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**Neither *doxa* nor *episteme*, in between *theoria* and *aesthesis*?**

**The *praxis-poiesis* of Portuguese constitutional doctrine**

**regarding the (re)public('s) social *nomos***



**Jan Tarasin, *Situação II***

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*Jurist's Law (Juristenrecht) as a dimension of European identity: institutional,  
methodological and legal-philosophical problems*

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**SKRIPT**

«Mirate la dottrina che s'asconde/sott'il velame delli versi strani»

DANTE, *La Divina Comedia – Inferno, IX, 62.*

**I. INTRODUCTION**

**1. Greetings**

**2. Beginnings: Invocation**

To begin with, allow me to expend some words on the relevance of this happy occasion. After all, felicitous moments of the sort should never go unnoticed, under penalty of falling into the Hegelian category of *forgetful non history*, thus concealing their changing properties from us<sup>1</sup>.

Perhaps we *have no more beginnings* nowadays, as Steiner famously noted<sup>2</sup>, but this conference, claiming to be the *first* (of something), cannot hide the promises it entails nor escape the best wishes and good omens that go along with every *dawning* moment in our

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<sup>1</sup> «*The History of the world is not the theatre of happiness. Periods of happiness are blank pages in it, for they are periods of harmony--periods when the antithesis is in abeyance*» - the translation is obviously from Georg F. HEGEL, *Vorlesungen über die Philosophie der Geschichte* (Kapitel 1 - Einleitung). It would be unforgivable to obliterate, however, not only the diverging *Ideas on the History of Mankind*, proposed by authors like Herder, but also the *interesting nature* of the times we're living in. As a matter of fact, for Herder, the allegedly blank pages of history are precisely those during which a culture enables its members to flourish (cf. J. Gottfried von HERDER, *Ideen zur Philosophie der Geschichte der Menschheit*); see also Slavoj ŽIŽEK, *Less Than Nothing: Hegel and the Shadow of Dialectical Materialism*, Verso, London/New York, 2012; and – although dismissing its somewhat *celebratory* tone... - IDEM, “Welcome to Interesting Times!” – Afterword to the Paperback edition of *Living in the End Times*, Verso, London/New York, 2011, pp. 403 e ss.

<sup>2</sup> George STEINER, *Grammars of Creation*, Yale University Press, New Haven, London, 2002;

individual and collective lives. Simultaneously, it definitively challenges our three institutions to uphold the implications, developments and demands of such an *initium* and its underlying, constitutive and guiding *principia*, thus burdening us with the somehow always *liturgical duty* of honouring the tradition just *invented*.

In sum, and for a start, besides congratulating all those involved in the organization of this meeting, personally thanking the organization for the granted privilege, I would also like, therefore, to consign a sincere vow of success concerning all future endeavours possibly *born from* and *bred by* this seminal occasion, hoping on the immense *potential* of the *metaphor* itself.

Secondly, following what has just been said, forgive me the audacity of inscribing this brief and topically displayed talk under the same sign I believe should also preside our relations and future encounters: that of the manifold and complex *proximities* and *distances* between our common juridical, political and general cultures. To promote a mutually transformative exercise of intercultural analogy – and my thought naturally flies on the wings of Professor Pinto Bronze’s lessons - permeated and stirred by the intrepid and venturesome ambition of *discovering/constituting* common grounds of ulterior interchange.

If one of your famous *three bards* wrote a *history of the future*, with a science fiction flavour and some utopian intonation<sup>3</sup>, our most celebrated baroque writer, the Jesuit Antonio Vieira, also authored an eschatological and prophetic *history of the future*<sup>4</sup>. With brilliant renaissance experiences, although delayed in both cases, we are immediately associated to some styles and attitudes: connected to the baroque in our case, and usually identified as romantic in yours.

Curiously enough, Vieira and Mickiewicz share something of an unorthodox catholic soul, plenty of mysticism and messianic thirst, hunger and longing for social justice; surely focused primarily in their respective countries – declining or oppressed (and conquered) by the time -, but, nonetheless, always within a broader project of emancipation and peace. Let us then read the *transcultural empire of the Holy Spirit*, championed by the Portuguese people - as proposed by Vieira - against Mickiewicz’s *The Books and The Pilgrimage of the Polish Nation*<sup>5</sup>, with its metaphor of *Poland as the Christ of Nations*. An *oeuvre* addressed to the emigrants we all are,

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<sup>3</sup> As far as it is known *Historia przyszłości* knew seven different versions but ended up unpublished.

