

# THE CRISIS OF STATE SOVEREIGNTY AND SOCIAL RIGHTS

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**Abstract:** The European integration process –which may be interpreted as a federalizing process– faces strong cultural and economic resistances. As a matter of fact, social rights have been understood and performed –within an old tradition of political thought– as proximity rights that cannot be universalized beyond the context of national States; this led to the resistant ideology of the protective function of State borders. Therefore it seems that the construction of the European Union as a complete political subject cannot be developed further if a centralized European Welfare is not created.

**Keywords:** Nation-State crisis; Social rights; European federalizing process

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## I. SOVEREIGNTY CRISIS AND EUROPEAN CONSTITUENT PROCESS

The crisis of the Nation-State and, consequently, of State sovereignty, can be observed in the light of the most powerful and controversial of its factors in this part of the world: the European integration process. The latter follows the path from Treaty to Constitution.

The analysis of the crisis of State sovereignty and of the European phenomenon from such a point of view is not a neutral choice, because it forces to take a stance on divisive issues: that a constituent process (which can be defined, according to a certain point of view, as federal, in one of the manifold possible realizations of federalism) is taking place; that therefore such a process is not completed yet, because it is not possible to affirm that Europe already has a Constitution in the proper sense (which

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does not mean that it lacks a constitutional system, and which in any case encourages to draw up a concept of Constitution able to maintain consolidated categories, but also useful to position them in the great ongoing transformation); that the completion of such a process is possible (and thus that it is not fundamentally prevented by impeding factors, such as the “absence of an European *demos*”); that it is desirable (the controversy on European “technocracy”, based on a very specific and restricted concept of democracy, is well known); that, in compliance with the true essence of constitutionalism, this process must consist in a stronger limitation of power and in a broader protection of rights.

In relation to all these points, there are ideologically-characterized positions and fears within individual States, while powerful counter-actions are prepared.

In this transition, which has emerged with indeterminate results (the very idea of Europe has been jeopardized by a persisting economic crisis with partly unprecedented characteristics), there are other sources of complexity: the reaction to the lack of achievement of an European constitutional Charter; the effort to provide deflationary State policies with a constitutional ground (in addition to treaties), exerting an unprecedented pressure on social rights; in connection with this, constitutional precedents such as the German, dissonant with the “European Constitutional logic” and fitting the “Treaty logic”.

A further source of complexity concerns the possibility for the EU to join the European Convention of Human Rights, although it is a source of a positive complexity, such as the one that arises from the now possible construction of a “constitutional” problem, which lies before the political community as well as the lawyers’ community in Europe.

## II. STAGNATION OF THE CONSTITUENT PROCESS AND CRISIS OF WELFARE SYSTEMS

It would be an unwise abstraction not to consider that the efforts to create the “Constitutional Treaty”, and their failure, have been accompanied by a crisis of welfare systems, and have been followed by a broader economic crisis characterized by distortions in financial markets. We must take this into account to understand why, after the referenda in France and in the Netherlands, it has been necessary to rule out “recovery” attempts in the forms provided by Declaration n. 30, attached to the Constitutional Treaty<sup>2</sup>: the possibilities offered by such a provision were immediately

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<sup>2</sup> Treaty establishing a Constitution for Europe, Rome, 29 October 2004, Final Act, Declarations concerning provisions of the Constitution, 30: “The Conference notes that if, two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and

jeopardized by the “freezing” of ratification processes in various States, starting from the United Kingdom (and without even getting to the point of considering the issue of the effectiveness of a Declaration attached to a not yet ratified Treaty). Similarly, the proposal to build a “two-speed Europe”<sup>3</sup>, on the grounds of arts. 43 and 44 of the Union Treaty<sup>4</sup>, failed to get a foothold. When put to the test, the institutional tools prepared to face the difficulties of the ratification phase, which were predictable also on the grounds of the experience concerning the setbacks in the integration process, proved to be inadequate in the face of the tension – already detectable in the past, but now heightened by the economic contingency and the coincidental “enlargement” of the Union – between levels and methods of protection of “civil” rights (or rights “corresponding to duties of justice”) and “social” rights (or rights “corresponding to duties of material aid”)<sup>5</sup>. Social rights – for well-established and ancient historical and cultural reasons, rooted in the deepest strata of the Western legal experience<sup>6</sup> – are rights defined “by proximity” (within the family, the community, the State), and, in the Nation-State experience, they are understood in relation to the guarantees established for them by boundaries, in the “protective”<sup>7</sup> function that is ensured by boundaries. Civil rights, on

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one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council”.

<sup>3</sup> A position repeatedly expressed by HABERMAS, J. (2005) *La creazione di un'identità europea è necessaria e possibile?*, in *L'Occidente diviso*, Roma-Bari, pp. 53ff., and, with reference to the following lack of ratification of the Constitutional Treaty, *Habermas: «Gli Stati-nazione rimangono protagonisti ma devono cambiare la loro immagine di sé»*, interview by N. Vallinoto, in *Il Corriere della Sera*, 25 marzo 2007, where criticism is expressed towards “a model of Europe as a convoy whose pace is established by the slowest vehicle” (“modello di Europa quale convoglio il cui incedere è determinato dal mezzo tra tutti più lento”).

<sup>4</sup> See arts. 43 and 44 of the Treaty on the European Union as modified by the Treaty of Nice, 26 February 2001, art. 1, nn. 11, 12 e 13.

<sup>5</sup> Referring to the terms used by NUSSBAUM, M.C. (2000) *Duties of Justice, Duties of Material Aid. Cicero's Problematic Legacy*, in *Journal of Political Philosophy*, 8, pp. 176ff., trad. it. *Giustizia e aiuto materiale*, Bologna, 2008, may shield our analysis from the constraints of the controversial distinction between civil and social rights, assuming a meaning of the two poles of such a conceptual couple which suggests its persistent usefulness.

<sup>6</sup> NUSSBAUM (2000) –examining the issue firstly from the point of view of duties, looking for a theory of duties of material aid aimed at the “fair exchange among nations”– observes the construction of the asymmetry between duties of justice and duties of material aid, in a complete form, already in Cicero's *De Officiis*, and highlights the persistent influence of this work in the entire “Western philosophical and political tradition”, up to contemporary justice theories, also through “Kant's analysis on cosmopolitan duties” (with respect to “Kant's debt to Cicero”, cf., by NUSSBAUM, M.C. (1977) *Kant and Stoic Cosmopolitanism*, in Bohmann, J. (ed.) *Perpetual Peace*, Cambridge, pp. 25ff.). The approach suggested by M.C. Nussbaum recalls an important cultural factor of strong resistance to the European integration process. This approach is here considered outside the well-known debate on cosmopolitanism and globalization processes; about these topics, see the useful reconstruction of CAMERLENGO, Q. (2007) *Contributo a una teoria del diritto costituzionale cosmopolitico*, Milano.

