How do Supranational Processes Anesthetize National Political Powers?

The Anti-States and Undemocratic Effects of the Multiplication of Sovereignties[*]

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ABSTRACT: The theme of revision of the Constitution is a central point in the analysis of the constitutional text and its relationship with the State and popular sovereignty. On one hand, it is linked to a question of legitimacy and effectiveness of the regulations, given that it represents the process of written rules; on the other hand, it is also linked to the recognition of the authority of "pouvoir constituant" on which the whole legitimacy of the Constitution is based. But in the global scenario, characterized by an indefinite multiplication of sovereignties, where the law is fragmented into the "law of peculiarity", the law of global market exchanges produces not only anti-states but also undemocratic effects.

KEYWORDS: constitutional revision, State sovereignty, supranational level, artificiality, Italian experience.

SUMMARY: Introduction; 1 The communitarization of domestic law through artificial tools; 2 State sovereignty *v.* popular sovereignty; 3 The supranational "legal formants" and the process of "hybridization"; Conclusions.

INTRODUCTION

The problem of "where" has taken on a great deal of importance following the global phenomena which have forced legal scholars to reconsider the question of space. In Europe and the United States, constitutionalism is established according to two different cultures of constitutional changes. On one hand, the European context is marked by the tension between Constitution/State

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and politics (the best example of which being the German Weimar Republic); on the other hand, with the new *Nomos* of the Earth (20th century), dominated by American international doctrines of interference on a global level, politics takes hold of the economy to identify itself with it and give life to the principle of *cujus oeconomia, ejus regio.* European States stop being exclusively guided by political interest of intrastate power (the *Nomos* of the Earth) to take an interest in governing the change of social structures. Mirkine-Guetzevitch spoke about a European «general constitutional law» founded on the rationalization of power to respond to society's needs and the transformational requirements of rights (in a social dimension and no longer in an economic-individual dimension), in accord with an international public law of reciprocal respect between the States[1].

In actual fact, the logic of cujus oeconomia, ejus regio follows the expansion of the American Nomos of the Earth in its different directions compared to the jus publicum europeaeum. The global context is characterized by moments of transformation, for example the process of European integration and the "constitutional" role of European judicial decisions and international cases of the ECHR. European culture entrenches itself behind the law against "informal" changes, negating validity to phenomena which are placed extra constitutionem. In this picture we include both attempts at constitutional reform which are constitutionally unfaithful and political tendencies in fraud of the Constitution; so that, if the legal and political systems begin to use the same g, decisions are made within the bounds of political correctness but outside the correct constitutional structure. But, every Constitution is text and context at the same time, a space within which gaps need to be filled by means of revision which respond to a recognized and common code. The complexity of the relationship comes from the search for harmony between the time of the Constitution and that of society in consideration of the fact that the judges, interpreting the Constitution, intervene as intermediaries in a dialogue which needs to be open in order to be democratic. The interpretation of the Constitution as a public process becomes the main vehicle of innovation of the constitution[2]. The Constitution as a written text and society determined by cultural pluralism are the main players in the problematic relationship wherein a judge feels the necessity to open up the constitutional text to the context in periods of crisis in the community. In opening itself to the social context, the Constitution is inevitably subject to time, and its written text guarantees stability and certainty on one hand, but exposes it to various interpretations on the other hand. In the temporal dimension, the Constitution is destined to change, at times leaving the text intact from which certain concepts can be interpreted in different ways; other times, intervening and revising it with respect to formal

1 See B. MIRKINE-GUETZEVITCH, *Le costituzioni europee,* Milano, Edizioni di Comunità, 1954.

2 J. LUTHER, *La Scienza häberliana delle costituzioni*, in *Analisi e diritto*, 2001.

procedure and the fundamental core remains unchanged in time. Sometimes its content is modified in order to satisfy the interests of a political class, a social group or a European impulse. An example of this is the Italian context because in Italy, constitutional law n. 1 of 20 April 2012 amended Article 81 of the Constitution, introducing the so-called "balanced budget"[3]. This new "rule" was introduced in accordance with the Fiscal compact, to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, ratified in Italy with law n. 114 of 23 July 2012. Article. 3, paragraph 2 of the Treaty declares: "The rules set out in paragraph 1[4] shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes". The mentioned article considers the "constitutionalization" of the bond "preferable", as a guarantee of stability and durability of the economic-political choices; this constitutionalization is therefore taken as a guarantee of financial stability. Following the amendment of Art. 81, those constitutional constraints called "reserves of justice", should have been introduced into the constitution, but in fact were not. These reserves of justice would represent a percentage which could not be touched by political majorities and would be aimed at guaranteeing a minimum standard of living and managing social rights, which would remain and would continue to be fundamental[5].

National government, with its political power, should be the determining force both in terms of strength and party strategy, and in terms of "pouvoir

3 A.S. BRUNO, *L'ipotesi italiana della costituzionalizzazione dell' "equità intergenerazionale" nel confronto col diritto costituzionale del Brasile*, in G.M. POMPEU; M. CARDUCCI; M.R. SÁNCHEZ (eds.), *Direito Constitucional nas Relações Econômicas: entre o crescimento econômico e o desenvolvimento humano*), LumenJurís, Rio de Janeiro, 2014.

