

FREEDOM AND AUTHORITY IN MODERN CONSTITUTIONALISM

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Abstract

The aim of this work is to investigate the evolution of the relationship between freedom and authority in the genesis and development of modern constitutionalism. More precisely, the paper traces the salient stages of the process of constitutionalization of democratic systems, focusing on the texture of a principle, such as that of the functionalization of authority to the guarantee of freedom, which will be fully implemented in the constitutional state of law. A principle which, however, risks being cracked by the process of cyber globalization, as a result of which there has been a transformation of the political-legal categories of statehood and, consequently, the relationship between freedom and authority, at least until the second half of the twentieth century. As evident, what occurred at the dawn of the 21st century is a scenario that borders on numerous profiles of criticality, especially if one considers that the protection of the person appears to be now subjugated by the new global forces, prey to a system that has erected the myth of technocentrism on the remains of anthropocentrism. In light of the above, the reflection focuses on the need to give a new order to the global (dis)order, placing the person at the centre of the global network of powers; in other words, the need to re-establish the constitutionalist link of instrumentality between power and person, and therefore between authority and freedom, which has been overwhelmed by the impetuous development of technocratic domination, by enslaving the person to the increase of power. The knot seems crucial, not only because it aims to restore a new and different centrality to the human person, but also, and above all because it questions the continuing relevance of the paradigm of the constitutional state of law, whether this may still be the institutional form of reference for the protection of the fundamental rights and freedoms of the person.

Keywords

Freedom; authority; constitutionalism; globalization; human person; constitutional State of law.

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1. THE DOCTRINE OF CONSTITUTIONALISM IN THE DOGMATICS OF POWER: FIRST THEORETICAL FRAMEWORK

The investigation of the relationship between freedom and authority is part of a broader reflection on that complex of principles, both juridical and political, around which the doctrine of constitutionalism has been forged. A doctrine that, is generally made to coincide with the elaboration of devices of limitation of the guarantee of the liberties² on behalf of the power in function, and is therefore declined in the forms of “a technique of the liberty against the arbitrary power”³.

However, while it is true that the protection of fundamental rights constitutes “the centre of gravity”⁴ of modern constitutionalism, it is equally certain that the physiognomy of the process of constitutionalization still appears to be marked by a certain fluidity.

In fact, that constitutionalism is not a concept of plain and unambiguous definition⁵ is already evident by simply comparing the variety of notions, often divergent one from the other, with which academics have outlined the contours of constitutional science, analyzing its origins and constituent elements.

² See RIDOLA, 2010, p. 2.

³ MATTEUCCI, 2016, p. 20. Similarly LIEBERMAN, 2014, p. 730: “Constitutionalism rejects arbitrary government; it recognizes and respects people’s rights despite the contrary will of officials or even popular majorities”; PREUSS, 2005, p. 147: “Constitutionalism comprises a set of ideas, principles and rules, all of which deal with the question of how to develop a political system which excludes as far as possible the chance of arbitrary rule”.

⁴ D’ATENA, 2017, p. 1.

⁵ CASPER, 1987, p. 3: “Constitutionalism is a term not altogether congenial to American lawyers. It seems to share the characteristics of other “isms”: it is neither clearly prescriptive nor clearly descriptive; its contours are difficult to discern”.

In a such a perspective, an example is the opposite theorization⁶ of constitutionalism formulated, still in the early 1930s, by *Gino Solazzi* in the *Enciclopedia Italiana*⁷ and *Walton H. Hamilton* in the *Encyclopaedia of the Social Sciences*⁸. The first asserted that the expression “constitutionalism” indicates the set of principles, of English origin, which characterizes the form of constitutional government and, among them, the principle of the division of powers and political representation, but also of the publicity and the responsibility of the rulers; as for the protection of the fundamental rights, the Author affirmed instead: “[a]citizens are also guaranteed a sphere of individual freedom with the determination of limits to the state in the performance of its activity in relation to certain fields of individual activity”.

On the contrary, Hamilton argued that the idea of constitutionalism derived from the prospect of a “new freedom” enshrined in the 1776 Declaration of Independence of the United States of America and that its inspiring principles were three: “[t]he first is a greater law (...) The second in an individual right. (...) The third is a charter”; in other words “[a] law for the government, safeguarding individual rights, set down in writing – that is the Constitution”.

Therefore, it is clear that constitutionalism is not a defined and historically determined model but rather constitutes a principle of rationalization of power that has been articulated in the wake of some strong nuclei, each of which variously declined according to the changing reconstructions that history, and in history, offered by interpreters⁹.

⁶ MATTEUCCI, 1992, pp. 521 ss.

⁷ SOLAZZI, 1949, p. 653.

⁸ HAMILTON, 1937, p. 255 ss.

⁹ LIEBERMAN, 2014, p. 731: “Despite the general agreement on the essential norms and practices of constitutionalism, there is no definitive model and some basic questions remain unsettled”.

It is no coincidence, for example, that the substratum of constitutionalism, originally based on the principles of the protection of the rights of freedom and the separation of powers, has been shaped over time by further principles, such as federative and representative, which to date, alongside the former, are among the indefectible elements of a form of constitutional state¹⁰.

In any case, although the notion of “constitutionalism” still lays itself open to some reconstructive uncertainties, it is reasonable to suppose that the common thread of the whole affair outlines the boundaries of the yet to be solved question of the relationship “between those who hold power and those who remain subject to it, and therefore the different way of realizing the correlation between authority and freedom”¹¹.

A relationship of which evolution has diachronically crossed the history of political communities, unfolding along a path that, starting from the conceptualization of the mixed government of the Greek-Roman age, marked the origin and development of modern statualistic organization.

2. BRIEF OUTLINE OF THE ORIGINS OF CONSTITUTIONALISM: FROM THE THEORY OF THE MIXED CONSTITUTION TO THE CONSTITUTIONAL STATE OF LAW

As to the origins of this phenomenon, it is customary to believe that constitutionalism has its roots in the revolutionary events which, at the end of the 18th century, led to the recognition of the rights of freedom in a state organized according to the principle of the division of powers. These principles have been expressly summarized in art. 16 of the *Declaration of Human Rights and of the Citizen* of 1789, in which it states:

¹⁰ See MANGIAMELI, 2020a, p. 230 s.; RIDOLA, 2010, p. 6 s.