<sup>7</sup> Some studies on welfare systems – State-centered studies clearly owing to Rokkan's theories – support an interpretation of Europeanization (and globalization) processes in the light of the concept of “boundaries”. They identify a hard to diffuse tension between the “sharing of social rights”, built on «closure» mechanisms – assuming the existence of a clearly demarcated and cohesive community, whose

the other hand, can be extended, universalized, without renouncing national cohesion within boundaries, because States can negotiate their guarantees, also by establishing supranational jurisdictional bodies.

Therefore, the hypothesis is the following: the universalization of civil rights may continue in a treaty logic; the universalization of social rights cannot be carried out outside of a complete European constitutional order, in a welfare system that is uniform and highly centralized (from an European point of view), where boundaries, in their protective function against the erosive power of asymmetries and diseconomies deriving from the new globalization, are instead those of Europe (and the extension of such boundaries, the modalities of their formation and the relation of the new order with the very concept of Nation-State would present in new and unexplored ways the issue of material justice in the light of the distribution of global wealth and of a new equality paradigm, as a transnational principle). Moreover, because the standards of protection of social rights in individual States are challenged by the integration process, the latter is especially hindered by the issue of social rights. Before this issue, the expansive and constructive force of European constitutional case-law (so far for the most part virtuously and effectively carried out by supranational courts and constitutional judges of individual Countries, also thanks to the stimulus provided by ordinary tribunals, in a coherent network) is destined to fade out.

This is the fundamental reason why the establishment of the principle of indivisibility of rights – at a time where its inclusion in the Constitutional Treaty through the Charter of Nice, and the subsequent recognition in Lisbon that the Charter and the principle established therein have the same value of the Treaty<sup>8</sup>, was being

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members feel that they belong to the same whole and that they are linked by reciprocity ties vis-à-vis common risks and similar needs – on the one hand, and European integration, which is instead based on “opening... on weakening or tearing apart those spatial demarcations and closure practices that Nation States have built to protect themselves” (FERRERA, M. (2005) *The Boundaries of Welfare*, Oxford, p. 2). From this point of view, in the European integration process the “spatial architecture of social citizenship, that is, the territorial reach of solidarity, the identity of its constituent communities, and, last but not least, the ultimate source of legitimate authority for the creation and the enforcement of rights” is at stake (FERRERA (2005) p. 51). This is a difficult process, from a cultural as well as a political point of view, if it is true that one can still support the idea of “a human right to boundaries, and to boundaries protecting men from each other as well as allowing them to freely and securely carry out a self-determined life” (KERSTING, W. (1998) *Einleitung*, in KERSTING, W. and CHWASZCZA, C. *Politische Philosophie der internationalen Beziehungen*, Frankfurt, p. 62).

<sup>8</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 December 2007, art. 6, §1: “The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”.

considered – can be seen as a “spectacular”<sup>9</sup> innovation. Such a principle, by linking the two spheres of social and civil rights (historically more than conceptually separated) programmatically raises the issue of the universalization of social rights, and thus of the very possibility of an European Constitution.

### III. THE ISSUE OF SOCIAL RIGHTS

The issue of the universalization of social rights and its tension with the integration process, if used as a reference point while considering the path from the Treaty to the Constitution, highlight some questionable stances which have confronted each other in the analysis of the European phenomenon.

On the one hand, they undermine negationist theories, which expect to apply the post-revolutionary, analytical paradigm of modernity to current transformations, and to constrict constitutionalism in the political representation circuit, assuming that this will lead from the *demos* to parliaments. Moreover, such theories experience constitutional jurisdictions – especially supranational – as inappropriate deviations. Consequently, they consider Europe as a land where animalistic, dominant and uncontrolled market forces are unleashed, with law inevitably subjugated to them. Such is the thesis of “democracy in one country”, of “national paths to constitutionalism”. However, the problem of fundamental rights and of their jurisdictional protection also against the malfunctioning of the representation circuit, by containing the concentration of power deriving from the affirmation of democracy by appointment and from the domination of national executive powers, reveals that its weakness lies in the theoretical categories adopted.

On the other hand, the abovementioned issues undermine the voluntarist rhetoric whereby every setback in the integration process is a cultural disagreement, a regional delay, a strategic deficiency with narrow scope. By refuting these assumptions, they pose once again the issue of the Union’s “foundation”, because the asymmetry in the universalization process reduces the prospect of a whole European order whose essence would consist in the “indivisible” guarantee of rights. The most typical feature of the European constitutionalization process, indeed, consists in its resistance to one of the most enduring paradigms of the history of legal thought, which grounds the concepts of Nation-State and of State sovereignty and, in connection with this, the concept of citizenship as belonging-subjection: the paradigm whereby, in its most organic and structured formulation, every political entity stems from the appropriation of a land, from which every order moves along, a *radical title* from which all other relations, of

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<sup>9</sup> ZILLER, J. (2003) *La nuova Costituzione europea*, Bologna, p. 17, and PINELLI, C. (2003) *La Carta dei diritti, la cittadinanza, la vita democratica dell’Unione*, in Bassanini, F. and Tiberi, G. (eds.) *Una Costituzione per l’Europa*, Bologna, p. 37.

possession and of ownership, public and private, and every social and international right<sup>10</sup>, are derived. Moreover, it is through conflict, always “rather tumultuously”<sup>11</sup>, that land occupation is achieved.

The progressive formation of the European constitutional order deviates from this model, from the “archetype of a constitutive legal process”<sup>12</sup>, due to its peculiar traits: “non-discontinuity” in its relations with States, because the formation of the European order takes place according to law, and not through ruptures consisting in absolute, self-legitimated and sovereign acts<sup>13</sup>; independence in its grounds from a *demos* identified through cohesion factors referring to a primordial, original and eternal ground, raised to a “national conscience” into which blood, soil and cultural ties merge<sup>14</sup>; grounds which lie instead in the common constitutional traditions and in the deriving judicial production of law.