4 The Contracting Parties shall apply the rules set out in this paragraph in addition and without prejudice to their obligations under European Union law: (a) the budgetary position of the general government of a Contracting Party shall be balanced or in surplus; (b) the rule under point (a) shall be deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0,5% of the gross domestic product at market prices. The Contracting Parties shall ensure rapid convergence towards their respective medium-term objective. The time-frame for such convergence will be proposed by the European Commission taking into consideration country-specific sustainability risks. Progress towards, and respect of, the medium-term objective shall be evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures, in line with the revised Stability and Growth Pact; the Contracting Parties may temporarily deviate from their respective medium-term objective or the adjustment path towards it only in exceptional circumstances, as defined in point (b) of paragraph 3; (d) where the ratio of the general government debt to gross domestic product at market prices is significantly below 60 % and where risks in terms of long-term sustainability of public finances are low, the lower limit of the medium-term objective specified under point (b) can reach a structural deficit of at most 1,0 % of the gross domestic product at market prices; (e) in the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically. The mechanism shall include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time.

5 O' GORMAN, R., *ECHR, the EU and the Weakness of Social Rights Protection at the European Level*, in *German Law Journal*, vol. 22, n. 10, 2011, p. 1833 ss.

constituant" with regard to a Constitution which is fighting to assert and protect its identity. The necessity for the constitutional text to open up to the "evolution" of society is useful to identify new cultural equilibrium through "indicators of predictability" provided by dialogue and negotiation between individuals and groups who participate in the decision making process. In this way, the text is adapted to its context, constructing the basis of what has been defined as a "time in history" and what is therefore a "time of the Constitution" since it determines "content and objectives". In the recent governmental changes (liberalization, marketization, globalization) "an increasing range of public life is being subjected to the discipline of the norms of liberal-legal constitutionalism [...] the norms of right conduct prescribed in these texts acquire their authority from precepts of reason rather than approval of "the people". It is the authority of these norms that is being asserted and these norms acquire the status of fundamental law not because they have been authorized by a people but because of the self-evident rationality of their claims"[6]. The ideal dialogue is between its unchanging elements and the structure which allows it to function, that is, its practical application according to the specific moment in time. In this way, the Constitution is both objective and subjective at the same time.

The article develops the following questions in three sections. In the first part, I underline how national law has lost its normative force as a symbol of positive legal order: with the process of globalization, it has been overtaken by a law whose origin is in the public opinion of members of society, in judges' decisions and in judicial science. In the second paragraph, I will focus on the role of the new techno-economical space which has eradicated the original Nomos which marked the link between a social community and its territory to indicate the beginning of a new configuration of the relationship between economy and politics. Finally, I support the thesis in which the State must intervene in regulating and constitutionalizing the global market, otherwise, along with the social counter-power of other spheres (NGO, media, trade unions etc.) it can have an effect on the economy, generating rules of self-limitation in order to preserve itself.

1 THE COMMUNITARIZATION OF DOMESTIC LAW THROUGH ARTIFICIAL TOOLS

From the Single European Act to the Maastricht Treaty and the Charter of Rights, the phases of evolution of European constitutionalism have generated among member States an awareness that the "Constitution" of the European Union would never be a "document" created by one single constituent power but something different to the classical Constitution in the Kelsenian sense; something that was being structured as a "process" through which

6 M. LOUGHLIN, *What is Constitutionalisation?*, in P. DOBNER; M. LOUGHLIN (eds.), *The Twilight of Constitutionalism*, Oxford, Oxford University Press, 2010.

to acknowledge the empirical legitimacy of the "Constitution" even after the consolidation of its formal authority. Confirmation of this is given in the constitutional architecture which, currently, does not appear to have been validated by any formal procedure of adoption by a constitutional *demos*[7]. The absence of a *Grundnorm* (Fundamental Law), as an incomplete moment of European integrity-integration, has caused multiple consequences both internally and externally, both on a European level and a global level. On one hand, this has led to national demands for definition of collective identity: the lack of a common code (in which every individual can identify himself, as this code has been created by everyone) and the consolidation of a supranational public power has caused reactions of delimitation of power among the member States, opposing the protection of fundamental rights and national identity to it in order to preserve the constitutional specificity. On the other hand, the individual, through European legislation, has been emancipated from national restrictions to the point of becoming one of the main pivotal of the European legal system, bringing about a multilevel judicial constitutional law, a *multilevel protection* which has broadened the space of intervention of judges in giving greater clarity to the indeterminate nature of precepts. With the process of globalization, national law has lost its normative force as a symbol of positive legal order. It has been overtaken by a law whose origin is in the public opinion of members of society, in judges' decisions and in legal science[8].

The legislators' intentions have been substituted by those of the judges, allowing human rights, fundamental individual rights – in the most modern sense of the term – to produce institutional and judicial artifices to effectively safeguard "individualism", in and of globalization against the abuse of the majority. In this sense, a denationalization of the States has followed the creation of the global juridical dimension. The States, with the choice of giving way to judges, have legitimized a dialogue which, in recent years, has involved national courts, the Court of Justice and the European Court of Human Rights. This has in part led to the communitarization of domestic law through shared values and spaces[9], and subsequently, to the increased flexibility of State powers; in part it has also led to the creation of a *soft law*[10], a law which is not binding in its legal strength but sufficiently strong in its programmatic structure to represent a break from traditional laws which have become too rigid for the logic behind European Union governments, and instrumental in steering capitalism and "technique".