¹¹ MORTATI, 1975, p. 135.

“Every society in which the guarantee of rights is not assured, nor the separation of powers established, does not have a constitution”.

Indeed, that of constitutionalism is a much older history, and it is a history of dialectic tension that has crossed the relationship between freedom and authority during a long evolutionary process, whose prodromi which can be traced back to the theory of Greek-Roman “mixed constitution”, which gave rise to the idea that the best form of government (the *cd. Aristotelian politia*) stemmed from a process of mixing between the archetypes of monarchy, aristocracy and democracy¹².

Not even negligible, for the purpose of a diachronic reading of constitutionalism, appears to be the influence explained by the particularism and customary tradition of the medieval age. And this, both with reference to the statute of the first imperial cities that, thanks to the autonomy granted to them, favored the emergence of a first conceptual nucleus of freedom in favor of citizens¹³; and with reference to the nature of the medieval juridical order, that it was an order based on the value of custom, to which observance was therefore also bound the princeps in the exercise of *iurisdictio*¹⁴.

It is well known, however, that this embryonic process of juridical limitation of power - the greatest expression of which occurred in the genesis of the limited English monarchy - was soon undermined, around the fourteenth century, from the bursting of the modern state and the

¹² BOBBIO, 1983, p. 491 ss.: “The doctrine of the mixed G. consists in the enunciation and relative argumentation in favor of the principle according to which the degeneration of a good form into a bad one can be avoided by the constitution of a government that results from a mixture or combination or reconciliation or reciprocal integration or even fusion of the three good forms”.

¹³ *Ex multis* CALASSO, 1931, p. 197 ss.; MICHETTI, 2021, p. 43 ss.; WEBER, 1950; ZORZI, 2020a; ZORZI, 2020b, p. 22 ss.

¹⁴ CORTESE, 1966, p. 137 ss.; QUAGLIONI, 2008, p. 56 ss.; BOBBIO, 1995, p. 87 ss.; GROSSI, 2006, p. 88 ss.

imposition of a new power structure that was that of monarchical absolutism; and indeed, the elaboration of the political-juridical category of sovereignty (by some great theorists such as *Jean Bodin* and *Thomas Hobbes*) is located within an institutional reality that responded to a renewed need for unification and concentration of power in the hands of the sovereign, through the monopoly of legitimate force and the activity of law production¹⁵ (sovereignty is, by definition, “*summa legibusque soluta potestas*”)¹⁶.

Therefore, it can be easily understood that, in the absolute state, the condition of the subjects was entirely subjugated by the state authority and, consequently, as the principle of freedom was relegated to a purely effective dimension¹⁷, forced to a precarious life and on the margins of the system¹⁸.

On the other hand, although Hobbes himself had not failed to formulate a doctrine of the “duties of sovereignty”, it is hardly necessary to recall that this did not include the guarantee of the freedom of subjects since freedom - to be understood as “absence of external impediments”¹⁹ - could have been manifested only in the silence of the law: “the freedom of a subject resides (...) only in those things that the sovereign has neglected in regulating the actions of his subjects”²⁰.

Rather, the advocate of a new and different conception of freedom in comparison with authority will be John Locke, whose doctrine of the State, instead, will enclose the rights of freedom between the causes of legitimacy and functionalization of political power. And in fact Locke's is a conception that rests the cornerstone of the entire system on the principle

¹⁵ MATTEUCCI, 1993, p. 81.

¹⁶ See BODIN, 1964, vol. I, cap. VIII, p. 345, note 2.

¹⁷ D'ATENA, 2018, p. 6.

¹⁸ GROSSI, 1991, p. 107.

¹⁹ HOBBS, 2019, chapter fourteenth, p. 173.

²⁰ HOBBS, 2019, chapter twenty-first, p. 177.

of freedom, anchoring the foundation of legitimacy of political power to the preservation of an intangible core of rights - and, among these, life, personal freedom and private property - which the laws of nature would bestow upon each man.

Thus, Giusnaturalism “finds in the individual not only a limit and a barrier, but also a positive principle of political organization. It is, in embryo, the new state founded on the same freedom, which has the purpose of balancing the rights of each with those of all the others”²¹.

It follows society and the State, rather than as weapons of despotism, are beginning to be thought of as institutional instruments of legal freedom, functionally oriented towards guaranteeing those rights that are first defined as fundamental and inalienable attributes of man²²; the State serves their defense and in it finds the justification of its existence²³.

Nevertheless, to give a strong emphasis to the individual personality are the battles for tolerance and religious freedom conducted in Europe since the sixteenth century²⁴ that, in addition to affirming the intangibility of individual consciousness (“internal forum”), marked the genesis of freedom of thought (“external forum”), thus fearing the foundational claim of a new social and political order that would place individual rights and freedoms at the centre²⁵.

²¹ DE RUGGIERO, 2003, p. 26.

²² DE RUGGIERO, 2003, p. 31.

²³ SCHMITT, 1984, p. 220. In this perspective, the preamble to the Virginia Declaration of Rights of 1776 is emblematic, which states that the Rights of the People constitute the “Basis and Foundation of Government”, since “That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community (...)” (art. 3).

²⁴ SCHMITT, 2010, p. 56 s.: “the first individual right, in the sense of the bourgeois social order, was religious freedom; and this remains the beginning and the principle of the whole catalog of rights of freedom - of faith and conscience, of association and assembly, of the press, of commerce and industry - which has developed since”.

²⁵ See RIDOLA, 2018, p. 32.

It must also be added that the ideas of civil and political emancipation, rooted in the trunk of the struggles for religious freedom, are essentially promulgated by the demands of a rising social class, such as the bourgeois, which (against the medieval heritage of privileges) advocated the recognition of a position of legal equality between all actors in the market and called for the guarantee of a sphere of freedom, mainly economic, removed from the interference of state despotism²⁶.

Thus, in the background of the process of constitutionalisation, stands the nascent political theory of legal and economic liberalism, which precisely identified the State not only as a guarantor of individual freedoms but also as a possible usurper of them, against which to prepare a complex system of legal guarantees of fundamental rights and freedoms²⁷: “[i] rights of freedom are the pivot of the State imagined, before the domination of the Parliaments, by the culture of the bourgeoisie”²⁸.

