to be reestablished "after the deluge" (Stolleis, 2003). And if that has not meant faithfulness to Kelsen's orthodoxy, it surely meant respect for a recognizable *legal* method, in terms that do not allow the extraordinary to irrupt uncontrollably in ordinary legal life.

The Court has declared since its earlier days that its exclusive task lies in determining the "objective" meaning of the *Grundgesetz*, specifying the more or less *restricted* scope of its provisions. Moreover, it has declared that this task is to be pursued in accordance with the elements of legal interpretation as established in the civil law tradition (often referred to, when the legal method is specifically at issue, as Savigny's tradition)[21]. That tradition is not threatened by the frequent appeal by the Court to "new" principles or formulas of interpretation (such as "unity of the Constitution", "integrating effect", "connection of meaning", "historical context", etc.). As Friedrich Müller has demonstrated, such new formulations are neither truly new nor autonomous from the traditional elements (the grammatical, the historical, the systematic and the teleological elements) but rather correspond to them (Müller, 1993: 199 ff.).

More relevant is the fact that the Court does not rely solely on "methodological elements in a strict sense" (or on their substitute formulas) but on other elements too, namely those concerning the factual context or "material reality" addressed by the norm (what Müller names the *Normbereich*), "elements of theory", and others. In this context, some authors—namely Hesse, followed by Müller—argue that, instead of speaking of interpretation, one should describe the task of the Court as amounting to a "concretization of the constitution". In fact, the Court, instead of seeking for aseptic meanings, has remained attentive "to the need for a result in accordance with material reality…; to the possibility of a change in the meaning of a constitutional norm as a result of factual transformations in the social world…; to the constitutive relevance of the situation to be regulated by the norm and by the decision…, to the historical, political and sociological

21. On the Court's proclaimed adherence to the "traditional doctrine" in what concerns constitutional interpretation, see Hesse (1995: 21-22).

contexts as aspects that, ultimately, weigh in on the decision" (Müller 2006: 199).

In his effort at a "methodical reconstruction" of the German practice, Müller offers a model of the process of concretization which has been highly influential in the continental context (Müller, 1993). Attempting at a synthesis, one may say the same process is characterized by the following aspects: *i)* the distinction between the norm text and the norm, the latter corresponding to the culmination of a process in which the former is a starting point; *ii)* the distinction between the "program of the norm" and the underlying reality (*Normbereich*); *iii*) Interpretation as concretization, given that what is at stake, considering both distinctions, is to settle the meaning of the norm in due attention to the relevant reality and the substance of the case.

This process undoubtfully means a departure from the strictness of Savigny's method and the idea of norm implied therein. Indeed, the distinction between the norm text and the norm implies that legal norms cannot be determined if one restricts oneself to "the observation of linguistic structures and verbal systematics", thus abstracting from "reality and the material density of positive constitutional law" (Müller, 2006: 225). Also, the process of concretization merges two operations that the classical method intended to keep separate—namely, the interpretation and the application of the law. Consequently, knowledge of the law in itself cannot be separated now from a regulative interest adjusted to the underlying realities (Müller, 2006: 221).

Still, if there are deviations from the traditional doctrine, it would be inaccurate to speak of a break with the past. One should speak instead of an evolution, and thus of a methodological neoclassicism. In fact, "methodical elements in a strict sense", particularly those immediately referred to the norm text, continue to have undisputed precedence, determining the frame of what is *legally* admissible, one which cannot be contravened in any circumstance (Savigny is very much still with us in spite of everything) (Müller, 2006: 307).

One could claim, of course, that this in itself does not keep the Court from reaching highly discretionary conclusions, considering the openness of the frames, particularly if concepts such as "equality", "human dignity", or the *"Rechtstaat*" are at stake. In fact, before such frames, nothing seems to

prevent the extraordinariness of morality and politics from taking over the process of concretization from the ordinariness of law. *Nothing except* the Court in its keenness to keep constitutional law *ordinary*, i.e., to convert the extraordinariness of the constitution into constitutional law through ordinary forms of legal reasoning.