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7 See J.H.H. WEILER, *Federalismo e costituzionalismo: il* «Sonderweg» *europeo*, in G. ZAGREBELSKY (ed.), *Diritti e Costituzione nell'Unione Europea*, Roma-Bari, Laterza, 2003, p. 22.

8 See G. FASSÒ, *Storia della filosofia del diritto*, Roma-Bari, Laterza, 2001, p. 197.

9 See V. PICCONE, *L'«internazionalizzazione» dei diritti umani*, in G. BRONZINI – F. GUARRIELLO – V. PICCONE, (eds.), *Le scommesse dell'Europa*, Roma, Ediesse, 2009, p. 22.

10 See G. AZZARITI, *Brevi notazioni sulle trasformazioni del diritto costituzionale e sulle sorti del diritto del lavoro in Europa*, *ibid*., p. 139.

The processes of internationalization have put national legal systems up against the same structural problems, producing forms of convergence in the search for solutions that, while different, can be considered "equivalent" in the functional sense. If we consider the European Treaties, it is clear that after the creation of a space without frontiers, a process of "delocalization" and "de-historicization" followed, after which individuals experienced the gap between being an "individual-member" of a political and legal institution and an "individual-member" of the economic space, that is, an active and passive part of the new economic assets. The effect on global society was also the division into sectors according to functions, a mass of global cultures, a vast amount of social systems which allow only single fragmented ties.

Each of us feels as if we belong to two spatial orders: the concrete places of our origin, our homeland, small or large, mutual exchanges influenced by State borders; on the other hand, the "system of universal dependence", the global extents of constitutional "technique" and economy, telematic communication, silent and objective markets. We come and go between places and non – places, between terrestrial positions and pure spaces. Our identity is split between *civis* and *homo oeconomicus,* between obedience to the laws of the city and the laws of global space[11]. Throughout time the relationship between the individual and society has never been static because it is built around and through two protagonists which are neither isolated nor immobile. In order to interact with society an individual has to look out on the world and open himself to it. The world welcomes him and shows itself to have a wealth of definitions, a whole system of attitudes, an ever active patrimony of ways of operating[12]. Consequently, the individual is conditioned by his being in the world, in his being a product of his own particular time which becomes entwined with the time of the society in which he is operating. The aims which a society intends to pursue become an integral part of a "continuous flow of events" of which that *continuum* of deeds done by the individual becomes a part. This is the origin of social and juridical pluralism, by which, ever new instances and events refer back to constitutionally safeguarded values which are waiting to be realized, while the certainty of the law is continually undermined, never completely made concrete. Although the law is expected to guarantee juridical safety it cannot in the long run avoid, as it evolves, creating something "new" bringing a social harmony founded on a balance between stability and change. A continual evolution and controlled transformation can be envisaged where the function of the law is not decided exclusively by an analysis of the equilibrium of the system but instead, takes into account upheavals, irregularities and states of transition.

11 See N. IRTI, *Norma e luoghi. Problemi di geo-diritto*, Roma-Bari, Laterza, 2001, p. 80.

12 See G. CAPOGRASSI, *Analisi dell'esperienza comune*, Milano, Giuffrè, 1975.

It could be said that it is a time of "metamorphosis", founded on the gradual change of a system whose identity has to remain unaltered[13].

The Constitution needs to be aware of social change, new conflicts, the continuing need for new solutions and interpretations, and institutional requirements for abstract and general rules in order to achieve certainty in the law and for the law. On the other hand, the Constitution needs to evaluate the real possibilities for resolving controversy and preserving its fundamental values.

The fundamental principles are the tool which the Constitution uses to resolve controversy, considering that these to be such, and therefore, effective (as the base of social and legal order which remains faithful to its original matrix, while constantly renewing itself), must be witness to a present which does not repudiate its history, or rather, a history which extends seamlessly into the present: *being* and *becoming* a time. For this reason, these principles carry out a function that is both conservative and promotional, maintaining the original values, (of which they are an imperfect translation) and at the same time opening up to new developments[14].

It is well known that Europe has always sought in the law the tool of unification so as not to yield to the individualist temptation of overseas *case law* and to maintain the culture of *common law* and *civil law* separate in respect for their different historical origins[15]; but the passage of one "rule" from one legal order (supranational) to another (national) has put an end to the original significance of the rule and the necessary re-elaboration of the same in consideration of the new socio-legal context. This artificial relationship that has arisen between the two systems has given way to something that could be assimilated in a new legal formant, a «legal irritant», to quote Gunther Teubner, allowing the inclusion of a "rule" from one context to another by using techniques of adaptation (e.g. constitutionally conforming interpretation or *Drittwirkung*) or inexorably evolving dynamics that expose the internal context to changes (e.g. community or international judicial living law).

