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RESTORATION OR REMODELING? THE CONSTITUTIONAL STATE IN THE POSTMODERN ERA

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In recent years, a significant part of legal reflection has focused on the crisis of constitutional States, due in part to globalization, in part to the attack that some political forces have launched on the values of "(inter)national constitutionalism"[1] (Mazzarese, 2018). A first reading, which we can define as optimistic, has highlighted the emergence from the crisis of a new "global law" and of international regimes able to foster a supranational protection of fundamental rights. On the contrary, a critical reading has denounced a process of de-constitutionalization overwhelming democracies. These readings are often presented as antithetical. And yet, on the one hand, each of them brings to light useful elements not only for theoretical reflection but also for the defense of (inter)national constitutionalism; on the other hand, both may underestimate the political and social dimension of the current crisis.

In the most optimistic interpretations, globalization and the erosion of national sovereignty have been interpreted as an epoch-making event which has radically transformed the legal sphere, opening up the creation of a "boundless law" (Ferrarese, 2006) fed by a new role of jurisdiction. The latter, more and more released from the territorial dimension, is able to weave a fruitful "dialogue of constitutionalism" (Slaughter, 2000, p. 1108) between national and supranational Courts and between Courts operating in

1. All the quotations from books published in Italian in the text have been translated by the author.

different legal systems. Thanks to this new dimension of law, individuals become protagonists, because their voices can be heard by the Courts. Moreover, the globalization of law reinforces the social dimension of the "legal order" (Grossi, 2015) and helps to overcome the boundaries of national citizenship, which is increasingly conceived in Western countries as a filter that allows a very selective protection of fundamental rights (Santoro, 2007). Thanks to "judicial globalization" (Slaughter, 2000), (inter)national constitutionalism can finally expand and guarantee the protection of fundamental rights also to those marginal subjects —such as migrants or prisoners— whose claims are often rejected at the national level. The global rule of law thus tends to bring the continental model of the rule of law closer to the English model, based on common law, which is also identified from a historical point of view as a "founding exception" (Zolo, 2002, p. 30). In this respect, the protection of fundamental rights is entrusted to a "community of interpreters" (Santoro, 2008) able to cross the borders of nations, opposing both despotic majorities and nationalisms. According to this perspective, the crisis of the constitutional State should be read as an evolution —certainly problematic— but not as a reversal. In fact, the greatest discontinuity is to be found in the shift from the modern legislative State to the constitutional State. It is this caesura which has undermined the principle of the separation of powers defended by Montesquieu, the supremacy of the law, typical of the French *État légal*, as well as the legal positivist myth of legal certainty, transforming even the continental judge into the "master of law" (p. 30) and giving the constitutional Courts the role of "permanent co-legislators" (Garapon, 1996). Indeed, it is (inter)national constitutionalism that has recognized the central role of interpretation. The protection of rights has had an expansive capacity thanks not only to international conventions, but also to international, regional and national case-law. Moreover, judicial interpretation today takes place in a context characterized by "interlegality" (de Sousa Santos, 2002). Judges must coordinate, for their constitutional mandate, legal sources of different levels: international, regional, national, local, up to the so-called "soft law" of private production and traditional norms. This is a "normativity from below" that does not have a binding force but can influence interpretation. In fact, (inter)national constitutionalism has broken with respect to the model of modern legal positivism, precisely because it requires judges to take into account not only the abstract legal subject of the Enlightenment tradition —the individual, the subject of law— but also embodied reality (Ciaramelli, 2013). Through the principle of substantive equality, which is the basis of the architecture of constitutional States, an equal right of being different is recognized.

The "optimistic" readings of legal globalism, therefore, do not appear, for the most part, as contrary to (inter)national constitutionalism, but see globalization as a viaticum for the expansion of the protection of fundamental rights. Critical readings, on the other hand, which are increasingly frequent today also in light of the serious involutions suffered by the protection of rights, denounce a process of de-constitutionalization that does not seem to be due so much to globalization per se as to the neoliberal political project[2]. This, aiming at the construction of a society of "private law", cannot but attack constitutionalism, which has as its objective the guarantee of fundamental rights through the limitation of both public and private powers.

Many of these interpretations, starting with the famous one developed by Luigi Ferrajoli, read the constitutional State in continuity with the experience of the modern continental European rule of law[3]. The constitutional State would not be conceivable without reference to the principles promoted by legal positivist philosophies: from the concept of order, to the separation of powers, to the principle of legality, to the dogma of legal certainty. In this perspective, the replacement of the metaphor of the pyramid with the metaphor of the network, considered more appropriate to describe the contemporary system of legal sources, is seen as an attempt to endorse the current deconstruction of law, weakening its authoritative dimension.