<sup>4</sup> António Vieira, *História do Futuro*, *Obra Completa*, Volume I, Tomo III (Profética), Círculo de Leitores, Lisboa, 2015. Professor João Loureiro has been particularly attentive to the effects of these prophesizing propensities within Portuguese and international constitutionalism, especially with regards to those utopian currents stemming from neo-joaquimite’s conceptions of history (that is, built upon Joachim de Fiore’s works) – cf. João C. Simões Gonçalves Loureiro, "Fiat constitutio, pereat mundus? Neojoaquimismo, constitucionalismo e escassez", in *Revista Portuguesa de Filosofia*, 70, 2014, pp. 231-260. Closer from our political and ideological philosophical thought - in spite of considerable academic distances - stands Paulo Ferreira da Cunha, in his *Constituição, Direito e Utopia. Do jurídico-constitucional nas utopias políticas*, Coimbra Editora, Coimbra, 1996. See also, António José Avelãs Nunes/Jacinto Nelson de Miranda Coutinho, *O Direito e o Futuro. O Futuro do Direito*, Almedina, Coimbra, 2008.

<sup>5</sup> Adam Mickiewicz, *The Books and The Pilgrimage of the Polish Nation*, James Ridgway, London, 1833.

providentially opened by a historical and philosophical debate on the history of mankind, arguing that it can (and should) be fathomed as something similar to a *now still unrealized freedom that awaits the oppressed in the future*. A formula which seems to resonate in the later *utopian not yet* of E. Bloch, while also incorporating a *responsibility towards the forgotten of the past*, not alien to W. Benjamin's *philosophy of history*.

No wonder then, that Micwievitz famous visit to the Pope Pius IX, asking *His Highness* not only to support the emancipation of Poland (and all other countries and peoples in the same situation), but also – and most astoundingly! – to endorse the French revolution of 1848, reminds me of our professor Orlando de Carvalho, before whose memory I take this opportunity to pay homage. In fact, this great polymath (a reader of polish, by the way) was able to aptly combine his catholic upbringing and later lifetime observance of intellectual Marxism<sup>6</sup>, with scientific rigour, poetic vein and activist militancy against an oppressive regime, never withdrawing those apparently contradictory - but constantly and intensely thought upon (deeply human, after all) - beliefs and practices. If *disciples are always sons of their master's hopes*, I hold most dearly the responsibilities beginning in his dreams of justice, fought with dialectic commitment as well as patience, in the ongoing and never-ending foundational and constitutive process/project of human self-transcendence.

Maybe these strange romantic conciliations enclose some of Poland's fascination, also keeping the secrets of our maritime adventures: if, trapped between the sea and Spain, we chose the unknown, what drove us to the water was probably both faith and need, hope and desperation; probably, the same could be said about the polish cavalry in the charge of Krojanty<sup>7</sup>.

But not only this: *Tadeusz*<sup>8</sup>, the last epic of worldwide fame is probably the signature of a nostalgic romanticism somewhat symmetric with our own *saudade*, the melancholic *hangover* of past enthusiasms, chanted in our collective identity-building epic *masterpiece: The Lusíadas*. We were exiled abroad, fled from our country, and are now left to lost dreams of sailing – adrift or like political *cybernauts* – maybe in the *Iberian stone raft* of José Saramago, but always away

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<sup>6</sup> Orlando Alves Pereira de Carvalho, “Para um novo paradigma interpretativo: o projecto social global”, in *Boletim da Faculdade de Direito da Universidade de Coimbra*, Vol. LXXIII, Coimbra, 1997, pp. 1-17; Idem, Oração de Sapiência “Ius - quod iustum?”, *Sep. Discursos de Abertura Solena das Aulas na Universidade de Coimbra*, Universidade de Coimbra, Coimbra, 1996; Idem, “Para uma teoria da pessoa humana (Reflexões para uma desmitificação necessária)”, agora in Francisco Liberal Fernandes/Maria Raquel Guimarães/Maria Regina Redinha (Coords.), *Orlando de Carvalho: Teoria Geral do Direito Civil*, Coimbra Editora, Coimbra, 2012; Idem, *Para uma teoria humana da propriedade: do problema do ser ao problema do ter*, Imprensa de Coimbra, Coimbra, 1952.