Consequently, the main dilemma seems not only to be the inadequacy of the law in incorporating the external rule in the national territory: after all, in the past, positivism bent to procedural rules and the Kelsenian *Grundnorm*, which claimed to explain the validity of any system, in fact, based all the States on the "rule of law", to then reveal itself as an empty container, suitable for the inclusion of any content but determining several problems of transformation of

13 See F. OST, *Le temps du droit*, Paris, Odile Jacob, 1999.

14 See A. RUGGERI, L'identità costituzionale alla prova: i principi fondamentali fra revisioni costituzionali polisemiche e interpretazioni-applicazioni «ragionevoli», in «Ars Interpretandi. Rivista di ermeneutica giuridica», 1996, pp. 113-129.

15 G. TEUBNER, *"Legal Irritants": come l'unificazione del diritto dà luogo a nuove divergenze*, in «*Ars Interpretandi. Rivista di ermeneutica giuridica*», 2006, p. 156.

meaning and role of the accepted term. In Italy, uniformity of the court decisions comes by means of living law, meaning the settled interpretation of the higher courts and successive adaptation by the lower courts. Artificiality, absolute unnaturality, is the foremost trait of modern law, or rather, of legal modernity. After breaking with natural law and every binding foundation, political and legal will can receive any content, adopt any rule. Laws are artificial, indifferent to their content, able to determine their own time and space. Enactment of these laws is mere formality: it is just procedure, and procedure becomes the basis of the law. Such artificiality allows the law to detach itself from its place of origin and to be extended as an agreement between States, to any number of territories[16]. The current dilemma concerns the division between cultural polycentrism and functional differentiation which has led the national territory to be part of the worldwide framework and thus the national law detached from its culture of origin[17]. For this reason, Teubner's «legal irritants» irritate the links of law to society. Foreign laws are irritating not only in relation to the national legal situation itself but also in relation to the social situation to which the law is closely linked in certain circumstances. As legal irritants, they force the specific episteme of national law to a reconstruction in the network of its distinctions. As social irritants, they lead the social discourse to which the law is closely bound to a reconstruction of itself. In this way, they give way to two different series of events whose interaction leads to an evolving dynamic that could find a new balance in the self-value of the situation involved. Such a complex and unstable process rarely leads to the convergence of the legal systems in question, but rather to the creation of new gaps in the relationship between operationally close social systems.

This founding relationship of recontextualizations both in a legal and social sense, as Teubner writes, cannot be considered the creator of a new institutional identity for unilateral determination (or rather, for legal transfer), nor can it reduce itself to the causal dependence between independent and dependent variables, or a relationship between an economic base and a legal supra-structure. Rather, it is a symbolic space of compatibility of different meanings that allows different possible results[18].

2 STATE SOVEREIGNTY *V.* POPULAR SOVEREIGNTY

The importance to replace the Constitution in a spatial dimension which takes into account the abolition of frontiers will allow the final board of coordinates so that constitutional laws do not become lost in existential

16 See N. IRTI, *Il carattere politico-giuridico del mercato*, in *Rassegna economica*, LXVIII, 2, 2004, p. 1.

17 See N. LUHMANN, The Paradoxy of Observing Systems, in «Cultural Critique», 31, The Politics of Systems and Environments, Part II, Autumn 1995, p. 37.

18 See G. TEUBNER, *Legal Irritants*, cit., p. 169.

ontologism, whose futile result is the same as all the a-historical conceptions of subjectivity, well expressed in Heidegger's human *Dasein,* in Jaspers' confused *historic conscience* or in Gadamer's labyrinthine *hermeneutic historicity*[19]. To depend solely on temporality to give continuity to the Constitution and identify its application with an act of faith in an "open" Constitution that reveals a mythical nature means to expose the Constitution to attacks and manipulations, because no barriers have been created which can define and realize the spatial dimensions of the Constitution (and the State). The eradication of constituent power signifies the lack of a precise moment in time in which a pluralist society chooses to organize itself according to a set of rules and principles to "rely on" and recognize a "writing degree zero" from which to derive the history of the new *Nomos* of the Earth. The opening of "economic globalization", in the era of cosmopolitanism and internationalization, has brought about a defenceless, neutral State, not only as welfare state, but also as a political entity and binding form of organized cohabitation[20].

The intermediate function carried out by the same State at a supranational level between the European Union and the national system, in order to guarantee stability and legitimacy of the process of social integration is, however, decisive in the safeguarding of constitutional guarantees that risk being evaded by European economic policies. The strength of Europe lies in the institutions which represent it and in the political processes determined by "regularity" of integration. What emerges from the phase of transition that has involved all member States towards the unification of Europe is a process of transformation realized in its "applicational level" and not only in the phase of «enactment of formal legislation»[21]. The logic of the market and the representative State support the unstoppable and detailed enactment of European legislation in which the determination of the aim is essentially the «fundamental political decision», normatively consolidated, therefore all political acts are instrumental in the phase of implementation of the Union's goals. These acts, differentiated by name, type, value and legal force do not take into account any form of responsibility and control of political trends – due to a lack of suitable methods of implementing liability and the lack of a liable body which can regulate political power[22]. These acts do not express any determining authority of the aims of the Union: the opening towards "impersonal" logic (the universality of human rights is the clearest example of this, both for the unconditional nature of the theme, and for the risk of it becoming merely a constitutional

19 See P. DE VEGA GARCIA, *Mondializzazione e diritto costituzionale: la crisi del principio democratico nel costituzionalismo attuale*, in *Diritto pubblico*, VII, 3, 2001, p. 1087.