Progressively, therefore, the liberal constitutional movement erodes the foundations of state absolutism, disarticulating the structural centralisation of the state-apparatus for a better organization of powers for the recognition and protection of the freedoms of the person; liberalism, therefore, “was primarily a challenge to vested interests, made sacred by the tradition of half a millennium”²⁹.

The principles, only briefly mentioned here, will find maximum explanation in the evolution of that particular state form, better known as the liberal state of law, which will be consolidated in the aftermath of the great revolutionary season which took place in England, North America and France between the seventeenth and eighteenth centuries and the result of which the original absolutist physiognomy of sovereignty will be

²⁶ DE RUGGIERO, 2003, p. 35.

²⁷ On topic BARBERIS, 2006, p. 80.

²⁸ AMATO, 1974, p. 274.

²⁹ LASKI, 1962, p. 2.

shaped by the eruption of a new and different conception of power, no longer unlimited in its expression but functionalized to the recognition of human rights and fundamental freedoms.

The revolutionary season is therefore defined as the “ridge of modern constitutionalism”³⁰ as a result of which the recognition and proclamation of fundamental human rights in the first constitutional documents will take place in conjunction with the introduction of certain principles of organisation and rationalisation of power structures, which include the principle of the division (vertical and horizontal) of power, the democratic principle, conveyed within the circuit of parliamentary representation, and the principle of legality, which is expressed in the duty of compliance with the law of the action of the public authorities.

However, what is particularly important here is the idea, conveyed by the liberal State tradition, that the legitimacy of the modern state is based on the capacity of the political order to realise citizens' rights; in other words, the power of the State, which at least theoretically is claimed to be limited, measurable and controllable, is functionalized to guarantee the freedom of the individual³¹.

A principle, that of the functionalization of the authority to guarantee freedom, which, in the aftermath of the “implosion” of the liberal State and at the end of totalitarian regimes, will acquire full realization in the constitutional state of law, when the problem of seeking a firmer foundation of freedom will have full strategic centrality.

2.1. *IT FOLLOWS*: THE EVOLUTION OF THE CONSTITUTIONAL PARADIGM DURING THE TWENTIETH CENTURY

³⁰ RIMOLI, 2011, p. 98.

³¹ SCHMITT, 1984, p. 173.

It is only with the evolution of the constitutional state of law that the person will take a real and proper substantive precedence with respect to every political institution and every constituted power³², consolidating the principle of “pre-existence or logical precedence”³³ of the inviolable rights of the person over the constitutive structures of the state order; a person who, in the post-World War II constitutional structure, abstracts from that isolated polarity of the liberal individualistic tradition to materialize within a more distinctly social dimension, in which the problem of freedom necessarily intersects with that of dynamic or substantial equality³⁴, evoking a specific intervention of the State to guarantee the full expression of the rights of freedom, positive and negative, of the citizen³⁵.

In fact, with the transition to the constitutional state of the twentieth century, the *separation* between state and society which, on the contrary, had constituted one of the presuppositions of thinkability of the liberal state has been attenuated; the constitutional state, instead, becomes “the legal form of pluralist democracy”³⁶, in which the principle of *neutrality* gives way to a process of integration of the pluralist composition of an “open society”³⁷, within which the *social ties*³⁸ of the individual are intertwined.

The overcoming of the statocentric approach therefore passes for the consideration that the person, as the end of the freedom system³⁹, is the pivot that legitimizes and functionalizes the new state in which “every action must be directed towards the *centre*, that is to say towards the

³² See PACE, 1992, p. 1 ss.; MANGIAMELLI, 2020b, p. 175 ss.

³³ BALDASSARRE, 1989, p. 1.

³⁴ CRISAFULLI, 1954, p. 73 ss.

³⁵ PACE, 1998, p. 22 s.

³⁶ CHELI, 2005, p. 1.

³⁷ *Ibidem*.

³⁸ RIDOLA, 2008, p. 399.

³⁹ GUARINO, 1969, p. 90 ss.

person”⁴⁰; with this in mind, “freedom is almost the centre of gravity on which, together with the institutional balance of the legal system, the very legitimacy of a given state order rests”⁴¹.

And in fact, the conceptual premise of the *new* relationship between the individual and the State is based on the assumption that “freedoms become essential forms, ways of being of sovereignty; instruments and conditions of authority which is justified only as a practical implementation (...) of them”⁴².

What follows from this is the establishment of a *circularity* in the constitutive relationship between fundamental rights and the legal order: the precedence of human rights, in fact, it does not stand *against* the legal system in defensive function but takes root *within* the same legal system from which arise the *founding claim* and the *guarantee of effectiveness* of the inviolable rights of the person.

A guarantee that is carried out primarily by means of a formal instrument, consisting in the solemn proclamation of fundamental rights within constitutional charters with the character of *rigidity*, in support of which not only is an aggravated process of constitutional review decided but also the configuration of the first European systems of constitutional justice is ensured, on the model of the centralised union of legitimacy introduced by the Austrian Constitution of 1920.

The affirmation of the principle of constitutional rigidity imports with it the idea of a *superiority* of the Constitution that is expressed in the duty of conformity to it of the content and form of any other act of public authorities, including the law of Parliament⁴³. It is therefore *in nuce* the

⁴⁰ DI SALVATORE, 2006, p. 46, in the wake of reflection of E.-W. BÖCKENFÖRDE, 1995, p. 231.

⁴¹ LOMBARDI, 1963, p. 845.

⁴² VOLPE, 1976, p. 603.

⁴³ On topic PACE, 2002, p. 265 ss.

enucleazione of the *principle of legality in constitutional sense* that, overlapping the principle of “legal legality”, exceeds the nineteenth-century dogma of the primacy of the law⁴⁴.

It is therefore the principle of constitutional legality which, in the final analysis, strengthens that ancillary relationship between fundamental rights and the Constitution, placidly synthesized in the idea that “If (...) there is no Constitution without rights, there are no rights without a Constitution. It is, in fact, the Constitution that makes human rights legal”⁴⁵.

Consequently, given “that any right of freedom for citizens cannot derive from the State as a legal state (...) is not conceivable, nor would it present any plausible reason to be, a contrast between the ‘sovereignty’ of the second and the ‘autonomy’ of the first”⁴⁶.