<sup>7</sup> For a fictional retelling of the tragic episode, v. Manuel Alegre, *Uma Carga de Cavalaria*, Caminho, Lisboa, 1998.

<sup>8</sup> *Pan Tadeusz or The Last Foray in Lithuania. A Tale of the Gentry during 1811–1812 in Twelve Books of Verse* (Translated from the Polish by George Rapall Noyes), J. M. Dent & Sons, London and Toronto, 1917.

from the European periphery; Poland, for its part, was frequently exiled *in* its own land, deprived from its country and having to fight him back. How could we not be romantics, then, if the pathos of injustice was shared through our bodies and minds, feeding sighs, sighs and struggles of and for justice. Indignities cause indignation, which entices our claim for dignity and common dignity, grounding and guiding action. Nowadays no less than then.

In the apocalyptic times of *Trumputinism*, the *sense of* (our constant) *ending* gains a terrific traction, fuelled by fear, and can only be counteracted from within our anguish and perplexity, doubt and apparent distrust. Milozsc beautiful *Poem for the end of the century* comes to mind (I beg pardon for this linguistic *treason*):

(...)  
*To whom should I turn*  
*With that affair so dark*  
*Of Pain and also guilt*  
*In the structure of the world*  
*If either here below*  
*Or over there on high*  
*No power can abolish*  
*The cause and the effect? (...)*

The alluded oscillation between contrasting traditions of thought and action, in search of synthetic, multi-layered and transversal responses, as well as transcultural attitudes of curiosity notwithstanding national patriotism, epitomized in J. Potocki peculiar *cosmopolitanism* and universal *Encyclopaedism*<sup>9</sup>, can be said to have become a mark of Portuguese and Polish culture. Law and constitutionality are not exceptions for this matter, even if some cultural veins run without parallel in one of our countries (for instance, there is no match for the polish analytical tradition among us). Phenomenology and Marxism, instead, drawing from a sociologically and rationally corrected Hegelianism, bear witness of this hybridization, offering a decisive support to much of what am about to sketchily contend.

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<sup>9</sup> Besides that, according to Milozsc, «*His opposition to the magnates who were steadily concentrating greater wealth and power in their hands provides another key to his work. Potocki idealized the patriarchal way of living with its chivalrous virtues, and in many ways he can be justly considered a representative of the Sarmatian baroque, but his yearning for social justice and his humane attitude toward the peasants distinguish him from the majority of his contemporaries. He was, strictly speaking, a publicist in verse*» - Czeslaw Milozsc, *The History of Polish Literature*, Second edition, University of California Press, Berkeley, Los Angeles/London, 1983, p. 136.

## PART I. FROM LEGAL/JURIDICAL TO CONSTITUTIONAL DOCTRINE

### 1. Legal doctrine

- 1.1. Doctrine and dogmatic in general
  - 1.1.1. Etymology
    - a). The Indo-European root (*\*dek*)
    - b). Greek and Latin concepts (*catechumen, dokein, docere, doctum, doctrina, dogma*)
  - 1.1.2. Truth and teaching.
  - 1.2.3. The theological paradigm
- 1.2. Legal doctrine and legal dogmatic
  - 1.2.1. Roman precedents
  - 1.2.2. The *Corpus Iuris Civilis* as *ratio scripta*.
  - 1.2.3. The *Commentators school*
    - a). The relevance of doctrine (transcending the *text* and the *glosses*)
    - b). *The communis opinio*
      - i. Origins (*popular or common opinion*)
      - ii. *Opinio doctorum* (and its many problems)
        - Quality of the opinions
        - Number of opinions
        - (...)
    - c). *Cultured Humanist Schollars* in pursuit of a *droit savant*.
  - 1.2.4. The Muslim quasi-parallel (before cultural and political stagnation and decline)
  - 1.2.5. The modern and contemporary transformations
    - a). *Philosophizing* tendencies
    - b). Scientific and logical *temptations*
    - c). The Emergence of German *Dogmatik* and its exportation
    - d). Critics of *Begriffjurisprudenz*
    - e). *Reine Rechtslehre*'s legacy
    - f). Actual complexities and trends: science or politics, logics or common sense?
  - 1.2.6. Some Portuguese and Polish lessons?
    - a). Poland
    - b). Portugal
      - i. (Ethically corrected) *Realism* – A. Hespanha
      - ii. (Linguistically pragmatic) *Normativism* – M. Teixeira de Sousa
      - iii. Sistematically mediated *Jurisprudentialism* – Castanheira Neves