20 See *ibid.*, p. 1091.

21 M. CARDUCCI, Il problema esplicativo delle trasformazioni costituzionali. Appunti per una comparazione di teorie e prassi, in A. SPADARO, (ed.), Le «trasformazioni» costituzionali nell'età della transizione, Torino, Giappichelli, 2000, p. 162.

22 See G. FERRARA, *L'indirizzo politico dalla nazionalità all'apolidia*, available at *http://www.astrid-online.it.*

"symbol") has started a process of universalization of the content of western constitutionalism (democracy, delegation, values, equality) which in reality clashes with the primary social levels (race, religion, language) that seem to prevail over functional roles imposed by law[23]. The political trend which on a global scale have been consolidated in institutions, in the long term risks being exhausted by the regularity of politics functioning without law; it continues to be denationalized to the point of becoming stateless due to something that has always been able to cross borders, more or less legally, but surely efficiently: money, which in turn has always had much to do with State sovereignty but never with popular sovereignty[24].

The creation of new alternative spaces to national space, determined both by processes that respond to transnational power and processes that operate outside institutionalized political power, can appear physiological in global logic, but it shows the absence (or non-activation) of a set of tools with which to generate "antibodies" against external attacks brought about by new situations and the subsequent artificiality of the relationship between the two dimensions (national and supranational).

Artificiality of law goes hand in hand with global techno-economy and therefore in identifying its essence, it can be placed either opposite it as an enemy or beside it as an ally. The eradication of law, the fall of the ancient *Nomos*, the ability to determine times and spaces of application: only these factors permit it to be on the same level of the techno-economy. Through agreements between States and therefore with artificial tools, the law is able to embrace, either entirely or partially, the planetary economy.

The new techno-economical space has eradicated the original *Nomos* which marked the link between a social community and its territory to indicate the beginning of a new configuration of the relationship between economy and politics. This process of reconfiguration, having in legal "technique" the most suitable tool and the natural environment with and in which to develop, must overcome the constitutional problems of transnational regimes in which the structural aspect, determined by constitutional rules, which give rationality to the system, has already been created. It is raising consciousness that the process of European integration, European judicial acts and International decisions of the European Court of Human Rights are not a product of the historical conflict between law and politics but the results of new mechanisms: *or technical structuring* (like European *Governance,* which seems to be a "tacit revision" of national Constitutions or "anesthesia" of their normative power) *or jurisprudential structuring* (with the decisions of the Court of Justice or the European Court of Human Rights in Europe, and especially the Inter-American Court of

23 See M. CARDUCCI, *Il problema esplicativo delle trasformazioni costituzionali*, cit., p. 166.

24 N. IRTI, *Norma e luoghi*, cit.

Human Rights in Latin America, where the interpretation of the Inter-American Convention are imposed on or condition the national interpretations of judges, becoming a heteronomous factor of informal modification compared to the contradictory national constitutional results)[25]. The global picture determined by economic power, which crosses territorial confines according to market logic and world trade, shows how State law struggles to provide the suitable conceptual tools for forming institutions capable of distinguish, if not managing, State sovereignty and free supranational economy[26].

3 THE SUPRANATIONAL "LEGAL FORMANTS" AND THE PROCESS OF "HYBRIDIZATION"

But the process of European integration is involved in more widespread phenomena of constitutional inter-connection which does not always respond to the logic of *cujus oeconomia, ejus regio*. Alongside the well known phenomenon of the relationship between international public law and State law, is the new dynamic recently named "transconstitutionalism". In particular between international law for the protection of human rights and fundamental constitutional laws (e.g. ECHR and Constitutions); supranational law and State laws (e.g. EU); State law and transnational organizations (e.g. WTO); national systems and local extra-State systems (e.g. indigenous law); supranational law and international law (e.g. ECHR and EU). Therefore, the connection, being no longer intrastate, becomes characterized by contexts of different places and subjects – public or private – leading to the assertion of what has been defined «polycontextural law». Can «polycontextural law» destructure the unilateralism of the American *Nomos*? Can polycontextural law favour the reciprocity of intrastate standards?[27]

Furthermore, the management of the global dimension itself – whether it is considered trans-constitutional or polycontextural – is not necessarily subjected to the logic of cujus oeconomia, ejus regio, but it is entrusted to the States, to interstate agreements (according to the original project through which the European Union was decided by the same States in full implementation of their sovereignty). It is evident that the current scenario presents a severance between territory and space, that is, between State sovereignty and the (supranational) dimension of the economy, between "where" and "everywhere". The "where" of law could be "everywhere": anywhere that has been agreed upon by interstate pacts. We discover in this way the great virtue of artificiality, which may not be of any place but can be in any place, and can therefore give a terrestrial base to global phenomena. It does not obey any Nomos, which would joined it to

25 See M. CARDUCCI, *Dal Nomos della terra del diritto costituzionale occidentale al trans costituzionalismo policontesturale*, lecture in Comparative Public Law at the University of Bari (Italy), May 7, 2010.