This means, of course, a distinction between legal reasoning, on the one hand, and political and moral reasoning, on the other. Revealing that distinction, the Court has consistently withheld from interrupting the ordinary legal life (namely, by invalidating statutes) when matters fall within "the margins of what is admissible or defensible in light of the constitutional order". This essentially means deference to other powers of the state, which are also understood to be engaged in the concretization of the constitution. The latter—unlike the Court—may decide according to criteria, political or moral, which transcend the "lawness" of constitutional law (and are more capable of evaluating the complexity of the social world too). It is in this context that the Court consistently speaks of a "criterion of functional adequacy" in the concretization of the constitution, doing it in terms that demand (of itself, above all) a "distribution of tasks between the legislative and the judicial powers" (Müller, 2006: 203).

Of course, the Court has not withheld from acting on the basis of concepts such as "equality", "human dignity" and the "*Rechtstaat*". Still, it has strived to deal with such concepts *as legal* concepts, restraining itself from ascribing unshared moral or political conceptions to them. Moreover, it has acted on their basis only when it is possible to translate them into specific rules—rules consistently applied throughout the decades of its existence, which have therefore become an unquestionable part of the *corpus* of constitutional law. Thus, if the Court parted from Kelsen's orthodoxy, its distance from the Viennese approach is not greater than that of authors such as Ferrajoli.

The rules at stake were indeed established by the Court in terms uncommitted to any specific *positive* concepts (moral or political conceptions) of the said concepts. This is particularly clear regarding "equality". It is *negatively* understood by the Court as a "prohibition of arbitrariness", which is respected whenever the differentiating solutions adopted by the law have "a reasonable justification emerging from the factual context or some other objectively applicable justification" (BVerfGE 1, 14; translated excerpt in Bumke, Vosskuhle, 2019: 135). Far from binding the legislator to adopt an egalitarian agenda—or any other political

morality—a "principle of equality" thus understood gives it "a largely free hand"[22].

Regarding "human dignity", the negative approach of the Court is also clear. Indeed, "in absence of accepted definitions of the term"—different moral ontologies pointing to very different understandings of human dignity, with these leading to sharply different consequences—, the Court has restricted the corresponding "substantive scope of protection" to the "object formula", thus excluding those treatments which reduce human beings to things or objects (Bumke, Vosskuhle, 2019:93). Human dignity is thus translated into a discrete prohibition which can be applied regardless of other demands that could be sustained from a "philosophical" or from a "theological standpoint"—the latter being irrelevant from the Court's *negative* perspective (BVerfGE 39, 1; translated excerpt in Bumke, Vosskuhle, 2019: 92–93)[23].

Regarding the "*Rechtstaat* principle", the strategy of the Court can also be understood in the same light. In fact, the most important dictates inferred from that concept are negative dictates. This is clear regarding those requirements of "proportionality" (usually referred to as its "prongs") implied in the internal critique of law by the Court, namely "legitimate purpose", "necessity", and "suitability" ("appropriateness", as shall be seen, has not generally been understood as relevant for that critique but for the settlement of situation-specific conflicts of rights). Considering for now the said three prongs:

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22. It should be noted that the introduction of a "new formula" for equality in the 1980s has not fundamentally altered this picture, the legislator remaining negatively bound by equality, even if now subjected to a more "intense" control when a group of persons singled out or affected by a norm is treated differently from another group (Bumke, Vosskuhle, 2019: 135). Indeed, that more intense control only adds to the classic "prohibition of arbitrariness" a requirement of non-disproportionality of the differentiating treatments adopted by the legislator in cases where they are suspect, namely because they appeal to categories such as age or sex. One can therefore speak of a qualified "prohibition of arbitrariness" that does not essentially challenge the self-restrained character of the practice of the Karlsruhe Court (Pieroth et al., 2014: 117–118).

23. Revealing due awareness that it should not go beyond that negative perspective, the Court has shown restraint in the application of the "object formula". It has clarified that "there are limits to the effectiveness of the object formula (...). Humans are often the mere object not only of prevailing conditions and societal development, but also of the laws with which they must comply. Human dignity is not violated simply because someone has become the target of criminal punishment, but rather when the measure which has been chosen fundamentally questions the quality of the affected party as a subject". (BVerfGE 109, 279; translated excerpt in Bumke, Vosskuhle, 2019: 93–94).