### 2. The political *nomos*: *constitutionality*

- 2.1. *εὐρεσις* - conditional postulates
- 2.2. Challenges
  - 2.2.1. Globalization – unification (and *in-differentiation*)
  - 2.2.2. *Societal differentiation* – *specification* (and *fragmentation*)
  - 2.2.3. Economics, Markets and Finance “dominion” (Walzer) - or *the commodifying* of the world (Polanyi).
- 2.3. Response
  - 2.3.1. The war of prefixes and suffixes: trans-, inter-, medium
  - 2.3.2. Culture – the site of *mediation*
    - a). *Begriffsgeschichte*

- b). *Senses and meanings*
  - c). Multiple perspectives and some of its exponents (Hartman, Cassirer, Geertz, Hall, Bauman, Eagleton...)
  - d). *Culture and Law*: some late contributions (Sarat, Rouland, Balkin, Mezey, Rosen, Cotterrell, Mankowski, Losh)
- 2.3.4. In-between the Political and the Juridical: *Zwischenlage der Verfassungsheit*
- a). Contents: *Constitutive mediating practices and institutions* (Luís M. Vale), in a reflexive structure-action (Giddens/Bourdieu) – between principles and ends, values and results.
  - b). Functions: Geographical, social, epistemological and normative couplings
  - c). Lineages
    - i. *Global Constitutionalism* (Harvard)
    - ii. *Global Administrative Law* (NYU)
    - iii. *Ius Publicum Europaeum, Publicity and South-American Common Constitutionalism* (Max Planck – Heidelberg)
  - d). New clues and tracks
    - i. Reclaiming the modern *ius gentium* (J. Waldron)
    - ii. Reinventing the *jus politicum* (M. Loughlin)
    - iii. Adapting public (constitutional) law to a global differentiated society (N. Walker)
- 2.3.5. The *socializing* (social-democratic) dimension of the constitutional *nomos*
- a). The *project(-demand) of social justice*: constitutional more than legal?
  - b). German *Sozialstaatlichkeit* and Portuguese *Sociality*
  - c). Markus Kotzur after Peter Häberle [universalizing a *socializ(ing) Verfassungskultur?*]
  - d). Lucas Pires and Gomes Canotilho's offspring (*inter-constitutionality* as inter-culturality with respect to sociality): Rangel, Loureiro, Alessandra, Galindo, etc...
  - e). Historical and comparative inputs (v.g. Hauser/Zirk-Sadowski/Wojciechowski, The Common European Constitutional Culture)

### 3. Constitutional doctrine

#### 3.1. *State of the art*

##### 3.1.1. Three models of jurisprudential relevance

- a). Switzerland (the importance of doctrinal quotes)
- b). Italy (using without quoting)
- c). France (the proscription of quotes)

##### 3.1.2. Portugal: Three doctrinally constructed normative models

- a). Procedural: The *concept of norm for the effects of constitutional control*
- b). Organic: Constitutional competences regarding the *constitutional control of European Union Law* and the *Portuguese law control under European Union Law*
- c). Material: *Modalities of fundamental rights legal and prudential compatibility*, concerning *social rights* (Vieira de Andrade vs Gomes Canotilho)

#### 3.2. Some critical hypothesis

##### 3.2.1. The partial autonomy of transcultural normative constitutionality and its reflexes on constitutional social doctrines