From this point of view, the demiurgic nature of constitutionalism can be fully grasped, which, acting as a technique of freedom, has shaped the organization of power in an instrumental sense to the protection of the person, establishing a conditioning middle-end relationship between the two distinct poles of freedom and authority: and in fact, while freedom identifies the state organization as an essential and privileged instrument for its recognition and protection⁴⁷, the exercise of public authority ceases to be arbitrary and takes on a perspective of service towards the person.

It is therefore evident that the *proprium* of constitutionalism consists in being, at the same time, a technique of *limitation* and *organization* of state power, insofar as the State, by means of a “certain” organization of power, rationalized by the principle of division, has proved to be the most suitable, and historically also the most effective, instrument for a better

⁴⁴ LUCIANI, 2016, p. 463.

⁴⁵ D’ATENA, 2017, p. 7.

⁴⁶ GROSSI, 1991, p. 157 s.

⁴⁷ ALLEGRETTI, 2003, p. 12. Similarly D’ATENA, 2017, p. 8 s.

guarantee and protection of fundamental human rights⁴⁸; a protection which has been further strengthened at an international and, above all, European level, thanks to the creation of a level of a supranational government which, over time, has taken the form of a genuine *Community of law*.

3. MODERN CONSTITUTIONALISM AND THE ADVENT OF THE GLOBALIZATION PROCESS

If what we have just outlined is the course of the relationship between freedom and authority - at least until the second half of the twentieth century - we must ask ourselves (even if within a limited space of investigation) about the consequences of the process of cyber globalization may be on the institutional structures forged by modern constitutionalism; in fact, the global phenomenon has imposed a certain retraction of the decision-making capacity of States in comparison with the new public and private entities of globalisation, deconstructing the convergence established between the norm and the place, between law and location, between authority and territory: in one word, the *nomos* of schmittiana derivation⁴⁹.

A deconstruction in respect of which the development of new information and communication technologies would have had a disruptive influence, giving such an acceleration on the circulation of goods and persons and on

⁴⁸ See GALLI, 2001, p. 80; BONFIGLIO, 2016, p. 46: “To avoid falling into the errors and horrors of the past, in the European Democratic Constitutions of the Second World War (...) the organisation of state power is instrumental to the recognition and protection of the dignity of the person and inviolable and inalienable human rights”.

⁴⁹ SCHMITT, 2002.

financial transactions as to trigger a massive displacement of power to new spaces and subjects distinct from those properly state ones⁵⁰.

Indeed, the turning point of the new global era should be placed around the mid-seventies when the virtualisation of banking and financial activity, together with a process of internal redistribution of power for the benefit of the executive circuit⁵¹, would have oriented “a *position of the politician* outside the categorical framework of the nation-state”⁵². In fact, the political power “no longer belongs only to traditional structures, largely state, but tends to disperse and settle in new locations, which often do not have a state configuration or explicitly institutional”⁵³ raising more than one criticism about the maintenance of the principles of democracy, transparency and accountability.

The most peculiar feature of global *governance* would therefore lie in the circumstance that the market does not simply seek to escape the political regulation of the state but instead tries to “*conform*” it, limiting the freedom of action of governments and states: the market “*claims power to give a form to the State and society*”, thus questioning the traditional reconstructive schemes of the state phenomenon and the hermeneutic value of the statistic paradigm itself “⁵⁴. In other words, it is “the era of *turbocapitalism*”, the era of the absence of containment of the economy by the State⁵⁵.

And in fact, the current international financial structure, in the context of an increasingly advanced globalization, would have triggered a progressive dematerialization of the territorial component, disarticulating the existing

⁵⁰ BAUMAN, 2000, p. 79: “Our time reveals a marked tendency to separate power from politics: true power, capable of establishing the extent of practical choices, flows; thanks to its increasingly less restricted mobility, it is practically global; or rather, extraterritorial”.

⁵¹ On topic, SASSEN, 2008, p. 200 ss.

⁵² BECK, 1999, p. 13.

⁵³ FERRARESE, 2000, p. 53.

⁵⁴ *Ex multis* SCACCIA, 2017, p. 15 s.; ORTINO, 1999, p. 114 s.; BAUMAN, 2020, p. 75.

⁵⁵ See BARCELLONA, 2001, p. 116.

connection between law, rights, power and territory on which the traditional state-building had been shaped⁵⁶, hinged on the dogma of territorial sovereignty.

It is not by chance that the most usual way of representing these transformations is to emphasize the erosion of the sovereign character of state power, evoking a progressive emptying of that political-juridical concept of sovereignty which, in the face of global phenomena, would have regressed to the point of plunging the State into an irreversible state of crisis, even predicting its death⁵⁷.

Similarly, as noted by a well-known economist, globalization would have revealed all the ineptitude of States in answering the new questions arising from the process of world integration of economies⁵⁸. The inability of the State to summarize in itself the processes of formation and execution of the decisions and to govern the social consequences (also) that reverberate in the “collecting networks of the National State”⁵⁹. This seriously undermines the guarantee of the fundamental rights and freedoms of the person - both civil and political and, above all, social⁶⁰ - which, despite the new threats arising from global space, find it difficult to recognize in the State that driving force of their protection which had instead been consolidated with the evolution of the constitutional state of law.

On the other hand, if “the State has or has had its best mission in the protection and promotion of human rights, the problem of its downsizing is the problem of its relationship with the most decisive issue of rights”⁶¹.

The dislocation of the *Politician* outside the categorical framework of the nation-State⁶² would therefore have a direct impact on the capacity of state

⁵⁶ See FERRARESE, 2000, p. 42 s.

⁵⁷ *Contra* AMATO MANGIAMELLI, 1998, p. 3 ss.

⁵⁸ STIGLITZ, 2011, p. 37.

⁵⁹ See BECK, 1999, p. 29.

⁶⁰ *Ex multis*, CASTELLS, 2014, p. 335 ss.; SILVESTRI, 2013, p. 907.

⁶¹ ALLEGRETTI, 2002, p. 17.

institutions to act, deprived of the monopoly on the government of the national economy and on the control of social wealth, to the point of believing that the process of globalization can be portrayed as a “loss not compensated or still in search of adequate compensation”⁶³.