i) The evaluation of "legitimate purpose" does not involve a positive assessment of legitimacy, but rather a negative assessment of non-illegitimacy of the objectives pursued by the state when negatively affecting individuals (*e.g.,* it is not illegitimate to restrict the possibility of foreign residents to bring their spouses to Germany in certain terms if the purpose is limiting further immigration to prevent a potential escalation of existing economic and social problems[24]).

ii) The evaluation of "necessity" concerns the existence of less restrictive (for fundamental rights) alternative means in the pursuit of the legitimate purpose selected by the legislator. "Necessity" has generally remained a negative requirement in the sense that the corresponding review is conducted in consideration of "the legislator's margin of appreciation" when considering alternatives (Bumke, Vosskuhle, 2019: 64).

iii) The evaluation of "suitability"—in which at stake is whether the means selected by the legislator are effective in securing its purpose—is also respectful of "the legislator's margin of appreciation". Clarifying the *negative* nature of the corresponding control, the Court has considered that, "on the legislative level, it is sufficient when the law demonstrates the abstract possibility of achieving its purposes—that is, the measures which are permitted are not evidently ineffective *ab initio*, but rather could achieve the desired results" (BVerfGE 100, 313; translated excerpt in Bumke, Vosskuhle, 2019: 61).

When characterizing the negative approach generally pursued by the Court, I do not intend to imply that this approach was pursued in all cases. It cannot be denied that in some cases, the Court allowed itself more leeway. At issue, therefore, is the identification of a trend in which the said concepts were

24. Decision on the immigration of spouses of foreigners (BVerfGE 76, 1;translated excerpt in Bumke, Vosskuhle, 2019: 60-61).

fundamentally left—as to their *positive* requirements—to the legislator, allowing the latter to pursue its own political or moral agenda within the *negative* boundaries set by the Court.

3.2.

When referring to proportionality above, I did not mention its fourth requirement, which is "appropriateness" or "proportionality in a narrow sense". According to this principle, burdens on the fundamental rights of individuals must be justified in light of given legitimate purposes. As we know, appropriateness evaluations imply a type of reasoning— balancing or weighing—which is far from being restricted to the mere subsumption of cases to discrete rules extracted from legal sources.

Rather, that type of reasoning has generally been understood to imply the understanding of legal commands as "principles" to be applied in variable terms, depending on their "weight" in each case. Moreover, in case "appropriateness review" is admitted as a method of judicial review of legislation, it will necessarily mean that the internal critique of law implies an assessment of the moral correctness of legislative solutions. Indeed, conclusions on their balanced or unbalanced character will necessarily reflect value judgments which are inevitably unshared in a context of pluralism.

Considering this, in case the Court had admitted appropriateness as a method of proper constitutional review, its practice would have clearly exceeded the boundaries of constitutional law as nothing but *law* (thus determinable by a still recognizable *legal* reasoning). On the contrary, the Court had engaged in extraordinary exercises of "justification-by-constitution", using the terms of Frank Michelman (2022: 50 ff.).

But this has not been the case in the practice of the Court. Indeed, appropriateness has not been characteristically considered as relevant in the review of legislation. On the contrary, appropriateness evaluations have been characteristically carried out in the decision of "constitutional complaints", i.e., in situations in which the Court is called to adjudicate on a "situation-specific constitutional conflict". In these situations, appropriateness evaluations do not imply questioning "the conflict resolution scheme in the relevant law"—i.e., they do not imply a replacement

of legislative solutions by judicial solutions. At stake instead is a due consideration of the circumstances of the case with due weight being given to "affected interests" within the open texture of laws (Bumke, Vosskuhle, 2019: 64–65).

This was precisely the approach taken in the leading case regarding appropriateness, the famous *Lebach* case (BVerfGE 35, 202). In this case, at stake was a conflict between the general right of personality and freedom of broadcast surrounding the eventual broadcasting of a program revealing specific details on the private lives of the perpetrators of a crime, namely their homosexual activities. When adjudicating on a constitutional complaint filed by one of those perpetrators, the Court did not revise the conflict-resolution scheme introduced by the legislator. Moving within the open texture of that scheme, the Court strived instead to find the best solution to the case—and to similar cases—, i.e., that solution which would best consider "the affected interests on all sides, the type of interference, and potential effects" (Bumke, Vosskuhle, 2019: 65).