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<sup>10</sup> “In some form, the constitutive process of a land-appropriation is found at the beginning of the history of every settled people, every commonwealth, every empire... Not only logically, but also historically, land-appropriation precedes the order that follows from it. It constitutes the original spatial order, the source of all further concrete order and all further law...All further property relations –communal or individual, public or private property, and all forms of possession and use in society and international law– are derived from this radical title”: SCHMITT, C. *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Köln, 1950 and then Berlin, 1974, English translation (from the 1974 edition) *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, New York, 2003, p. 48. The “resistance” and the diffusion of this approach in the conceptions of Nation-State is not undermined by the –instead very controversial– idea that Carl Schmitt develops from it in relation to the identification of the *nòmos* in the “legal order” rather than in the “norm”, in contrast with what he defines as “the presumption of an exclusive prevalence of a Keynesian “abstract normativism” (see SCHMITT, C. (1934) *Ueber die drei Arten des Rechtswissenschaftlichen Denkens*, Hamburg, trad. it. *I tre tipi di pensiero giuridico*, in Miglio, G. and Schiera, P. (eds.) (1979) *Le categorie del “politico”*, Bologna, pp. 247ff. note 3); he declares to share this idea with Santi Romano (in his book *L’ordinamento Giuridico*, p. 260), even if he considers the “terminological and conceptual component of “legal order” as not any more belonging to “the useful combined terms, because it can be used to hide the difference between a thought based on rules and a thug based on the legal order” (SCHMITT (1934) p. 251). In fact, the concept of “birth of a nation” with the establishment of a boundary is, to a certain extent, independent from constructions “based on an actual order” or “institutional” or, in an extreme sense, “decisionists”: and this degree of independence supports its persuasive strength.

<sup>11</sup> SCHMITT (1950) p. 46 “... at times, the right to land arose from overflowing migrations of peoples and campaigns of conquest and, at other times, from successful defense of a country against foreigners”.

<sup>12</sup> SCHMITT (1950) p. 47.

<sup>13</sup> See FIORAVANTI, M. (2005) *Il Trattato costituzionale europeo: una nuova tappa del processo costituente in Europa*, in Vacca, G. (ed.) *Dalla Convenzione alla Costituzione. Rapporto 2005 della Fondazione Istituto Gramsci sull’integrazione europea*, Bari, p. 108; and, on the “impossible *tabula rasa*”, ZILLER (2003) *La nuova Costituzione europea*.

<sup>14</sup> The contrast between “people’s nation” (*Volksnation*) and “citizens’ nation” –with the latter distancing itself from the historical experience of the Nation-State– can be found in HABERMAS, J. (1998) *Una costituzione per l’Europa? Commento a Dieter Grimm*, in *L’inclusione dell’altro*, Milano, p. 171.

The “grounds”, therefore, lie in judicially-sanctioned legitimacy: the law produced by judges derives from the people – from European people – because judicial bodies can be considered as democratically legitimized; indirect legitimacy, mediated by law and by the subjection of judges to it, irrespective of the modalities of their formation. Judicial law-making builds the basis of the constitutional guarantee of rights, in which citizens identify themselves thanks to the strong links with constitutional traditions common to the European context. Legitimacy acts as a limitation to power, *vis-à-vis* politically representative authorities, but the essence of constitutionalism lies precisely in limitations of power, in the form in which it occurs.

And yet, this is a form of “progressive” legitimacy: it is not possible to maintain that a judicially-built European Constitution, with courts in charge of its protection, has been established. Judicial law-making is the propelling force pushing towards the Constitution; but the final result cannot be reached without a fundamental political decision able to solve the issue of the asymmetry between civil and social rights and of their different possibilities of universalization, which cannot be faced with judicial techniques – no matter how refined by experience. This issue cannot be judicially solved because it involves the characters of the Welfare State in Europe, posing the problem of a new paradigm of equality on which to build a framework of constitutional rules inspired by a vision of economic relations according to a principle of justice (justice in relations among individuals and among different parts of the world). And, according to these principles, it is necessary to build an organization of public powers at European level, severing the subordination ties with States. It is thus a matter of creating constitutional parameters through political decisions, binding and guiding judges, who cannot move beyond the current *acquis communautaire* on the sole basis of their creative power; without this, the European Constitution risks to lose ground every time States experience economic turmoil.

If, programmatically, this working hypothesis is accepted on a methodological level (imposing a tight and permanent integration between the historical and the “positive” legal approach), it would be possible to consider in a less ideological light the experience of social rights in Europe and of the whole integration process itself, seen as a to-be-completed constituent process.

#### IV. CONCEPTS OF MARKET AND SOCIAL RIGHTS

It is well known that a considerable part of scholars has often adopted a dissenting stance, strongly critical of Europe’s “founding fathers”, building the *tòpos* of the “social frigidity”<sup>15</sup> of the constitutive Treaty.

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<sup>15</sup> This expression was coined by MANCINI, G. F. (1988) *Principi fondamentali di diritto del lavoro nell’ordinamento della Comunità europea*, in the Conference Proceedings on *Il lavoro nel diritto comunitario e l’ordinamento italiano*, held in Parma, 30 and 31 October 1985, Padova, p. 33. Widely

Actually – if one rejects the theory of the “duplicity” of the “founding fathers”, as creators of welfare systems in their respective countries but at the same time uninterested in the guarantee of social rights in Europe, considering this as an “historical mystery”<sup>16</sup> – it is necessary to recognize the original idea and aim: to build an European, open market, leaving the “social sovereignty” of States in *its own national boundaries*, where welfare systems were being built, and where social rights constituted the object of post-war Constitutions which, in different forms, had guaranteed them by creating compendiums where they were established as principles. The opening and the integration of markets – in the expectations of the framers of the European order – would promote and imply the progressive harmonization of social systems towards the highest levels of guarantee<sup>17</sup>. The idea of a market based on perfect competition as a direct and autonomous regulator of social order was unknown to the “founding fathers”. The “fixed social fund dogma”<sup>18</sup>, whereby it is possible to assume that salaries and occupational levels depend exclusively on the competition on the labour market and on the dynamics of the economic cycle, and through which the ideology of the self-regulating force of the market is established, was unknown to the cultural references which inspired them. The market is instead embedded<sup>19</sup> – structured, built – in social and legal conditions and rules which make it possible<sup>20</sup>. And these rules are not generated by the market; nor can the market organize itself<sup>21</sup>.

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recalled and accepted, it was re-used by its creator in different times, although against a different historical background and notwithstanding divergent analytical and reconstructive contributions. It is also possible to find it in MANCINI, G. F. (1995) *Regole giuridiche e relazioni sindacali nell'Unione Europea*, in AA.VV., *Protocollo sociale di Maastricht: realtà e prospettive*, Roma, e in MANCINI, G. F. (2004) *L'incidenza del diritto comunitario sul diritto del lavoro degli Stati membri*, in *Democrazia e costituzionalismo nell'Unione europea*, Bologna, pp. 259ff.

<sup>16</sup> ALLEGRETTI, U. (2004) *I diritti sociali*, in *I diritti fondamentali e le Corti in Europa*, Seminario Luiss (Libera Università Internazionale degli Studi Sociali), 21 maggio, *paper*.