In essence, from the “*object* of the rules and limits of the *government of the welfare state*”⁶⁴, economic power today becomes the *main creator*, dispersed within “transnational networks of deterritorialized *governance*”⁶⁵ that have deprived the authority, first, social protection systems at state level, eroding the core of *welfare state* policies⁶⁶; an erosion which, as known, has also affected the already weak system of protection of social rights at an international and, above all, a European level; as appeared evident in the turning point made by the Court of Justice to the judicial process on the balance between social rights and economic freedoms (the cd. *Laval quartet*), generally to the detriment of the first⁶⁷.

The market thus becomes the dominant element of the global world and with respect to it the subjects appear reduced to “mere 'functions', as figures or variables of a process that dominates them with its own objective laws”⁶⁸, marking a break with that “tradition humanistic of modernity”⁶⁹ based on the “privileged link that passes between rights and state experience”⁷⁰.

⁶² BECK, 1999, p. 13.

⁶³ CARETTI, 2014, p. 14.

⁶⁴ LUCIANI, 1996, p. 160.

⁶⁵ SCACCIA, 2019, p. 78.

⁶⁶ D'ALBERTI, 2013, p. 195 ss.

⁶⁷ MANGIAMELI, 2020a, p. 127 ss.

⁶⁸ BALDASSARRE, 2002, p. 244.

⁶⁹ *Ibidem*.

⁷⁰ AMATO MANGIAMELI, 2004, p. 66; ALLEGRETTI, 2003, p. 11.

The re-edition of the paradigm of economic liberalism, under the renewed guise of a “global liberalism”⁷¹ would therefore have cultivated the germ of a “depersonalized individualism”⁷² which, in addition to undermining the roots of “community culture”⁷³, would have determined an “emptying of the sense of constitutionalism and, through this, of pluralist democracy”⁷⁴, to the extent that orderly social coexistence had instead used appropriate institutional guarantees to affirm the recognition and protection of the fundamental rights and freedoms of the person⁷⁵.

However, the one just outlined is a model of failure from multiple points of view that emerge not only to a more strictly empirical and factual analysis⁷⁶, such as that on the failure to reduce poverty⁷⁷ or the dramatic instability of economic balances but also to a broader reflection that aims to investigate the effects of globalization under the lens of modern constitutionalism, in order to verify the consequences brought on the *person* in the changed structure of powers.

The global age, in fact, “so much does the movement to eradicate the Eurocentric order in the *Mobilmachung* of the techno-scientific apparatus and economic freedom as reaffirms the impossibility of a totally formless order, a chaos without any structure (*ein strukturloses Chaos*)»⁷⁸ in which the *person*, lost the compass of his own orientation, is forced to a nomadic existence and wandering⁷⁹, prey of a system that has erected the myth of technocentrism on the remains of anthropocentrism.

⁷¹ According to the definition of BALDASSARRE, 2002, p. 248.

⁷² BARCELONA, 2001, p. 118.

⁷³ *Ibidem*.

⁷⁴ BALDASSARE, 2002, p. 272.

⁷⁵ BALDASSARE, 2002, p. 272 s.

⁷⁶ See PALLANCH, 2005, p. 1.

⁷⁷ CONTALDI, 2021, p. 11 s.

⁷⁸ DALLARI, 2017, p. 155.

⁷⁹ AZZARITI, 2014, p. 149.

On the other hand, and as pointed out by extensive literature, “the idea of order refers not so much to things as they are, but rather to the way they are treated; to the ability to *order*, rather than to any intrinsic capacity of things as they are by chance and at a certain time”⁸⁰; a *capacity* that the forces of globalization have shown they do not possess, on the contrary releasing a disruptive charge of world order that has frustrated many of the ambitions of progress and equality originally placed in the phenomenon of *universalization*.

And so, at a time of *punctuation* of history like the present one⁸¹, in which the new global (dis)order does not appear able to undermine the old models of stability, it is necessary to ask ourselves which institutions are responsible for governing global phenomena towards the construction of a new order that gives the person a central position in the global network of powers; a question whose solution cannot be ignored, at least according to the writer, from a *resurgence* of the paradigm of the *constitutional State of law* - being the only institutional form that can allow an “acceptable coexistence in the global system”⁸² - as well as the *Politician*⁸³ and the tradition of democratic constitutionalism, as the only possible institutional response to the problem of the guarantee of fundamental rights in the construction of the new world order, on the assumption that “rights cannot be separated from a relationship with the Power that guarantees them”⁸⁴.

4. FOR A NEW “HUMAN” ORDER: CONCLUDING NOTES

⁸⁰ BAUMAN, 2005, p. 336.

⁸¹ AMATO MANGIAMELI, 2004, p. 3.

⁸² MANGIAMELI, 2020a, p. 243.

⁸³ See GALLI, 2000, p. 363.

⁸⁴ BARCELLONA, 2001, p. 134.

The observations that have just been made point in the direction of believing that the process of globalisation, as it has so far been managed, has given more than a twist to the dynamics of the relationship between freedom and authority, by enslaving the person to the empowerment of the new economic-financial elites.

In this light, therefore, the need to give back a “human face”⁸⁵ to globalization emerges handheld, imprinting on it the demiurgical trait of constitutionalism that has made the *person* - with his dignity and freedom - the principle, the object and the aim of state institutions, functionalizing the exercise of power with respect to the “human person”⁸⁶.

A perspective of “service” that - as has been inferred so far - seems to escape the logic of settling global power, insubstantial to assume that democratic connotation which can only adhere to a *power* that imposes itself as “guarantee of support for the freedom and material condition of the human person”⁸⁷.

In truth, to the state of the art, not even supranational institutions of government appear in a position to embody that spirit of service which should be coessential with a political authority charged with guiding the transition of the current scenario towards the horizon of a new humanism; in fact, while acknowledging the enormous progress that has been made in constitutionalising the European Union, there remain a number of criticisms which undermine the process of political integration and that, in fact, they still make the European institutional system politically weak and devoid of genuine democratic legitimacy⁸⁸.

⁸⁵ STIGLITZ, 2002, p. 250.

⁸⁶ MANGIAMELI, 2020c, p. 77; ALLEGRETTI, 2002, p. 17.