This reflection has recently been taken up again by Orsetta Giolo in *Il diritto neoliberale* (2020), a book which clearly follows in the wake of Ferrajoli's theories. According to Giolo, what we are witnessing is not at all an expansion of (inter)national constitutionalism, but rather "a striking overturning of the legal (and political) architecture affirmed since the second half of the Twentieth century: so much so that the transition underway tends to take on the characteristics of a reversal that follows the logic of regression" (p. 23). The text, on the one hand, aims to identify the paradigm of "neoliberal law", focusing on the processes in progress, on the other hand, it is a sharp criticism of that legal theory that welcomes the neoliberal lexicon, underestimating the risks associated with the abandonment of the conceptual tools forged by the continental European legal tradition. According to this reading, the metaphor of the network "would represent only the superordinate level of contemporary law, which is limited to the privileged class of people who participate —directly or not— in the neoliberal practices of redistribution of wealth" (p. 27). This partial representation would help to hide the "lower legal level, destined for the non-privileged classes" (Ibid.) to which "neoliberal law" would instead

2. The literature that has attempted to define neoliberalism is extensive. See, for example, De Carolis (2017).
3. Ferrajoli has offered this interpretation in many works, see in particular Ferrajoli (2007 and 2016).

show a strongly authoritarian face (just think of the results to which "penal populism" leads). The network of global law is pierced. The very power that constitutionalism had attempted to control through law disappears from it. There is thus no continuity between the paradigm of the constitutional State and contemporary global law. Legal cosmopolitanism and universalism, on which (inter)national constitutionalism is founded, should not be confused with legal globalism which, on the contrary, would represent its negation in many respects. And so, while neoliberalism and cosmopolitanism are "false friends" (p. 37), neoliberalism and sovereignism must be considered as "false enemies", since the State which plays the role of "local police station" (Bauman, 1998) on the national territory is the necessary prop for a hegemonic design based on the expansion of the logic of the market and on the containment, even violent if necessary, of social conflict.

The global law narrative would contribute to blur the distinction between legitimate and illegitimate power, to abandon the principle of legality, to liberalize and privatize the use of force, according to a logic of "re-feudalization of social dynamics" (Giolo, 2020, p. 54). At the center of the neoliberal attack are the principle of equality, increasingly replaced with much weaker principles, such as "sameness" and "equal opportunity", and the notion of freedom, reduced to freedom of choice and deprived of its deepest meaning, which historically has opposed it to oppression and connected it with emancipation. This attack is aimed at the erosion of the protection of fundamental rights. A sign of this is the spread, especially in Europe, of the lexicon of "vulnerability" and the new role of the "victim" in supranational and national legal systems. Semantic slippages and the reality of law would converge. In this passage, "the constitutive nexus between victim and vulnerability" is replacing that "between subject and discrimination, between subjectivity and oppression, typical of public space and distributive justice" (p. 85). Neoliberal power paternalistically protects the vulnerable victim and annihilates subject autonomy. The increase in inequality is not a mere consequence of the implementation of the neoliberal project. It is its main objective. That is why neoliberalism undermines (inter)national constitutionalism and aims to "undo" democracy (Brown, 2015).

Giolo (2020) warns jurists against the appeal of postmodernist interpretations and reiterates the need to work towards the full implementation of the project of (inter) national constitutionalism. In this perspective:

> The set-up of constitutional States established in the second half of the Twentieth century, the internationalization of rights and guarantees, as well as the conceptual

> clarification that composes and holds up the legal and political map of the principles of equality and freedom are still important and fruitful tools, which must be reaffirmed and renewed, without the fear of resorting to "antiquated" means [...]. (p. 132)

Similarly, the project of cosmopolitanism should be relaunched, achieving, as Ferrajoli has been arguing for some time, the full constitutionalization of powers at the supranational level and placing limits on private powers. And the perspective of legal and institutional pacifism should be recovered (Giolo, 2020, pp. 134-135). Moreover, the role of arbitration and private transactions should be resized and the dialogue between the Courts (p. 137) should follow clearer rules, in order to create "a new constitutional paradigm at the global level" (p. 137). Vulnerability should thus be freed from its neoliberal use and brought back to an "*explicit* foundation" of policies and legal institutions (p. 140), recovering its ontological value and universal meaning. Still in the wake of Ferrajoli, Giolo suggests "rethinking force/violence", relaunching proposals such as the universal ban on weapons. On the level of the philosophy of law —and political philosophy— fighting the neoliberal paradigm means, finally, rejecting the postmodern fragmentation of subjectivities, recovering the centrality of embodied political (and legal) subjects proper to (inter)national constitutionalism and further emphasized by critical legal thinking. Freedom, equality, emancipation —that is, the words that have accompanied the history of the rule of law since its inception— should be put back at the center of legal-philosophical reflection. To legal science, in fact, Giolo (2020) attributes an important task, namely that of "deciding which law to accept" and "therefore which model of society and politics to promote" (p. 147).