<sup>17</sup> In opposition to the “social frigidity” *tòpos*, a “strong «social empathy» of the founding fathers” was thus observed, notwithstanding the “«misery» of the provisions” of the Treaty of Rome: GIUBBONI, S. (2003) *Diritti sociali e mercato. La dimensione sociale dell'integrazione europea*, Bologna, pp. 44ff.

<sup>18</sup> For a critical stance on such a “dogma”, see MINGIONE, E. (1997) *Sociologia della vita economica*, Roma, spec. pp. 84ff.

<sup>19</sup> On this concept, the fundamental reference is POLANYI, K. *The Great Transformation: The Political and Economic Originins of Our Time*, Farrar & Rinehart, New York, 1944 and Beacon Press, Boston, 2001, trad. ital. *La grande trasformazione. Le origini economiche e politiche della nostra epoca*, Torino, 1974.

<sup>20</sup> The “founding fathers”, actually, worked in the context of a complex set of relations in the economy and in the legal order which, contrary to the “economic nationalism” of the 1930s, has been defined as “embedded liberalism” by RUGGIE, J. G. (1982) *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, in *International Organization*, vol. 36, n. 2, *passim* and 393. And they were well aware of their time.

<sup>21</sup> Gathering some elements from the analysis of the events “in the half century between 1879 and 1929”, Polanyi highlights the “destructive tensions” deriving from the self-regulatory claims of the market, observing that as soon as the mechanism of the self-regulating market was started, its impact on society was so violent that almost instantly and without any previous change of opinion, powerful protective reactions were set in motion. He observes: “...Social history in the nineteenth century was thus the result

The idea of a market as the result of a series of atomized relations, of a market based on the postulation of perfect competition, which generates “allocative efficiency and maximization of the general well-being”, working “without any prolonged social and human contact between two or more parts”, where “there is no place for bargaining, negotiation, complaints and reciprocal settlements” and where “the various operators bargaining with each other do not need to enter in recurring and continuous relationships after which they would get to know each other well”<sup>22</sup>, such a market does not exist, or at least it does not exist in its assumed purity, and is mostly an ideological abstraction<sup>23</sup>.

It is not, however, the market which the “founding fathers” had in mind. Nor did they believe social contexts and legal rules to be the by-product of the market (which tends to be, instead, the neo-classical approach): such a view, in case its divisive potential had been overlooked, would have prevented from understanding phenomena such as the regional diversities of productive systems and social exclusion, from preparing appropriate counter-policies, which are instead a characteristic of the European order in its most developed stage, and the establishment of “fourth generation” rights in the Charter of Nice and subsequently in the Treaty of Lisbon. It would have prevented the understanding of dynamics and characters typical of welfare systems (as it prevents today the understanding of the features of the new globalization, ad of its influence in the European space): and instead, precisely as “welfare creators”, the “founding fathers” had it very clear that the market is a construction, not a “natural”

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of a double movement: the extension of the market organization in respect to genuine commodities was accompanied by its restriction in respect to fictitious ones. While on the one hand markets spread all over the face of the globe and the amount of goods involved grew to unbelievable proportions, on the other hand a network of measures and policies was integrated into powerful institutions designed to check the action of the market relative to labour, land, and money. While the organization of world commodity markets, world capital markets, and world currency markets under the aegis of the gold standard gave an unparalleled momentum to the mechanism of markets, a deep-seated movement sprang into being to resist the pernicious effects of a market-controlled economy. Society protected itself against the perils inherent in a self-regulating market system--this was the one comprehensive feature in the history of the age” (POLANYI, K. (1944) chapter 6).The risk for society inherent to the utopian principle of a self-regulated market is therefore a historical evidence (POLANYI (1944)).

<sup>22</sup> HIRSCHMAN, A. O. (1987) *L'economia politica come scienza morale e sociale*, Napoli, p. 87.

<sup>23</sup> The “«deviations»” from the ideal competition model are “frequent and important”, and nonetheless “economists who are favourable to the market...have frequently...minimized these deviations from the ideal competition model, in an effort to present the reality of an imperfect competition as very close to the ideal one. By doing so, they have made an effort to provide the market system with *economic* legitimacy. But, at the same time, they have sacrificed the *sociological* legitimacy which could have been rightly asked due to the way in which, differently than the perfect competition model, most markets work in the real world. Only recently economists developed a certain number of approaches which no longer consider the deviations from the competition model as sinful or unimportant ...” HIRSCHMAN (1987) [translation mine].

phenomenon, and a construction founded on largely legal rules, and whose development is shaped by legal rules<sup>24</sup>.

The logic of a legal construction of the market<sup>25</sup> – adopted by the “founding fathers” – actually constitutes the ground for the legal technique and the content of the Treaties in their original form.

If the goal is to regulate the markets, so as to guarantee the full autonomy of Member States in the discipline of working conditions and in the definition of social protection systems<sup>26</sup>, the same principle of competition, which is nonetheless a cornerstone of the order prepared for Europe, must be limited whenever it can result in forms of social dumping, that is, when it forces States with higher levels of social protection and wages to downward chases of States where these standards are lower: such is the framework of the CECA Treaty<sup>27</sup>.

Moreover, in the Treaty of Rome, policies aimed at supporting the living standards of rural populations were pursued through market control as well as the limitation of competition; in the meantime, in the field of social security, measures of

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<sup>24</sup> Economic liberalism, understood as self-regulation of the market, is historically incapable of hindering forces pushing towards the dissolution of social orders, even when its ideological power is at its fullest, because “the protection of men, of nature and of the productive order” always means “an interference in the labour market and in that of the land” as well as in the money market, damaging “ipso facto... the self-regulation of the system”: it is possible to say that this issue, that Polanyi attributes to the time between the end of the XIX century and the Great Depression of 1929, is recurrent in the observation of the economic phenomenon (POLANYI (1944) P. 275).

<sup>25</sup> The “founding fathers” idea, where the consciousness of the necessary character of markets and the inescapable need to face its “shortcomings” and “failures” are reconciled, is extremely relevant even today, in a historical period where the “intellectual rejection of the market mechanism”, which led to “radical proposals”, has been followed by a “dramatic” change of climate and “the tables are now turned. The virtues of the market mechanism are now assumed to be so pervasive that qualifications seem unimportant. Any pointer to the defects of the market mechanism appears to be, in the present mood, strangely old-fashioned and contrary to contemporary culture ... One set of prejudices has given way to another – opposite – set of preconceptions. Yesterday’s unexamined faith has become today’s heresy, and yesterday’s heresy is not the new superstition”: Sen, A. (1999) *Development as Freedom*, Oxford University Press, Oxford, p. 111.