⁸⁷ MANGIAMELI, 2020c, p. 77.

⁸⁸ On topic, MANGIAMELI, 2020d, *passim*; CIANCIO, 2016; ALIBRANDI, 2016, p. 57 ss.; PASQUINO, 2012, p. 417 ss.; LUPO, 2014, p. 1 ss.

Therefore, even in the changed global geography of powers, the role of the state paradigm re-emerges irreplaceable, which still appears today as the most authentic and privileged interpreter of the tradition of democratic constitutionalism⁸⁹, representing the institutional model of reference for the protection of fundamental human rights and freedoms⁹⁰.

As a result, one agrees with that theoretical approach, widely shared in doctrine, according to which “*l'État n'est pas mort ni en train de mourir*”⁹¹, still embodying a *powerful political reality*⁹² on which bears the burdensome task of refounding the “genetic heritage” of globalization - finalizing it to the collective welfare - and reorganizing the governance of the whole process according to a structure more in line with the spirit of “service” which is typical of democratic political institutions.

Hence, rather than “crisis” or even worse “extinction”, it would perhaps be more accurate to discuss a *redefinition* of the role of the State in the global arena of powers⁹³ so that it acquires a new and different awareness of the *open* character of its own statehood, to steer the overall legal order towards the organizational principles of democratic constitutionalism⁹⁴.

The challenge is therefore undoubtedly formidable for the State's executive capacity, which is called upon to express itself not only *inwards*, strengthening the protection of fundamental rights, but also, and above all, *outwards*, within that reticular structure in which they articulate “multiple and multiform processes of global *governance*”⁹⁵ trying the enterprise, not at all easy, to redesign the map of powers globalizing “the personalist

⁸⁹ MICHETTI, 2021, p. 157.

⁹⁰ MANGIAMELI, 2020a, p. 244.

⁹¹ The expression, taken from DUGUIT, 1922, p. 40, is taken from AMATO MANGIAMELI, 2004, p. 65.

⁹² See AMATO MANGIAMELI, 2004, p. 65 s.

⁹³ As also stated by DALLARI, 2017, p. 158.

⁹⁴ See MICHETTI, 2021, p. 157. Similar MANGIAMELI, 2020a, p. 245.

⁹⁵ D'ANDREA, 2014, p. 182.

principle, that of the contemporary constitutional systems is placed like the true hinge”⁹⁶.

In short, what we want to affirm is the idea that the realization of fundamental rights requires a *structural adjustment*⁹⁷ of what is today’s scenario, crowded and convulsed, of global powers, so that the *multilevel* and *interline* geometry of globality is shaped by instruments of *limitation* and *concertation* of power that, in addition to restoring the primacy of the *person*, make the protection of rights *effective*⁹⁸.

An adjustment that cannot but imply a *return* to “*political law*”⁹⁹ as a means of regulating a power, such as the global one, that today is frayed in the pluriverse disorder of an a-territorial, liquid, anomic and proteiform right¹⁰⁰, imbued with an economic *factuality* that has replaced the primacy of *homo oeconomicus* at the primacy of the *person*¹⁰¹.

In other words, what is required is the need for a *re-territorialization* of law¹⁰² and, *a fortiori*, a *re-politicization* of powers and functions¹⁰³ - and above all of a regulatory one, but also redistributive and social - that, on the basis of modern constitutionalism, ensure respect for the *human person* as well as in the irreversibility of the globalizing phenomenon¹⁰⁴, on the basis of a now inextricable interweaving between global and local that has been better synthesized by *Robertson* with the term *glocalization*¹⁰⁵.

⁹⁶ D’ANDREA, 2014, p. 181.

⁹⁷ ALLEGRETTI, 2003, p. 21.

⁹⁸ As also noted by AZZARITI, 2014, p. 149.

⁹⁹ The expression is taken from ALGOSTINO, 2018, p. 107.

¹⁰⁰ ALGOSTINO, 2018, p. 57.

¹⁰¹ RODOTÀ, 1992, p. 14.

¹⁰² IRTI, 2006, p. 104 s.

¹⁰³ IRTI, 2006, p. 86.

¹⁰⁴ FERRARESE, 2002, p. 114.

¹⁰⁵ ROBERTSON, 1999. On the subject, see also BAUMAN, 2005, p. 336 ss.

It is in such a context, therefore, that the doctrine of constitutionalism could still play a decisive role in the construction of a global order hinged on the personalist principle, establishing, within the State, the *archidemic point* of a new order that consolidates and replicates the constitutional paradigm externally, placing political limits on the free deployment of technocratic forces.

On the other hand, both on the international and on the European side, it is clear that progress towards the protection of rights is only possible if the state political authority retains its central position in the chessboard of the “post-national constellation”¹⁰⁶ as a privileged interpreter and advocate of the tradition of democratic constitutionalism, being the only institutional subject - but also the only global actor - structurally and teleologically preordained to the protection of the fundamental rights of individuals¹⁰⁷.

REFERENCES

- ALGOSTINO, Alessandra, *Diritto proteiforme e conflitto sul diritto. Studio sulla trasformazione delle fonti del diritto*, Turin, 2018.
- ALIBRANDI, Rosamaria, *Extra ordinem. Breve storia del costituzionalismo multilivello tra volontà d'integrazione, dialettica delle differenze, globalizzazione e trasformazione dello stato*, in *Foro, Nuova época*, vol. 19, n. 2/2016.
- ALLEGRETTI, Umberto, *I diritti fondamentali fra tradizione statale e nuovi livelli di potere*, in P. Barcellona, A. Carrino (Eds.), *I diritti umani tra politica filosofia e storia*, Tome II, *I diritti umani nella costruzione del nuovo ordine mondiale*, Naples, 2003.
- Diritti e Stato nella mondializzazione*, Enna, 2002.
- AMATO, Giuliano, *Libertà (dir. cost.)*, in *Enc. dir.*, vol. XXIV, Turin, 1974.

¹⁰⁶ The expression is taken from HABERMAS, 2002.

¹⁰⁷ MICHETTI, 2021, *passim*.