26 See C. SCHMITT, *Il Nomos della terra*, Milano, Adelphi, 1991, p. 301.

27 See M. CARDUCCI, *Dal Nomos della terra del diritto costituzionale occidentale al trans costituzionalismo policontesturale*, cit.

the individuality of a place, but merely answers the need for more precise and effective functionality[28]. If the response to a «catastrophe contingency», ever more acute in the current financial crisis, can only come from within the State, then the State must intervene in regulating and constitutionalizing the global market, otherwise, along with the social counter-power of other spheres (NGO, media, trade unions etc.) it can have an effect on the economy, generating «self-controlling impulses» through rules of self-limitation[29].

These rules of self-discipline are not inherent to every system but represent that «clamping lever» of the system against internal risks and external attacks: this is the distinction between structural and functional Constitution, both relating to the necessary content of a "Fundamental Law". Structural/ Kelsenian Constitution represents the sources of producing law that guarantees the rationality of the system, while functional Constitution differs from structural Constitution in that it does not belong necessary to any system, it comprises all limitative rules which impede self-damage of the system by driving out any such tendencies. The Constitution will be ultimately tested when appealing to those limitative rules when faced with a challenge – almost a circuit breaker when faced with a blackout. These rules will protect the Constitution from destructive and self-destructive attacks only if political forces can guarantee the effectiveness of these rules.

Mediation of political will permit the States to construct their own sovereignty by translating the responsibility of decisions into laws. At the same time, political choices are as ever the real creators of economic spaces and the economy is formed around state rules and laws. Therefore, on one hand, the crisis of normativity is cause and effect of the creation of *contra* or *extra constitutionem* rules which are legitimate because they conform to an evolutional process which recognizes the EU as the ideal space in which to embrace the challenges of globalization: a «process of positivization» that is modulated around a «series of operations of recognition and identification», or rather, a continuing and widespread hermeneutic practice of acceptance and use, articulated over all levels, from "technical" levels, recognized by the same system, to non-institutionalized levels of private citizens, who experience the law as valid and favour it over other possibilities. On the other hand, there is the affirmation of a new *aequitas* in the "figurative" path of modern subject, summoned to reclaim the past in order to preserve it and support it in the future.

«The process of European integration presents many challenges to the member States. The ECHR is an international treaty with a Fundamental Rights Charter and the national constitutions consider it as an essential parameter for

28 See N. IRTI, *Norma e luoghi*, cit., pp. 76-77.

29 M. DOGLIANI, Costituzione in senso formale, materiale, strutturale e funzionale: a proposito di una riflessione di Gunther Teubner sulle tendenze autodistruttive dei sistemi sociali, available at http://www.costituzionalismo.it.

their jurisprudence. National constitutional jurisprudence is to be in conformity with Strasbourg jurisprudence: this kind of approach allows fundamental rights to have two sides of the same identity, one is handled by the national constitution, and the other one by the ECHR. In this context a frequent question is what the mechanism to link the ECHR to the national constitutional orders is: being a formal part of the national constitutional order as in Austria (the most far-reaching solution); being the essential criteria for the interpretation of internal fundamental rights as in Spain (Constitution Art. 10.2); being a normative layer between ordinary legislation and the Constitution as in France and the new democracies of Central and Eastern Europe; or, being equal to ordinary laws such as, for example, in Germany»[30].

But the Lisbon Treaty did not only succeed in combining two notions, "constitutional traditions" and "general principles", simplifying the long debate which had involved both notions; it also appears to have given the European Court of Human Rights a new legal status in the system of sources of law, thus benefiting from a role of *primauté* over national law. The decision of the Italian *Consiglio di Stato* (Council of State)[31] no. 1220 of 2 March 2010 on this topic does not limit the sphere of Community law, object of direct application, as if it could ignore the controversial matter and above all, ignore the deficiency of national legislation in resolving the question at hand.[32]

Often Italian decisions has appealed to the principles of the ECHR, highlighting the exceptional necessity to disapply the national law in order to guarantee minimum rights to the individual or to apply the judicial decisions of the Strasbourg Court; or to produce a "community aimed" result; as the Court of Strasbourg encouraged to respect article 35 of the ECHR which permits an appeal to the judge of the Convention only after exhausting internal legal paths, even though the national judge must interpret the State legal tools in a manner conforming to the Convention.

However, in this particular case, the judge opted for the principle of full and direct application of the ECHR, without disapplying specific internal laws contrasting with the Convention. Fully respecting constitutional guarantees of legality and motivation of judgments (art 97 and 111 Italian Const.), the Council

30 A. RAINER, *The Emergence of European Constitutional Law,* available at *http://www.ejcl.org.* The global dimension of these problems brings with it a new law of spaces which can no longer provide answers relevant to historical continuity and logical unity typical of European law, but which will permit various, defined and efficient solutions. An interesting example of this is article 6 of the TEU: «Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law»; See «Official Journal of the European Union», March 30, 2010, available at *http://eurlex.europa.eu/LexUriServ/LexUriServ.douri=OJ:C:2010:083:0013:0046:en:PDF.*

31 It is the Supreme Court in the hierarchy of administrative courts.

32 28 See G. COLAVITTI – C. PAGOTTO, *Il Consiglio di Stato applica direttamente le norme CEDU grazie al* Trattato di Lisbona: l'inizio di un nuovo percorso? Nota a Consiglio di Stato, sent. 2 marzo 2010, n. 1220, available at http://associazionedeicostituzionalisti.it.

of State wanted to motivate the logical legal *iter* of the choice to disapply the national law, in order to ensure the prevalence of a fundamental human right safeguarded by the ECHR. For years constitutional decisions has swayed between trying to safeguard the national *Nomos,* favouring the territorial element, and practical remedies which, with the support of interpretational activity, opted for solutions which were more "effective" than respectful of the hierarchy of sources of law.