<sup>26</sup> The “founding fathers” stance is, therefore, very distant from the “distortion argument”, whereby “social protection is different from other expenses financed by taxes because not only it costs money, but it also distorts some key economic decisions”, so that “the welfare state is not only too expensive, but it is also the cause of Europe’s economic malaise”. Such a position “is in some cases developed by arguing that any interference with a market economy distorts decisions; imposes non-zero marginal tax rates; forces us to abandon an homogeneous, common playing field”. A position that “presents a problem”: “it assumes a world of perfectly competitive and balanced markets, a theoretical framework where the issues causing the very existence of the welfare state are absent”: ATKINSON, A. B. (2005) *La politica sociale dell’Unione Europea nel contesto della globalizzazione*, in *Studi economici*, special issue, 26 [translation mine].

<sup>27</sup> See GIUBBONI (2003) p. 49.

forced harmonization, which could have led to downward chases according to the economic cycle, were ruled out. In sum, a regulation aimed at correcting the spontaneous dynamics of the market in the fields where social costs would be too burdensome was being pursued, while these dynamics were left undisturbed whenever they were thought to support a desirable harmonization. From this perspective, social policies, already on the grounds of art. 51 of the Treaty, were kept on the national level; and differences were accepted and assumed, and coordinated only as far as it was necessary in a context where the guarantee of freedom of movement for workers and freedom of establishment were being pursued<sup>28</sup>.

Hence, the “founding fathers” were not affected by any kind of social indifference, nor did they aim to support and protect the “natural” market dynamics; if anything, they harboured the utopia of a natural, upwards harmonization of welfare systems in accordance with the European context. A virtuous utopia, because it introduces a mitigating factor of inequality, supporting the overcoming of imbalances and diseconomies, in the European integration process. An utopia nonetheless, because the deterministic faith in the certain achievement of the expected aims thanks to the implementation of a “first static engine”, able to start an infallible mechanism, is illusory. Such a natural upward harmonization of social systems, indeed, does not occur in the concrete historical process: it is, rather, a conflicting result, achieved in stops and starts, and exposed to throwbacks. Experience suggests that the biggest obstacle to the achievement of that original objective is the difficulty of regulation due to the inefficiency of decision-making processes inspired to the logic of the Treaties (unanimous decisions according to the modules of the intergovernmental method). It is, in sum, a matter of constitutionalization deficit, not considered by the “founding fathers”, which distances the integration process from the historical premises that they had envisaged.

The events surrounding the Treaty confirm this tendency to the oscillation towards solutions eroding both the national paths to welfare systems and those policies aimed at favouring the expansion of social protection mechanism, in the absence of a codification of European constitutional principles which individual States and the Community’s decisional bodies would have to comply with.

With Maastricht, from the point of view of the threshold imposed to public deficit and to inflation rates and with the resulting significant limitation of independent macroeconomic national policies, the “flexibility” of social protection systems is established as a value, as an expression of “modernity”, *vis-à-vis* the old, bad habit of deficit spending in individual States. Thus, the “Maastricht spirit” still lingers in Europe, surviving the modifications to the Treaty. It does so in the inflexibility of the “Stability Pact” as a tool of constraint and control on economic and financial choices.

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<sup>28</sup> GIUBBONI (2003) pp. 69ff.

And it is reinforced by the implementation of the “mutual recognition”<sup>29</sup> model, where a glimpse of the self-regulating market is observable<sup>30</sup> together with the tendency to the erosion of national guarantees offered by national welfare systems.

In this context, the resistance of boundaries in their protective function is at issue, with the principle of the application to workers of the law of their country of destination, with the ruling out, from a legal point of view, of the principle of exportability for social assistance benefits or for non-contributory benefits in general, with the national control on many social citizenship benefits. This is a limit to deregulation, to the freedom of action of the market. However, it is a weak limitation if its function is to guarantee the current levels of social protection in individual States, precisely because in individual States the direct public provision of services takes a step back: the producing State gives way to the regulating State.

Only when the “logic of the Treaty” is weakened, giving way to the “logic of the Constitution”, the tendency to deregulation is efficiently moderated as well: the affirmation of the majority vote and the creation of EU-level rules in the social field lead to a level of protection which is superior than those of the most advanced national systems<sup>31</sup>. When this occurs, boundary recede; not any more by leaving full scope for social dumping, but rather by allowing for higher levels of guarantee, pursuant to the key principle of the indivisibility between civil and social rights.

Therefore, these two forces on the European scene – on the one hand the self-regulation of the market, pushing on the standards of guarantee of social rights within national boundaries incapable of preventing, in the logic of the Treaty, phases of significant erosion, and on the other hand the setting up of an European system of guarantee of those very rights, in the logic of the Constitution – are in perpetual tension, and their mutual affirmation and retreat, also under the influence of the economic cycle, are mostly dependent on the future of the European Constitution.

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<sup>29</sup> The “mutual recognition” principle, whereby any legally produced and commercialized good must be allowed to access the market of the other member States, is rooted in the Court of Justice case-law, and was extended from the sphere of the free movement of goods to that of the free movement of services and persons by the *White Paper from the Commission to the European Council on Completing the Internal Market*, 1985, spec., §58. By virtue of the White Paper, it is the market, in the competition between systems, to establish the most convenient level of regulation, curbing public interferences.

<sup>30</sup> See LO FARO, A. (1999) *Funzioni e finzioni della contrattazione collettiva comunitaria. La contrattazione collettiva come risorsa dell'ordinamento giuridico comunitario*, Milano, pp. 65ff., who theorizes mutual recognition as a “radical *alternative*, and not a mere technical variation of the harmonization strategy” and as a “potential drift towards deregulation”, when not “equally employed as a general criterion for the establishment and functioning of the single market” [translation mine].

<sup>31</sup> GIUBBONI (2003) p. 106.

Moreover, at the present time the spirit of Maastricht has resumed lingering in a significant way, supported by the claim to include the “budget balance” obligation in national Constitutions (quite explicitly expressing the will to impose a vision of economic relations based on development models of individual States where growth is mostly fuelled by exports, generating national closure and, where party systems are weaker and more vulnerable, plebiscitary regressions).

In Italy, such an obligation has been carried out through an extensive and pervasive reform of the Constitution, which has affected not only art. 81 – which now establishes the principle of the “balance between income and expenditures” of the State budget, “in consideration of the negative and positive phases of the economic cycle”, allowing debt only “in exceptional circumstances” – but also art. 97 and art. 199, in order to extend the same principle to all public administrations and local governments, as well as art. 117, in order to make the “harmonization of public budgets” an exclusive competence of the State.