- a). Nature
- b). Intentionality and Rationality(/ies)
- c). Actors and agents

- d). Practices of invention, expression, communication, implementation, and sanctioning or enforcement.
- 3.2.2. The relation between constitutional doctrine and other sources and criteria of normative constitutionality
  - a). Doctrine, Values and Principles
  - b). Doctrine and Jurisprudence
  - c). Doctrine and Reality
    - i. Ethical
    - ii. Economic
    - iii. Political
    - iv. (Specifically) Juridical

## **PART II. RECENT DEVELOPMENTS: THE PRAXIS AND POIESIS OF CONSTITUTIONAL DOCTRINE**

### **1. The American Model**

- 1.1. The originality of *doctrine* within the common law: some practical examples
- 1.2. The role played by Langdell
- 1.3. The *new doctrine*
  - 1.3.1. Negative functions
  - 1.3.2 Positive functions
    - a). Normative *design* and constitutional *architecture*
    - b). *Construction* beyond mere *interpretation*
    - c). Public intervention(s): three examples
      - i. The nomination (and hearings) of Helena Kagan and Clara Sotomayor;
      - ii. Financing of Parties (*McCutcheon v. Federal Election Commission*)
      - iii. *Obamacare* and the *National Federation of Independent Business v. Sebelius*
    - d). *Popular constitutionalism* activism
- 1.4. Place and meaning of legal academia, after the crisis: critical and/or dogmatic?
- 1.5. The many streams of *American law as culture: praxis* and *poiesis* in the footsteps of the pragmatist tradition?

### **2. Returning to Europe** (one cannot help notice)

- 2.1. New constitutional dawns?
  - a). Castells and the new *nets and webs of indignation and hope*
    - i. *Occupy Wall Street*
    - ii. *Wettbürger*
    - iii. *Indignados*
    - iv. *Que se lixe a Troika*
  - b). Constitutional translations
    - i. The *Arab Spring* and its falling *Winter night*
    - ii. *Ice and fire: Iceland's deglaciation?*
- 2.2. Constitutional twilights (or eclipses): Turkey and Hungary
- 2.3. Constitution and culture
  - 2.3.1. Italy – the anthropological, sociological and ideological dimension of culture
    - a). *L'uso alternativo del diritto*: misunderstandings and mistakes
    - b). The *Via Maestra Movement*



- i. Context: constitutional critics and *la legge Calderoli o Porcellum*
  - ii. *Il Manifesto* and the protests: the route from *Piazza della Repubblica* to *Piazza del Popolo* (and back again?)
  - iii. The *constitution is on the streets!* (still listening to Calamandrei)
- 2.3.2 Germany – the ethical and the aesthetical: from German idealism to media studies
  - a). Idealism
  - b). Hermeneutics, *Geist- und Kulturwissenschaften*
  - c). Axiological (ontological) realism
  - d). Neo-Kantians and Neo-Hegelians
  - e). Constituionality and culturality
    - i. Kaufmann
    - ii. Smend and Heller
    - iii. Häberle and its «southern disciples»: the Granada School
    - iv. Fikentscher and cultural anthropology
    - v. The recent *Käte* College experience: an aesthetic turn?
      - Werner Gephard
      - The polish presence of Marta Bucholc
- 2.4. Portugal
  - 2.4.1. New constitutional projects (neo-liberal revolutions without the people...)
    - a). Parties (*PSD*)
    - b). Foundations (*FFMS*)
    - c). Journals (*Observador*)
  - 2.4.2. The jurisprudential polemic
    - a). Protagonists
    - b). Issues
      - i. Global analysis
      - ii. Previous questions
      - iii. Juridical Principles in general (principiology)
      - iv. Principles, questions or rights in special
      - v. Theoretical problems
  - 2.4.3. Institutional doctrinal *producers*
    - a). Economic and financial Law: *IDEEF*
    - b). Public Law: *ICJP*
    - c). Social Law: *IJ* (Sociality, poverty and scarcity group).