This critical reading represents a strong defense of the constitutional State and is conducted with great theoretical and argumentative coherence. Both interpretations, however, the "optimistic" and the critical one, reveal an overconfidence in the autonomy of law and legal science and risk underestimating the scope of political and social processes that have been underway for some time. The "optimistic" reading too quickly dismisses the problem of the transformation of State sovereignty. It trusts in the jurisdictionalization of conflicts and tends to underestimate the resistance that globalism has produced and that can lead to a regressive de-globalization. On the other hand, we agree upon the defense of the legacy of (inter)national constitutionalism promoted by critical interpretations, but some crucial nodes remain to be solved. The first lies in the fact that the phenomena described by the first perspective, such as the development of a *lex mercatoria* and of

interlegality, are not mere metaphors used by philosophical theory or by the sociology of law, but are ongoing processes that cannot be dismissed as univocal, nor are they easily reversible. The second is that, even if it produces resistance, the neoliberal political project still has a strong grip. Neoliberal governmentality is welded to biopolitical government. The neoliberal anthropological model has achieved a cultural hegemony that undermines the value foundations of the project of (inter)national constitutionalism. The principle of competition, the theorization of a hierarchy between lives, commodification, the rupture of the social bond, the acceptance of inequality, the idolatry of merit, etc. are internalized dogmas, whose genesis lies, however, in the intrinsic limits of classical liberalism and in the history and episteme of the West, marked by the post-colonial fracture and heteropatriarchal domination. Fighting this hegemony appears to be an inalienable task, which cannot be entrusted to legal science alone. In fact, law as a social phenomenon is nourished by the values that forge the "legal consciousness" and guide legal interpretation.

Similarly, the thesis that separates the cosmopolitan project of (inter)national constitutionalism from that of globalism (and even more so from neoliberalism) appears convincing[4]. And yet, one cannot fail to grasp how the crisis of the constitutional State was triggered by the erosion of national sovereignty, which reduced the grip of public powers on the economy. The cosmopolitan project, without a strong State anchorage, is either utopian or despotic, as Danilo Zolo (1995) has taught us. As Geminello Preterossi (2019) has argued:

> Taxation and representation are [...] the two gametes that, by uniting, give life to the constitutional State, that is, to that form of State in which public power (of which taxation is a typical expression) is subject to law and this is legitimate if produced by bodies supported by electoral consensus, that is, by those who will have to pay the taxes. (p. 34)

With globalization this nexus has been broken and the great economic powers have been able to evade the constraints imposed by the States (Beck, 2000). The national sovereignty imagined by modern philosophies as monolithic is a myth, but certainly globalization, understood as both a political project and a social process, has led to a transformation of modern States, configuring new practices of sovereignty. The sovereignty of States, including those apparently stronger on the international scene, now

4. A thesis repeatedly reaffirmed by Tecla Mazzarese.

appears "disaggregated" (Slaughter, 2004), public and private powers interpenetrate. In this context, the relaunch of the project of (inter)national constitutionalism cannot but pass, on the one hand, through the refinement of the instruments of judicial protection of rights offered by the international "constellation of Courts" (Santoro, 2008, p. 76) and, on the other, through the re-proposition of its deep political reasons. This cannot disregard the national dimension, which is the one within which the rule of law was built in modernity. This recovery, however, in order to have an emancipatory value, cannot take place according to the logic of sovereignism, which, as Giolo underlines, is a "false enemy" of neoliberalism. On the other hand, it cannot be resolved in the legal sphere, but implies the construction of a political horizon in which conflicts for redistribution and recognition can be played out on multiple levels and in forms different from those that have characterized modernity. In the current landscape, alliances are necessarily "strategic", "uneasy and unpredictable" (Butler, 2015) and it is from these that one must be able to develop new forms of solidarity, giving rise to that "double movement" advocated by Preterossi (2018, p. 206) that allows, on the one hand, not to flee from power, to "constitute it in order to constitutionalize it" and, on the other, to operate "a constant critical, self-reflective deconstruction". In short, (inter)national constitutionalism, if it wants to survive, must face the challenge of postmodernity. This does not mean that everything that modernity has built must be considered obsolete, starting with the role still played by States institutions. There are, however, caesuras with which it is necessary to come to terms. While demolishing is certainly wrong, restoring is not enough. We need a remodeling that strengthens the building of the constitutional State and makes it capable of coping with new practices of sovereignty and new social dynamics, conjugating itself to that anthropological paradigm shift that the theory of vulnerability, the ethics of care and the critique of Capitalocene have long been calling for as the only way out of the dangerous transition we are experiencing.

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