Any doubts on the conforming force of these innovations would be dispersed by the observation of art. 5 of the constitutional law n. 1 of 20 April 2012, which, by modifying art. 81, has established the content of the new type of law which can authorize debt (a law adopted by the Parliament “by an absolute majority for each Chamber”: art. 81, paragraph 2) and has affirmed that “exceptional circumstances” under which this can be justified are “serious economic recessions”, “financial crisis” and “natural disasters”. Moreover, the “new type” of law n. 243 of 24 December 2012 (“Provisions for the implementation of the budget balance principle pursuant to art. 81, paragraph 6, of the Constitution”) further restricts the mentioned exceptional circumstances by specifying them, where it establishes that these consist in “times of serious economic recessions also concerning the euro area or the entire European Union” or in “exceptional events, beyond State control, including serious financial crises and serious natural disasters, with relevant repercussions on the general financial situation of the country” (art. 6, paragraph 2). Moreover, paragraph 3 of article 6 establishes that the resulting “temporary deviations of the structural balance from the planned objective”<sup>32</sup> must be determined “after consultation with the European Commission”, on the grounds of a report updating the planned objectives in the field of public finance, clarifying “the nature and the duration of the deviation” and establishing “the goals towards which available resources must be channelled”, as well as defining the “re-orientation plan towards the planned objective, making its duration proportional to the seriousness of the events”.

Such a rigour is explained by the tendency of the Italian system to strictly conform to the obligations imposed by the European Union. The Europlus Pact of 11 March 2011 (not binding from a strictly legal point of view, but considered as a

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<sup>32</sup> Translation mine.

commitment because it was signed by Heads of State and Prime Ministers in the euro area, thus affecting their international credibility) already established an obligation to insert in Constitutions or national laws the rules of the Stability and Growth Pact (individual States were allowed to freely choose the form as far as the discussed rules were binding both at national and at sub-national level).

Then, Directive 2011/85/EU established an obligation to adopt rules concerning the formulation of budgets and monitoring mechanisms, aimed at ensuring the correction of excessive deficits of States in the euro zone.

With law n. 114 of 23 July 2012, Italy ratified the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (fiscal compact), that entered into force on 1 January 2013. It is this Treaty that establishes the duty to introduce in individual States, preferably through constitutional laws, the obligation to maintain balanced budgets or budget surpluses, controlling structural deficit, in accordance with the specific mid-term objective for each State of a yearly improvement of the corrected budget balance for the cycle amounting to more than 0,5% of the GNP, when the national debt is over 60%. Deviations from the mid-term objective are allowed only temporarily, in exceptional circumstances, in case of unusual events that the involved State cannot control and that could cause significant repercussions on the financial situation of the public administration, or in times of serious recession. In any case, however, the deficit must not undermine the sustainability of the mid-term budget. State parties are bound to initiate automatic correction mechanisms in case of significant deviations from the reference value in the relation between the national debt and the GNP, and are obliged to implement corrective measures within a specific deadline.

Against this background - which defines the context and clarifies the rationale of the mentioned reforms to the Italian Constitution – it is possible to notice not only the will to prevent deficit spending policies in all cases, but also the unrelatedness, even more than the explicit aversion, to Keynesian economic cultures, together with an inspiration towards theories which claimed to provide pernicious relations between debt and GNP above a certain threshold with an “irrefutable scientific basis” (only to then observe that some theoretical conclusions are not at all inevitable and even that certain analytical results were based on trivial material mistakes during the use of computer programmes<sup>33</sup>).

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<sup>33</sup> This is very well epitomized by the case of the analytical hypotheses and the theoretical assumptions of Carmen Reinhart and Kenneth Rogoff, Harvard economists, according to whom when the debt is higher than 90% of the GNP, economic growth becomes too low (REINHART, C. and ROGOFF, K. (2010) *Growth in a Time of Debt*, working paper 15639, Cambridge, <http://www.nber.org/papers/w15639>). This theory has met wide consensus, and was considered also in a political context as “the economists’ view”: an irrefutable statement, a starting point to define any serious economic policy. However, these assumptions

The Spanish constitutional framework is very close to the Italian: the reform of art. 135 of the Constitution of 27 September 2011 established the obligation for all public administrations to conform to the budget stability principle (*estabilidad presupuestaria*) and the prohibition for the State and the Autonomous Communities to incur in a structural deficit above the threshold established by the European Union.

France, whose law of constitutional reform n. 2008-724 of 23 July 2008 had inserted the “budget balance in public administrations” objective in art. 34 of the Constitution, did not deem appropriate to update the Constitution, even after the ratification of the fiscal compact Treaty, and rather chose the tool of an organic law to regulate the determination of mid-term objectives of the budget of public administrations and of the yearly structural and effective balance, the corrective mechanisms in case of deviation of public finances from the programmed objectives, and the institution of a monitoring body (*Haut Conseil des finances publiques*).

With different degrees of resistance, individual countries have conformed with the strict approach adopted in Germany, putting to the test the structural characters of their economic and welfare models.

## **V. SOVEREIGNTY, PROTECTIVE FUNCTION OF BOUNDARIES, EUROPEAN CONSTITUENT PROCESS**

Moving beyond boundaries and thus beyond State sovereignty – potentially not compromising the levels of protection of social rights with rejection effects that could jeopardize the very perspective of European integration – is, then, implied in the European constitutionalization process.

This is partly due to the conflicting events surrounding the conventional legal sources. It is however mostly imputable to the Court of Justice work, which impacts on

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are far from generally accepted in the scientific world. Equally authoritative and convincing theories identify (using the same data submitted by Reinhart and Rogoff) some negative relation between high debt and economic performance, but not a 90% threshold over which a significant relation between debt and low growth would be identifiable. In some cases – observable and actually observed – this relation is actually inverse: in 1990, Japan collapsed in a serious condition of debt only after the plunge of its growth. Moreover, other economists have questioned the completeness of the data used to maintain such hypothesis as well as the use of an unusual and questionable statistical procedure. Furthermore, an encoding mistake has been found in the use of Excel (see KRUGMAN, P. 2013) *The Excel depression*, in *International Herald Tribune*, 20-21, p. 7). In sum, unfortunately certain circumstances generate beliefs ascribable to scientism which, due to their conformity with contingently dominant ideological positions, are used as a basis for economic policies destined to generate economic depression (and to erode the systems of protection of social rights).

the very nature of the Treaties, transmitting them characters of constitutionalization<sup>34</sup>, in a dynamic phase and in part independently of the not always consistent results achieved in the political context and of their alternating successes and failures. It is the judicial formation of constitutional law that questions the exclusive and protective function of national boundaries; and it is against it that the strongest objections arise.

However, in this general context – with a previously unseen magnitude, considering that it involves the very concept of law creation and undermines the distinction between civil law and common law systems – the issue of social rights remains a pitfall.