**Roman Opalka,**  
***Kompozycja Abstrakcyjna*, 1965**

## (SLIGHTLY) DEVELOPPED SUMMARY

Drawing from an *inter-* (as well as - *hopefully* - *trans-*)*cultural* conception of constitutional public and social *law* [understood as a sort of trans-subjectively - shared, communal or collective (according to the latest developments in phenomenology) - *self-transcending project* of realizing sense of validity concerning the juspolitical problem of the fundamental *nomos of, by and for politics*], this talk (and its underlying investigation) purports to *situate* the *recent history*, actual *workings* and future *prospects* of Portuguese constitutional *Professorenrecht* (as revealed mainly during the crisis), not only *geographically*, but also in *epistemological, historical* and *phenomenological* terms.

To attain such a purpose in the curial manners requested by University protocols, and also under the indeclinable dictates (therein implicit) of intellectual honesty, a preliminary and explicitly perfunctory definition and display of some basic philosophical and theoretical coordinates hereby assumed - with regards to the *material intentionalities* (and implied *structural guaranties*) of (jus)normative *sociality, publicity* and *constitutionality* -, will be *sketchily* adduced before taking into account some comparative references, especially those provided by the US, German and Italian theoretical, doctrinal, dogmatic, practical and empirical traditions: from the theories and doctrines of *living* and *popular constitutionalism* aroused by public issues involving the academia (not less than social movements), to the methodological relations between *construction, interpretation, enforcement, concretization* and *realization* of the constitution; from the experience of *diritto alternativo* to the more recent intellectual mobilization of scholars against the Italian *referendum*; from *law as performance* to *Verfassungsrechts als Kultur* (und *Kampf um Gerechtigkeit*, one could add), from *constitutional design* to *the architectonics of justice*.

Therefore, under the conspicuous title chosen and the presumptuous spell of unfulfillable promises it casts upon this humble communication, some clearance will be attempted, using its enunciatively long formulation as a frame in which to thematise the current condition of constitutional *Juristenrecht*. The precinct thereby fenced won't probably promote the clairvoyant awe or dazzle of a *glowing flash*, negatively turning night into day. After all, Heidegger taught us, in his *Zollikon seminars*, that *Lichtung* comes from *lightness* and *openness* (not from light). And even if one refuses the perilous anti-illuminist passivity of his *expecting Dasein*, disguised although as free project(ion) into the wide, in favour of a definitively more *active* and *constitutive* tension of the incarnate (and inter-corporeally solidary) human being with and (in)to the transformable world, while *chiasmatically* fused with/in it – maybe ours are times unsuitable to the likes of ambitions surpassing the mere *Survivance des*

*lucioles*, that Didi-Huberman reflected, in dialogue with the famous lament of Pasolini (*la scomparsa delle lucciole*). Notwithstanding these and similarly important caveats and reservations, our perspective ventures to be a less pessimistic account of the current engagement possibilities between theory and practice, in what concerns the instillation and infusion of value senses in human institutions, so as to *correct* or *direct* them towards a more just society. The supporting convictions for this essay are thus reflected in that cleared terrain of exploration, taken as an enclosure of multiple convergences, at different levels, and, thereby, as a real intersection point (whose gift will be that of defining a kind of *inbetweenness* or even *middleness*, from which fulcrum to derive and diffuse radiant streams of guiding light). Despite the title's express reference to the epistemological stance - where science can be opposed to opinion, and distant and almost merged proximity aptly denote two ways of *sensing* and *making sense of* the world - meanings will inevitably end up overblowing and pouring into the axiological domains, once it starts being reported to the practical realm of politics and law, after the subtitle guidance and the *Holzwege* or routes it invites or points us to.

***Doctrine, dogma and dogmatic*** will then be initially traced to their theological and philosophical origins, and only then surprised in their juridical translation and/or autonomous juridical emergence, in order to deconstruct their general cultural relevance and to further outline the contribution to the construction of Europe and European civilization still owed to them.