- AMATO MANGIAMELI, Agata C. (Ed.), *Ripensare lo Stato. Osservazioni preliminari, Presentazione a O. Höffe, Persino un popolo di diavoli ha bisogno dello Stato*, Turin, 1998.
- Stati post-moderni e diritto dei popoli*, Turin, 2004.
- AZZARITI, Gaetano *Costituzionalismo e crisi dello Stato-Nazione. Le garanzie possibili nello spazio globalizzato*, in AA.VV., *Costituzionalismo e globalizzazione. Atti del XXVII Convegno annuale. Salerno, 22-24 novembre 2012*, Naples, 2014.
- BALDASSARRE, Antonio, *Diritti inviolabili* (voice), in *Enc. giur.*, vol. XI, Rome, 1989.
- Globalizzazione contro democrazia*, Rome-Bari, 2002.
- BARBERIS, Mauro, *Liberalismo, costituzionalismo, pluralismo*, in *Materiali per una storia della cultura giuridica*, n. 1/2006.
- BARCELLONA, Pietro, *Le passioni negate. Globalismo e diritti umani*, Troina, 2001.
- BAUMAN, Zygmunt, *La solitudine del cittadino globale*, translation by G. Bettini, Milan, 2000.
- Dentro la globalizzazione. Le conseguenze sulle persone, Le conseguenze sulle persone*, italian translation, Bari-Rome, 2020.
- Sulla globalizzazione: o globalizzazione per alcuni, localizzazione per altri*, in Id., *Saggi scelti*, P. Beilharz (Ed.), italian translation, Rome, 2005.
- BECK, Ulrich, *Che cos'è la globalizzazione. Rischi e prospettive della società planetaria*, Rome, 1999.
- BOBBIO, Norberto, *Governo misto*, in *Dizionario di politica*, Turin, 1983.
- Stato, governo, società. Frammenti di un dizionario politico*, Turin, 1995.
- BÖCKENFÖRDE, Ernst-Wolfgang, *Staat und Gesellschaft*, in *Staatslexikon Recht – Wirtschaft – Gesellschaft*, V Band, 7. Aufl., Freiburg-Basel-Wien, 1995.
- BODIN, Jean, *I sei libri dello Stato*, M. Isnardi Parente (Ed.), Turin, 1964.
- BONFIGLIO, Salvatore, *Costituzionalismo meticcio. Oltre il colonialismo dei diritti umani*, Turin, 2016.

- CALASSO, Francesco, *Origini italiane della formola «Rex in regno suo est imperator»*, in *Archivio Storico Italiano*, 1931, Vol. 89 (Serie 7, Vol. 16), No. 4 (340) (1931).
- CANTARO, Antonio, *Potenza e impotenza del sovranismo europeo. Pandemia e tecnocrazia*, in *Federalismi.it*, n. 15/2021.
- CARETTI, Paolo, *Globalizzazione e diritti fondamentali*, in AA.VV., *Costituzionalismo e globalizzazione. Atti del XXVII Convegno annuale. Salerno, 22-24 novembre 2012*, Naples, 2014.
- CASPER, Gerhard, *Constitutionalism*, University of Chicago Law Occasional Paper, No. 22 (1987).
- CASTELLS, Manuel, *Il potere delle identità*, Milan, 2014.
- CHELI, Enzo, *I fondamenti dello “Stato costituzionale”. Relazione al Convegno su “Lo Stato costituzionale. I fondamenti e la tutela”*, Roma 27-28 ottobre 2005, in www.astrid-online.it.
- CIANCIO, Adriana, *Democrazia e sovranazionalità: ripensare il Parlamento europeo*, in *Rivista AIC*, n. 3/2016.
- CONTALDI, Gianluca, *Cosa resta della globalizzazione?*, in Id. (Ed.), *Sovranità e diritti al tempo della globalizzazione*, Rome, 2021.
- CORTESE, Ennio, *Il problema della sovranità nel pensiero giuridico medioevale*, Rome, 1966.
- CRISAFULLI, Vezio, *Individuo e società nella Costituzione italiana*, in *Dir. lav.*, 1954.
- D’ALBERTI, Marco, *La crisi globale e la sorte dei diritti fondamentali*, in *Riv. it. sc. giur.*, n. 4/2013.
- DALLARI, Edoardo, *Il problema del politico. Saggio su Hegel e Schmitt*, Padua, 2017.
- D’ANDREA, Luigi, *Brevi riflessioni su governance globale e costituzionalismo interlivello*, in AA.VV., *Costituzionalismo e globalizzazione. Atti del XXVII Convegno annuale. Salerno, 22-24 novembre 2012*, Naples, 2014.
- D’ATENA, Antonio, *Le stagioni del costituzionalismo nel suo rapporto con la tutela dei diritti fondamentali*, in *Dir. soc.*, n. 1/2017.

- Costituzionalismo e tutela dei diritti fondamentali*, in Id., *Lezioni di diritto costituzionale*, IV ed., Turin, 2018.
- DE RUGGIERO, Guido, *Storia del liberalismo europeo*, Rome-Bari, 2003.
- DI SALVATORE, Enzo, *Appunti per uno studio sulla libertà nella tradizione costituzionale europea*, in *Teoria del diritto e dello Stato*, nn. 1-2-3, 2006.
- DUGUIT, Léon, *Le droit social, le droit individuel et la transformation de l'état*, Paris, 1922.
- FERRARESE, Maria Rosaria, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Bologna, 2000.
- Il diritto al presente. Globalizzazione e tempo delle istituzioni*, Bologna, 2002.
- GALLI, Carlo, *Spazi politici. L'età moderna e l'età globale*, Bologna, 2001.
- Spazio e politica nell'età globale*, in *Fil. Pol.*, n. 3/2000.
- GROSSI, Paolo, *L'ordine giuridico medievale*, Rome-Bari, 2006.
- GROSSI, Pierfrancesco, *I diritti di libertà ad uso di lezioni*, I, 1, II ed., Turin, 1991.
- GUARINO, Giuseppe, *Lezioni di diritto pubblico*, Milan, 1969.
- HABERMAS, Jürgen, *La costellazione postnazionale. Mercato globale, nazioni e democrazia*, Milan, 2002.
- HAMILTON, Walton H, *Constitutionalism*, in *Encyclopaedia of the Social Sciences*, vol. III, New York, 1937.
- HOBBS, Thomas, *Leviatano o la materia, la forma e il potere di uno Stato ecclesiastico e civile*, A. Pacchi (Ed.), Rome-Bari, 2019.
- IRTI, Natalino, *Norma e luoghi. Problemi di geo-diritto*, Rome-Bari, 2006.
- LASKI, Harold J., *Le origini del liberalismo europeo*, translation by P. Vittorelli, London, 1962.
- LIEBERMAN, Jethro K., *Constitutionalism*, in *The Encyclopedia of Political Thought*, 2014.
- LOMBARDI, Giorgio, *Libertà (Diritto costituzionale)*, in *N.mo Dig. It.*, vol. IX, Turin, 1963.
- LUCIANI, Massimo, *L'antisovrano e la crisi delle costituzioni*, in *Riv. dir. cost.*, n. 1/1996.
- Interpretazione conforme a Costituzione*, in *Enc. dir.*, Ann. IX, Milan, 2016.