The modern State is characterized by its being fully rooted in a process of globalization that, under the influence of a multitude of forces and trends, has undermined its own forms and limits that were, until some time ago, evolutive "acquisitions" of a constitutional democracy and, as such, of a common heritage. The absence of democratic constitutionalism denounced by scholars are particularly evident in the process of disintegration of the welfare state, where social rights are so evanescent as to weaken the very foundations of democracy[33]. Indeed, the constitutional state is characterized, on the one hand, by an unstructured sovereignty and the weakness of the social state; and on the other hand, by a reduced power to control economy. This last characteristic has deprived political parties and trade unions, as well as national parliaments, of the ability to manage the economic growth through which operate (as the main characteristic of the rule of law) the appropriate balancing with the founding values of a constitutional state. In this framework, the political crisis has emerged as a crisis of relations and interactions between actors and institutions of representation, and therefore as a crisis of what could be the heart of a model of participatory democracy[34]. Last but not least, the judicial function has contributed to the destabilization of the constitution, at least as a constitutional model of the European historical experience. The judiciary power seems to be transformed into a guarantee of the last claim, with the role of mediator in socio-cultural conflicts within the new constitutionalism, as a new legislator, parallel and complementary to the parliamentary one[35].

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33 For example, the notion of EU citizenship 'is determined by citizenship in the Member States, despite widely varying definitions of who is and who may become a citizen' (2012, 130); and if the Eu citizenship involves important legal elements such as the right to property to conclude valid contracts or to take part in elections in EU Member States, it does not show its own civic fundamental side: "there are no programmes for social provision at the European level. Thus, social rights continue to be claimed at the national level", C.E. SCHALL, *Is the Problem of European Citizenship a Problem of Social Citizenship? Social Policy, Federalism, and Democracy in the EU and United States*, in *Sociological Inquiry*, vol. 82, 2012, p. 123 ss.

34 Anne Rasmussen highlights the complex role of the Members of the European Parliament strictly linked to both national and EU-level parties in her *Party soldiers in a non-partisan community? Party linkage in the European parliament*, in *The Role of the political parties in the European Union*, in *Journal of European Public* Policy, 2008, p. 1164 ss.

35 C. CRISHAM, K. MORTELMAN, "Observations of Member States in the Preliminary Rulings. Procedure before the Court of Justice of the European Communities", in D. O'KEEFE D., H.G. SCHERMERS (eds.), *Essays in European Law and Integration,* Boston, Kluwer-Deventer, 1982, p. 43 ss.; P. PORTINARO, "Dal custode della costituzione alla costituzione dei custodi", in G. GOZZI (ed.), *Democrazia, diritti, costituzione. I fondamenti costituzionali delle democrazie contemporanee*, il Mulino, 1997.

The entrance of the communitarian law on the national territory should take place through the application of international law in the light of a certain "peculiarity" or a "particular relevance" according to interpretation, the simplest tool with which to validate a system of values carried by law across socially accepted formats. Over time, the artificial and disconnected law of the new spaces has found in constitutional "technique" and economy loyal allies to set against the multiplicity of the States and the uniformity of legal discipline. It has to be highlighted that, the Italian system is a unified system of civil law (that is, of codified statutory law) and the sources of law are mainly written: there are several codes (civil, criminal, civil procedure, criminal procedure, etc.) and a large number of statutes. Precedent is used but not as a real "source" of law because its force is merely persuasive. Until the 1950s, Italian judges interpreted the law in conformity to the Constitution as long as it was not in contrast to it, in defense of the unity and of the logical coherence of the entire juridical system. From the 1970s it was felt that there was a new need to overturn the principles of positivism. Judges turned their attention to the private individual, towards the recognition and defense of his rights, to compensation for injuries and damage. Judicial decisions are not traditionally a source of law in Italy and they are supposed to affect only the parties in the case at hand. Italian democracy, heavily influenced by the example of France and the writings of French scholarship, has regarded legislative supremacy as a fundamental principle.

Consequently, only the legislature, which speaks for the people, is supposed to make law. Although the role of judicial precedent in the Italian system is not that of a source of law, nor is it a mere virtual authority. Instead, drawing strength over time through the interpretive activity of judges, it does not have prognostic pretensions and therefore it does not have a definitive character, limiting itself to the present. In this way, precedent constitutes an indicator to the predictability of the juridical consequences of an act, thus assuring the certainty of the law. It is realized in the certainty of the action through the law, in an ethical and utilitarian perspective, so as not to reduce it to pure appearance.