The etymological confluence around the idea of *teaching what is thought to be true* (*doctrina, δόγμα, κατηχέω*) will lend a fertile opportunity to question (the essence of) ***normativity*** in its relation to subjects and practices, their collective identities (as interpreters and performers) and discourses, as well as the conditions, patterns, and guides, *chronotopologically* spread - challenging, for instance, the metonymical slides of a desirable *theory of foundational recognition* (beyond mere acceptance, obedience or conformity) to a *pedagogical* law, suspect of *biopolitical* strategies (in any case, without having to repeat the somehow contra-productive denunciations of Foucault, nor reproduce, in the opposite side, the fascinated vindications of an excessively proliferous Sunstein).

Only by rethinking the general and specific *Sinn* of **law**, and its peculiar *modus essendi* - *existing* as a tense synthesis of validity and effectiveness, constituted through different instances and experiences in a dialectic between problems and senses therein discovered/constituted, which is dogmatically and problematically mediated by several criteria and principles, altogether unified in an open and evolving system - can one reach the plural expressions of juridical astringency or *bindingness*, as *sanctionability*, expressed in presumptions of ideal and factual (spiritually and materially cultural) validity, which create burdens of *conter-argumentation* for those who pretend to protest, contest and supplant them.

Thus said, **legal doctrine and dogmatic** could then loom in their multifarious juridical meanings and functions, whether in the vest of a general internal perspective of law, mediating between philosophy or theory and the empirical praxis, or stand out as a particular legal/juridical source - by means of a rationalized re-elaboration of law, whether culminating in practical normative models of action, evaluation and judgment (pragmatically assumed as valid and effective criteria, under the abovementioned condition of possible contradiction).

Against this background, the leading heuristic track *open* or *enlightened* by the subtitle will desirably awaken and lead us to the necessary **interrogation of constitutionality**, as excogitated (rediscovered and imagined), constructed and preconized in previous works: as a kind of *substantivation* of an adjective or adverbial normative predicate, due to a still undergoing process of (trans-literally called) *noetic* and *noematic* autonomization, for whose sake some genealogical lineages and archaeological roots have been thoroughly searched, reconstructed and displayed before.

The result should not hold as a Kantian transcendental formal concept, neither appear in the robes of an ethically material concretion of rational justice in history (indisputably valid in its reality), but instead as a sort of phenomenologically normative *eidōs* or *ousia*, reflexively made conscious, through a continuous and increasingly wide, multi-lingual and intercultural ‘*problematization*’, as a counterfactual quasi-transcendental condition of possibility for our constitutional thought, debate, design and structure-action, and also as a normative orientation (imprecise and immediately indeterminate it may appear), to the adventurous voyage of any society collectively organized as a republic - in that sense possibly assimilated to a cooperative *enterprise or universalitas* (more than a simple association of personal atoms, and less than a programmed homogeneous unity). Conception which can only stand as viable thanks to the various material synthesis that its rational history and permanent critical reflection has enabled it to incorporate transport and communicate in a densifying manner; certainly not without amounting complexities and certainly prone to the constitutive radical paradoxes anyone can easily envision, but, nevertheless, highly qualifying of its original propitiatory and regulative potential in the field of social responsibilities and rights – privileged in our studies. However, to resume this positive dimension, it will be necessary to attend and host the appeals stemming from *responsabilizing* memories, duties of justice towards the defeated, claims from the forgotten ones, and several warnings lighted by disasters and false victories, more or less dogmatically stabilized in any moment.

The light thus timidly shed will trustfully suffice to shine upon the essential lineaments of a trans-cultural constitutionality, underpinned by intercultural conflicts and debates, among which the specifically inter-constitutional expressions of interaction and the trans-constitutional vectors of crossed *transcendence* arise as particularly significant. The declinations of universality, in its paradoxical relation to singularity (very well undertaken by law’s specific

sense and mode of practical-normative mediation), should thus be translated, with the help of an original *mediology* of constitutional normativity, to the proper sphere of the latter's intentionality, using the old notion of *nomos* as referential signifier, and re-projecting its socializing dimensions (normative or even jus-sociality) into reality.

Even from the shadows, or running as a subterranean vein under the visible stream of our discourse, the belief in this conducive hypothesis of a common constitutional culture "*politically transcultural*", won't cease to inspire the next descriptive and analytical three steps.

The selected point of departure rests in a brief inventory of the place occupied by **constitutional Professorenrecht, in three European countries**; backlog supplied by some examples of processual, organic, and material normative criteria forged by doctrinal thought and since then consensually *dogmatized*.