- LUPO, Nicola, *Parlamento europeo e Parlamenti nazionali nella Costituzione "composita" nell'UE: le diverse letture possibili*, in *Rivista AIC*, n. 3/2014.
- MANGIAMELI, Stelio, *Stato, integrazione europea e globalizzazione. Le nuove sfide del costituzionalismo*, in Id., *I diritti costituzionali: dallo Stato ai processi di integrazione*, Turin, 2020a.
- Il contributo dell'esperienza costituzionale italiana alla dommatica europea* in Id., *I diritti costituzionali: dallo Stato ai processi di integrazione*, Turin, 2020b.
- Appunti sullo "Stato sociale sussidiario"*, in Id., *I diritti costituzionali: dallo Stato ai processi di integrazione*, Turin, 2020c.
- Covid-19 and European Union. The answer to the health crisis as a way for resuming the process of European Integration*, in *Humanities and Rights Global Network Journal*, 2020d, 2(2).
- MATTEUCCI, Nicola, *Organizzazione del potere e libertà. Storia del costituzionalismo moderno*, Bologna, 2016.
- Costituzionalismo*, in *Enciclopedia delle Scienze Sociali*, vol. II, Rome, 1992.
- Lo Stato moderno*, Bologna, 1993.
- MICHETTI, Michela, *Territorio e organizzazione del potere. Livelli di governo e legittimità dello Stato*, Turin, 2021.
- MORTATI, Costantino, *Istituzioni di diritto pubblico*, vol. I, Padua, 1975.
- ORTINO, Sergio, *Il nuovo nomos della Terra*, Bologna, 1999.
- PACE, Alessandro, *Problematica delle libertà costituzionali. Lezioni. Parte generale*, II ed., Padua, 1992.
- La variegata struttura dei diritti costituzionali*, in *Associazione per gli studi parlamentari*, Quaderno n. 8, Seminario 1997, Turin, 1998.
- Costituzioni rigide e costituzioni flessibili*, in A. Pace, *Potere costituente, rigidità costituzionale, autovincoli legislativi*, Padua, 2002.
- PALLANCH, Chiara (Ed.), *Le promesse tradite della globalizzazione. Intervista a Joseph Stiglitz*, in *Jura Gentium. Rivista di filosofia del diritto internazionale e della politica globale*, 2005.
- PASQUINO, Gianfranco, *Deficit democratico*, in *Riv. it. sc. pol.*, n. 3/2012.
- PREUSS, Ulrich K., *Constitutionalism*, in E. Craig (Ed.), *The shorter routledge encyclopedia of philosophy*, London and New York, 2005.

- QUAGLIONI, Diego, *Dal costituzionalismo medievale al costituzionale moderno*, in *Annali del Seminario Giuridico*, vol. 52 (2007-2008), Turin, 2008.
- RIDOLA, Paolo, *Diritto comparato e Diritto costituzionale europeo*, Turin, 2010.
Il principio libertà nello stato costituzionale. I diritti fondamentali in prospettiva storico-comparativa, Turin, 2018.
Diritti costituzionali (voice), in *Diritto costituzionale*, S. Mangiameli (Ed.), Milan, 2008.
- RIMOLI, Francesco, *L'idea di costituzione. Una storia critica*, Rome, 2011.
- ROBERTSON, Roland, *Globalizzazione. Teoria sociale e cultura globale*, translation by A. De Leonibus, Trieste, 1999.
- RODOTÀ, Stefano, *Repertorio di fine secolo*, Rome-Bari, 1992.
- SASSEN, Saskia, *Territorio, autorità, diritti*, Milan, 2008.
- SCACCIA, Gino, *Il territorio fra sovranità statale e globalizzazione dello spazio economico*, in *Rivista AIC*, n. 3/2017.
La sovranità statale nell'era della globalizzazione, in V. Mastroiacovo (a cura di), *Le sovranità nell'era della post globalizzazione. Atti del Convegno di Foggia 1° marzo 2019*, Pisa, 2019.
- SCHMITT, Carl, *Land und Meer. Eine weltgeschichtliche Betrachtung*, italian translation by G. Gurisatti, II ed., Milan, 2002.
Cattolicesimo romano e forma politica, italian translation by C. Galli, Bologna, 2010.
Dottrina della costituzione, A. Caracciolo (Ed.), Milan, 1984.
- SILVESTRI, Gaetano, *Costituzionalismo e crisi dello Stato-nazione. Le garanzie possibile nello spazio globalizzato*, in *Riv. trim. dir. pubbl.*, n. 4/2013.
- SOLAZZI, Gino, *Costituzionalismo*, in *Enciclopedia italiana*, Rome, 1949.
- STIGLITZ, Joseph E., *Globalizzazione*, Rome, 2011.
La globalizzazione e i suoi oppositori, translation by D. Cavallini, Turin, 2002.
- VOLPE, Giuseppe, *La legge ferrea delle corporazioni e i magistrati*, in *Foro. it.*, 1976.
- WEBER, Max, *La città*, translation by O. Padova, Milan, 1950.

ZORZI, Andrea, *Le libertà delle città italiane nel tardo medioevo: qualche riflessione*, in *Edad Media. Revista de Historia*, n. 21/2020a.

Le declinazioni della libertà nelle città comunali e signorili italiane (secoli XII-XIV), in Id. (Ed.), *La libertà nelle città comunali e signorili italiane*, Rome, 2020b.