The value of the certainty of law and in law indicates the need for the individual to be in a position to know the consequences of his own actions so as to avoid intervention by the authorities, the arbitrary nature of power which identifies itself in the principle of constitutionality. In Italy, uniformity of the court decisions comes by the means of living law, meaning the settled interpretation of the higher courts and successive adaptation by the lower courts. Since living law is the concrete symbol of the evolution of leading case shift, it constitutes one of the parameters to which the Court can refer in the evaluation of the constitutional legitimacy of a law. Therefore, living law is placed as a representative of a precise cultural context but is supported by the element of precedent and, thus, from the acts which are "crystallized" through it, it is made concrete. Particular difficulties arise in the search for suitable criteria for identifying a sufficiently homogeneous

and constant standpoint capable of producing living law. For this purpose, precedent plays a fundamental role because it contributes to the concretization of living law itself; the nature of precedent is not binding but nevertheless has a fundamental role because it can constitute the heart of judicial dialectic. Since the decision of a judge is the result of a choice influenced by a surrounding socio-cultural environment, the existence of a consolidated standpoint constitutes a limit to the discretion of the Constitutional Court. It will have to evaluate the constitutional legitimacy of a law interpreted according to the standpoint of the Courts on the basis of living law. On the other hand, it represents a parameter, a value on which the relationship between a decision and the actual exercising of jurisdiction is founded.

The judge refers to foreign law in cases characterized by elements of internationalization or transnationalization with regard to the Italian system. A cross-reference to foreign law can be demanded as a result of adherence to an agreement governing uniform law; is a cultural choice made by the judge, a voluntary remittal and it is often determined by the need to increase the level of persuasion of the decision made. Furthermore, the subject of comparative law is often used as a tool to reinforce a final decision. The diffusion of a mixed law, both public and private, emerges, arising from the dismissal of public functions, the penetration of private law within public law in civil law systems, and the split between public and private law in the common law system. Particularly with regard to Community law, it is possible to see a process of "hybridization", which is a direct and indirect influence (of the Community law) of the reception of foreign experiences. In this sense, the judicial decisions of the Court of Justice and of the European Court of Human Rights can be seen as "legal formants" which produce "law", allowing foreign experience to enter the national system and, through the support of national living law, to be part of "consolidated law".

Different agencies, such as the standardization commissions, technical regulating agencies and central banks have direct transactions which cut through State confines, meaning that the previous division between internal and external affairs is less clear in many areas; international treaties have been used to synchronize political-legal decisions, a way of increasing global, international, regional and socio-legal dynamics; but the most radical change concerns national hierarchies replaced by a combination of institutions and treaties in which case, inter-dependence is the most appropriate way to describe the relationship between States. The practical result of this attempt of coexistence of the two spheres (national and supranational) has not led to the disappearance of States, nor to the loss of their powers, but to the conviction that they will have to operate in a new way and that international cooperation plays an ever greater role in government institutions, characterized by new international orders, negotiations, competencies, conflict-resolving mechanisms, decentralization policies of international cooperation and growing flexibility. This process

of denationalization has placed law and authority at a spread level among organizations operating at a supranational, transnational and international level, while nation-States are part of an interaction and a framework of "superior" dynamics. The recognition of the autonomy and authority of Community law, immediately applicable and obligatory in domestic legislation, shows the existence of a legal space, or rather a law not defined internally, and autonomous institutions, unbound from hierarchical relationships, in which order seems to simply coincide with the «pure effectiveness of the law»[36].

CONCLUSIONS

Writing and reading the Constitution should give an awareness of the history of a State and its fundamental principles, (among which even political and legal conflicts represent an achievement), the structure and function of the text, and the institutions which apply the rules. The theme of revision of the Constitution is a central point in the analysis of the text and its relationship with time. On one hand, it is linked to a question of legitimacy and effectiveness of the regulations, given that it represents the process of written rules; it is also linked to the recognition of the authority of "pouvoir constituant" on which the whole legitimacy of the Constitution is based. To speak of the revision of the Constitution means to wonder about the existence of a set of rules and principles which make up a "genetic code", unrelated to time, and representative of a structural limit for amending the constitutional text. The core is made up of "eternity clauses", designed to protect the integrity of the constitutional system, the need for stability, certainty and constancy, and also a series of variables destined to change over time, adapting to the requirements of the cultural context. In other words, the foundation of the Constitution, its very framework, is shown to be not only necessary, essential and indivisible, a determining force for the safeguard of fundamental rights and for the recognition of the identity of the Constitution, but also dynamic. The actual scenario leads to a question: whether we are entering a third historical phase of the concept of sovereignty – the first being characterized by exclusive territorial control, the second by collective self-rule of a multitude through a constitution which constitutes them as a "We the people", and the third by the re-conceptualization of the idea of collective self-rule as the capacity of a collective to interact with other communities and share with them the control of their life conditions on a global scale, irrespective of territorial boundaries[37]. This indefinite multiplication of sovereignties, where the law is fragmented into the "law of peculiarity", the law of global market exchanges produces not only anti-states but also undemocratic effects.

36 N. IRTI, *Norma e luoghi*, cit., p. 75.

37 U. PREUSS, *Disconnecting Constitutions from Statehood: is Global Constitutionalism a Viable Concept?* in P. DOBNER; M. LOUGHLIN (eds.), *The Twilight of Constitutionalism*, Oxford, Oxford University Press, 2010, p. 39; *Problems of a Concept of European Citizenship*, in *European L. Journal*, 1995, p. 277 ss.