In case the requirement of appropriateness is applied in these terms, one cannot truly say that the Court is engaging in a "discourse of justification"—or "justification-by-constitution". Rather, the Court is engaging in a "discourse of application", consisting in the finding of appropriate solutions to cases at hand (and to similar cases), and that considering that the legislator—given the nature of its activity—cannot foresee in necessary or suitable terms what solutions are better adjusted to the specific circumstances of particular cases (or types of cases). That being so, as García Amado puts it, the requirement of appropriateness "is not about convincing an auditorium that the right norm is being applied (the rightness of the legitimate norm is presupposed), but rather about applying in the best way the norm that best fits the case" (García Amado, 2023: 219).

It cannot be denied, of course, that when engaging in appropriateness evaluations, the Court is engaging in a form of reasoning—balancing or weighing—which cannot be characterized as orthodox *legal* reasoning from a strictly positivist or conventionalist perspective. Kelsen or Hart would undoubtedly have portrayed appropriateness evaluations as downright exercises of judicial discretion. However, any sort of familiarity with the practice of law in the civil law tradition advises more caution at this level (the same is true in the common law tradition). In fact, the settlement of concrete disputes with due attention being paid to all the relevant circumstances and

interests is believed to be a core task of judges, their inevitable autonomy not meaning that they are transcending what is admissible in terms of *legal* method or ordinary *legal* reasoning. It is precisely this understanding that is reflected today in the mentioned conception of the legal method as amounting to a concretization of the law, thus attentive to the "substance of the case". Alternatively, one may speak of the "judicial development of the law" as an integral part of the legal method—one to be employed by *any judge* called to decide on *concrete* cases[25].

Therefore, the development of constitutional law through *concrete* appropriateness evaluations is far from meaning its conversion into an extraordinary law—nor the constitutional judge into an exceptional judge. Rather, the Court has consistently strived to reason as a supreme ordinary court, seeking to concretize constitutional law as "supreme ordinary law". As can be inferred from the above, this does not mean that the Court's practice can be understood as conforming to positivism, whether Kelsenian or otherwise. In fact, legal theory crystallizations can hardly ever be accurate regarding any practice of law (or the corresponding concept), tending to abstract from the fact that we are dealing with historical objects which only make sense within traditions or discourses that are complex and evolving[26].

Thus, when the Court handles constitutional law as it does, it is not conceiving itself neither as positivist, nor as anti-positivist. Rather, it operates within conceptions established in the civil law tradition—a complex and evolving tradition—on what law ordinarily is and on what it means to reason as a judge bound by the law.

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25. On the judicial development of the law as part of the legal method, see (Larenz, 1991). There are limits of course to the judicial development of the law if it is to remain within the boundaries of legal reasoning. In a separate opinion added to the Rügeverkümmerung decision (BVerfGE 122, 248), Justices Andreas Vosskuhle, Lerke Osterloh, and Udo di Fabio, summarized the limits that the Federal Constitutional Court considers to be relevant at this level: "a judicial development of the law which superseded the clear wording of a statute, did not resonate with the statute, and which neither expressly nor implicitly approved by the legislature, impermissibly interferes with the competency of the democratically legitimated legislature (BverfGE 118, 212). If the legislature has reached a clear decision, a judge may not (...) replace it with a judge-made solution which could not have been achieved in this manner by parliamentary means (BverfGE 92, 6). Whether the legislature has reached such a clear decision can be determined only by interpretation using the recognized methods" (excerpt translated Bumke, Vosskuhle, 2019: 356).

26. On law as a "historical object", see Stolleis (2018: 21 ff.).

4. Conclusion

I proposed above that, in different ways in different traditions, constitutional interpretation meant a conversion of the extraordinary into the ordinary. When faced with constitutions that are extraordinary from a legal perspective-—since filled with exceptional political and moral significance—constitutional judges tended to convert them into *ordinary* constitutional *law*, and they did that by remaining faithful to ordinary forms of legal reasoning. These forms are different in the common law tradition, on the one hand, and in the civil law tradition, on the other. Neither of these traditions can be modelled by appealing to this or that theory of law (be it positivist or anti-positivist; be it inclusively positivist or exclusively positivist). Rather, they correspond to discourses that shape in complex terms—also in evolving terms—what it means to be a judge bound by *the law* and therefore what it means to reason *legally*. When acting accordingly, constitutional judges strive to be unexceptional inhabitants of the "province of lawyers".

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