Among supranational courts, indeed, approaches effectively protecting the freedoms of circulation are being established, but the techniques used to balance with social rights – even if they appear possible and have become habitual after Amsterdam (and the *Albany* judgment) – are affected by a fundamental limitation: the guarantee of social rights is still indirect, because it is established as long as the protection of social *interests* is involved by the pursuit of social *objectives* assumed as priorities within the European Union (thus, social rights can hardly be considered as subjective positions that can be directly justiciable). In this feature, an overturned perspective has been observed in comparison with national Constitution models, especially with the Italian<sup>35</sup>, whereby the centrality of the protection of the individual actually arises from the guarantee of social rights, and to that protection the action of public powers is subordinated in its pursuit of social objectives. However, the Italian constitutional model of guarantee of social rights precisely acts within its national boundaries; in comparison, the European model is reversed, because it stops before national boundaries. A change of perspective could only occur if a common statute of fundamental rights were established at European level, as a constitutional principle able to impose compliance by creating a correspondence between social rights and “material aid” duties.

This central and unavoidable issue persists, also (and perhaps especially) when considered in the light of *governance* models, based on “promotional law”, in which there is the expectation to move beyond the limitation of the harmonization of the national social legislation.

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<sup>34</sup> An outcome deemed “revolutionary”, although “quiet”, by WEILER, J. H. H. 1994) *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, in *Comparative Political Studies*, pp. 510ff.

<sup>35</sup> In this sense, while commenting on art. 136 of the Treaty after Amsterdam, see LUCIANI, M. 2000) *Diritti sociali e integrazione europea*, in *Politica del diritto*, n. 3, especially p. 379, where it is observed that “in the constitutional model, social rights are understood as the premise and the aim of public powers... The constitutional protection is, in any case, directly aimed at rights while the social interests is only indirectly achieved, thanks to the fulfilment of the former” [translation mine]. In the context of the Community, on the other hand, social interests “presented as objectives” are directly protected by the Treaty, whereas “rights remain in the background and the possibility for their fulfilment is connected to the need to realize social objectives”, resuming their “*Reflexrechte* status” [translation mine].

We could consider the case of the Open Method of Coordination (OMC)<sup>36</sup>. The Method is based on the idea of a soft law realized in mediated political decisions, with shared objectives, made “reasonable” by “technical” indicators (ultimately, the control on such a “reasonableness” could be carried out by the Court of Justice<sup>37</sup>). Aside from the fears that the OMC may erode the social *acquis communautaire*, “based on hard rules and in any case considered, despite its fragility, socially healthy”<sup>38</sup>, it is not completely clear what kind of relationship should exist between the OMC (“promotional”) rules and those of protection of fundamental rights: the latter should be understood as an “*a priori* ... reference framework influencing the very structure” of the OMC, or as a “corrective ... *a posteriori*” of the OMC<sup>39</sup>. Such a distinction would be quite relevant with respect to justiciability in cases of infringement of subjective positions implied by policies in individual States, if the OMC were explicitly mentioned by the Treaty as a regulatory model to be respected by Community and national authorities: the decisions of the former, aimed at the differentiation of interventions according to the peculiarities of each national order, would put the provisions of the Treaty closer to the decisions of individual States, using the Treaty as an integrated normative standard. However, if that were the case, the OMC could be hardly related to the soft law framework; rather, it could function as a guideline principle, so as to offer a wide spectrum of interpretative possibilities, but it would not be possible to reduce it to a mere orientation criterion, entrusted to voluntary implementation mechanisms and sustained by merely political incentives. On the other hand, if that were not the case, namely if the OMC brought its object outside the scope of regulation, it would be incompatible with the need to protect fundamental civil and social rights; such rights, by their nature, must find – and do find in European constitutional traditions – a foundation and a guarantee in rules imposing themselves at the highest level of the legal order. Therefore, the OMC could offer, in judicial contexts, elements of comparison in the logic process of interpretation. Alternatively, its indications could be translated into hard law, so that the OMC would be nothing more than an orderly way of acquisition of factual elements used to ground a legislative decision, but outside of (and before) the strict legal path which leads to such a decision.

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<sup>36</sup> This expression can be found in the proceedings of the Lisbon European Council of 2000; the Amsterdam Treaty defines the OMC as a tool of cooperation among States in the field of social policies.

<sup>37</sup> Furthermore, it is possible to note that – in the complex reconstructive polymorphism observable with respect to the OMC – the “indeterminate” and “flexible” character of the rules has been considered as a way to take “the concrete definition of rights [away] from the courts”, whereas according to the results of the legal analysis of judicial systems it is exactly the “disappearance of the strict distinction between creation and implementation” that leads to the judicial formation of law: for the counterintuitive conclusion, see BARBERA, M. (2006) *Introduzione. I problemi teorici e pratici posti dal Metodo di coordinamento aperto delle politiche sociali*, in Barbera, M. (ed.) *Nuove forme di regolazione: il Metodo aperto di coordinamento delle politiche sociali*, Milano, p. 23 [translation mine].

<sup>38</sup> CARUSO, B. *Il diritto del lavoro tra hard law e soft law: nuove funzioni e nuove tecniche normative*, in *Nuove forme di regolazione*, p. 91.

<sup>39</sup> The alternative is problematically submitted by LO FARO (1999) pp. 354ff.

To date, in any case, the OMC does not appear to be crucial.

Even considering it as potentially productive of good results, the OMC does not lend itself to generalizations because it applies in the field of social policy; whereas in other areas – where controversies are harsher, as in the case of the right to work – the focus is on flexicurity, namely on a Community action based on the orientations of the Council pursuant to art. 128 TEC.

The OMC, therefore, being legally weak by inclination if not by definition because it is not supported by a significant system of sanctions, can only temporarily be strong from a political point of view, thanks to the strength deriving from the contingent times, from temporary balances, while waiting for structurally solid solutions. This is particularly true in the recessionary economic stage persisting in many countries of the Union and whose nature and possible future developments appear to be unknown: cyclic crisis or renovation and transformation of markets? A crisis that States tend to face (or to be forced to face, urged by the disarticulation of party systems and by the risk of populist detours) within their own boundaries, because the price that governments must pay when they plan to support common strategies at an European level is extremely high (for that matter, also the currently strongest States, which now call for the highest strictness of their counterparts, could temporarily in the past set aside the monetary constraints established in Maastricht.

The issue of the judicial creation of European law thus remains in existence.

With respect to this issue, the criticism against the function of the Court of Justice, on the assumption that the Court establishes and balances values and principles by substituting for a democratic political body, appears to be misleading: this is a very ideological point of view, and because of that it does not consider the concrete features of the ongoing constitutional process: it is inspired by a “sovereignist” conception whereby solidarity among citizens of a constitutional State would be possible only “in the traditional form of people’s cohesion as cemented in the national conscience”<sup>40</sup>.