To produce some contrast, consideration will then be given to the **American experience**, using the debates surrounding the nominations to the supreme court, as well as some decisions, concerning parties and campaigns financing issues and the *Patient and Affordable Health care Act (Obamacare)* as examples of theoretical, methodological and practical debates, marked by an active participation of professors, whether as public figures, citizens involved in social movements, juridical experts or members of the academia. If prompted to identify the leading personal reference for this transatlantic interchange, the answer would hardly assign that role to other than Jack Balkin, probably on the grounds of the manifold reflexes (political, theoretical, methodological) of his understanding of (constitutional) *law as culture*.

Finally, **returning to Europe**, and after a quick tour along the peripheries and their latest constitutional adventures – shadowed by national and international *constitutional doctrine* (and cutted against *its projected civilizational horizon*) - the focus will shift to the German, Italian and Portuguese tradition. The objectives pursued are different, but obviously entwined by the streamline of doctrine's participation in the critical reconstitution of the *nomos*, with resource to disquisition, and inspection, invention and imagination, design and proposition, intervention and action: emphasize the contrast between the internal authority and the external prestige of the *Rechtsdogmatik*, and collect the flowers and fruits of the association between law and culture in Germany, nowadays specifically cultivated in the *Kate Kolleg* in Hamburg, but owing the greatest lot to the seminal work of Peter Häberle and its disciples (mainly in southern Europe), which can be put to comparison with that of Balkin; the historical public protagonism of jurists (magistrates) in Italy, and the recent participation of eminent constitutional scholars (Zagrebelsky, Rodotà) in a socially, politically and economically transversal academic mobilization in defence of the republican constitution; and finally Portugal, where the economic crises provoked an unusual constitutional debate, lighted by proposals of constitutional reforms, coming from the main party in parliament, or sponsored by foundations and their newspapers;

stirred by the tension between executive and judiciary powers, concerning some legislative measures and correlated policies; and fuelled by several monographic, teaching and collective works, not to mention articles and public appearances and speeches.

## ANEX 1

### **The «*crisis (constitutional) jurisprudence*»**

Constitutional Court Judgments no. 399/2010, 396/2011, 353/2012, 187/2013, 474/2013, 602/2013, 794/2013, and 862/2013

### ***Constitutional doctrine (somewhat) related to the crisis (a few examples)***

Francisco Pereira Coutinho, “Austerity on the loose in Portugal: European judicial restraint in times of crisis”

Gonçalo Almeida Ribeiro, “Judicial Activism Against Austerity in Portugal”

Gonçalo de Almeida Ribeiro/Luís Pereira Coutinho (Orgs.), *The constitutional court and the crisis* (including important texts by Benedita Urbano, Paulo Mota Pinto, Gonçalo de Almeida Ribeiro, José Melo Alexandrino, João Loureiro, Rui Medeiros and others);

Jorge Reis Novais, *In defense of the constitutional court*;

Idem, *Fundamental Rights and Constitutional Justice in a Democratic Rechtsstaat*;

Idem, “The fundamental right to a retirement pension in a financial emergency scenario”

João Loureiro, “Social State: reform or revolution?”

Idem, “Sociality(ies), State(s) and economy(ies): between charity(ies) and crisis”.

Luís Pereira Coutinho, “The «pension convergence» as a political issue”

Mariana Canotilho/Teresa Violante, Rui Lanceiro, “Austerity measures under judicial scrutiny: the Portuguese constitutional case-law”;

Miguel Nogueira de Brito, “Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis”;

Miguel Nogueira de Brito/Luís Pereira Coutinho, “«Proportional equality, new model of control under the principle of equality?”

Pedro Gonçalves/Carla Amado Gomes/Helena Melo/Filipa Calvão (Coord.), *The crisis and Public Law*;

Vieira de Andrade, “The role of the State in Society and Sociality”

Vitalino Canas, “Prima facie Constitution: equality, proportionality and legitimate expectations”

[The portuguese titles were transl(ite)rated to english; the bibliographic information is obviously minimal]

## ANEX 2

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