Actually, in this unforeseen constituent process the Court of Justice has assumed the features of a body of constitutional jurisdiction: it tends to create the supreme judicial parameter by extracting it from constitutional traditions, it implements balancing techniques, it redefines processes (see for instance the cases of restriction of

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<sup>40</sup> This was the critical summary of the “pseudo-sovereign” view by J. HABERMAS, *Soltanto un sogno può salvare l’Europa*, in *La Repubblica*, 9 giugno 2005[translation mine]: that was the difficult decade of the “stagnation” of the European constituent process, following the failed attempt to create the “Constitutional Treaty”; the decade which preceded the current awful period of “constitutional recession” (and of economic recession).

the decisional scope of the referring judge, as in the *Wiking* case); it determines in sum its own position in the system.

The vicissitudes of social rights are a clear demonstration; however, they also prove the impossibility to accept “minimalist” views, which tend to minimize the importance of a constitutional “writing” (and thus to deem as negligible the elimination in the Treaty of Lisbon of the “symbols of constitutionality”). Such views are openly inspired by ordinary practical wisdom: it is believed that the Court of Justice will continue in any case its work of judicial shaping of rights, free from interferences of allegedly “constitutional” texts, with their flawed content and uncertain drafting. These views constitute the most intense leap of faith in the Treaty form and the highest distrust in the constituent process: where there is a Treaty, there must not be a written Constitution, which would be detrimental because the Treaty-supranational judge combination is sufficient to control the excessive role of States and to guarantee rights and freedoms.

The “scandalous” social rights shine a light on the illusory character of these constructions.

With written constitutional principles, the Court of Justice – in due time – would be forced to retreat before boundaries, would be crushed by the indeterminacies of the constituent process and would find itself in the fire of a conflict among national positions.

In the field of social rights, in fact, it is time to make fundamental choices on the *content* of the European Constitution, because the balancing techniques in the normative system as defined by the reconstruction of common traditions and by Treaties are inadequate in front of the great ongoing changes.

This is occurring starting from the “third globalization” – the current one – characterized by previously unknown asymmetries and externalities, in a context of abysmal inequalities (the new “failures of the market”). Before them, it will be difficult for Europe as a whole to remain within its boundaries. The crucial topic of this time, indeed, concerns migration; and in the field of rights – including social rights – it concerns *universalization*. The matter of the porous character of boundaries overlaps with the matter of its outward shift: with the enlargement towards Eastern countries, Europe is facing a new source of complexity, which forces it to *internal* diversification. Therefore, the issues are the following: what are the limits to diversification, and according to which justiciable constitutional parameter? Is this parameter to be found in common constitutional traditions?

As outlined above, the principle of indivisibility was considered as a “spectacular” innovation when, through its incorporation in the Charter of Nice, it was thought to be introduced in the Constitutional Treaty, because social rights were

believed to find an appropriate protection even outside of national boundaries, moving beyond the assumed distance in Europe between the degree of protection recognized to them and the guarantee of economic freedoms.

However, if we concretely observe individual national systems, we must consider the privatization processes in the field of essential public services, traditionally managed by public companies or by companies with significant public participation, under the assumption of a potential influence of business decisions on fundamental rights. Today States, which no longer manage them directly, intervene in these sectors in a regulatory way, creating rules of different hierarchy levels and considering the protection of the very negative freedoms (and precisely by doing so they define new limitations, because these freedoms imply the possibility of a direct activation of guarantees, without the need for normative policies). As far as social rights are concerned, these processes are potentially able to weaken their protection, because the State loses the status of *provider* of those services, necessarily becoming the *regulator* of private management. Therefore, it can no longer directly guarantee protection standards, and it can only indirectly pursue their conservation or expansion (in more and more difficult conditions: the general tendency is towards restriction): incentive policies, transfer of resources towards weak sectors. And thus the guarantee of social rights becomes indirect beyond what is necessary pursuant to their nature.

Therefore, in a multi-level framework, the protective function of the boundary re-emerges in constitutional case-law, shielded by national sovereignty.

From the point of view of European Union law, an expression of this phenomenon is the *Bundesverfassungsgericht* judgment on the Lisbon Treaty of 30 June 2009.

In Italy, when it was necessary to define the relationship between the law deriving from the European Convention of Human Rights and the national law, since the European Court decisions, undermining the results of the balance between the right to property and the social right to work, maintained the “inviolable” character of the former, the Italian Constitutional Court applied the “interposing parameter” model: ECHR rules derive from the provisions of the Convention as they are interpreted by the Strasbourg Court, and as such they cannot be called into question; however, since the foundation of their creation in the national system lies in art. 117, paragraph 1 of the Constitution, those provisions are substantiated in constitutional judgments concerning ordinary national laws. By doing so, the unmediated intrusion in the national system of supranational law, resulting from the interpretation of the Strasbourg Court, has been prevented, averting the direct disapplication by ordinary judges of laws believed to be unconstitutional. This is how the resurgence of the protective function of national sovereignty, as it appears in the political area of legislative production, occurred, and this is how a national constitutional judge has re-established its exclusive function of

control, restating that it is not “identifiable, with specific reference to conventional rules ... any limitation of national sovereignty” (see judgments of 22 October 2007, n. 348 and n. 349; 16 November 2009, n. 311; 30 November 2009, n. 317; 7 June 2011, n. 181); thus, no concessions to a stronger position of the Strasbourg Court.

## **VI. END OF NATIONAL SOVEREIGNTY AND TRIUMPH OF UNIVERSAL DEMOCRACY?**

The path and the destiny of national sovereignty – in the name of which the great tragedies of European and world history have unfolded, but which, in the developments of modern time, has also characterized the progressive establishment of the guarantee of fundamental rights on the grounds of Constitutions of the post-World War II era – are now open to new and previously unseen developments.

Sovereignty, subjected to an advanced process of erosion, has not disappeared. Nor is it possible to believe that it is destined to do so, at a time when the perspective of new orders, of a new paradigm of the concept of State, of new variations of the issue of equality, is still unclear.

The history of social rights in Europe epitomizes the complexity of this turn. State sovereignty is still perceived as a guarantee of protection systems: for this reason it disappears and it re-emerges among the stormy waves of the European constituent process. It re-emerges supported by populism and by regressive tendencies, especially in some less consolidated democracies.

A harsh confrontation among general conceptions of economy, and among development models, is occurring: a continuation of wars (luckily) through other means, one could say.

The condition for avoiding that the extinction, or the radical transformation, of State sovereignty result into the cancellation of the democratic principle rests in the creation of an European Constitution, grounded on the guarantee of civil and social rights; in economic policies not oriented according to regional closures; in a political government of Europe.

It is not at all certain that this will be achieved, because history, just like markets, is not determined by an invisible and inescapable hand. But this is one of the possible solutions that the current crisis is offering.