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**Is Constitutionalism on the wane? Moving from P. Dobner, M. Loughlin (eds), *The Twilight of Constitutionalism*, Oxford University Press, 2010 towards an updated bibliography.**

di FRANCESCO BILANCIA

IS CONSTITUTIONALISM ON THE WANE?  
MOVING FROM P. DOBNER, M. LOUGHLIN (EDS),  
*THE TWILIGHT OF CONSTITUTIONALISM*,  
OXFORD UNIVERSITY PRESS, 2010  
TOWARDS AN UPDATED BIBLIOGRAPHY

by *Francesco Bilancia*

By bringing constitutional thought beyond the present crisis which national constitutions are experiencing the topics and questions raised in this collected edition, as summarised in the *Introduction* by PETRA DOBNER and MARTIN LOUGHLIN, remain of the outmost importance despite the book being published 6 years ago. By crisis we mean both the loss of effectiveness of States' law (and power, as facts and processes affecting governments at national and international level) and new methodological approaches to law, economics, politics, and so on. Since this book have been published, many other important works have come out, both in Italian and English, such as G. TEUBNER, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford, 2012; J.L. COHEN, *Globalization and Sovereignty. Rethinking Legality, Legitimacy and Constitutionalism*, Cambridge, 2012; G. PALOMBELLA, *E' possibile una legalità globale? Il Rule of law e la governance del mondo*, Bologna, 2012; H. LINDHAL, *Fault Lines of Globalization. Legal Order and the Politics of A-Legality*, Oxford, 2013; G. AZZARITI, *Il costituzionalismo moderno può sopravvivere?*, Roma-Bari, 2013; A. O'DONOGHUE, *Constitutionalism in global constitutionalization*, Cambridge, 2014; AA., VV., *Costituzionalismo e globalizzazione*, in Associazione Italiana dei Costituzionalisti, *Annuario 2012*, Napoli, 2014<sup>1</sup>.

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<sup>1</sup> See, also, M.R. FERRARESE, *Le istituzioni della globalizzazione*, Bologna, 2000; F. BILANCIA, *La crisi dell'ordinamento giuridico dello Stato rappresentativo*, Padova, 2000; A. BALDASSARRE, *Globalizzazione contro democrazia*, Roma-Bari, 2002; G.W. ANDERSON, *Constitutional Rights after Globalization*, Oxford and Portland, 2005. I am really grateful to Stefano Civitarese for having indicated many of these works to me.

The thread of all these researches is the role of constitutionalism beyond the State, an issue which requires us to handle constitutional notions out of their «natural environment» by adopting unconventional methods. In other words the challenge is to compare with each other either institutions, legal systems and legal acts or concepts such as law, legal order, jurisprudence, Constitution which have different contextual meanings. For example, when we think of state's law (no matter if in a common law or a civil law system); European Union law; international law or global law, by using the same word we do not understand the same concept of law. At the same time by evoking such expressions as Constitution, constitutional law; constitutionalisation of European law or of international law while seeking out a European Constitution or complaining about a loss of effectiveness of State constitutions we do not refer to the same concept of Constitution and constitutional law.

On the other hand, taking into account traditional topics of State constitutional law to study EU law, international law or global administrative law, may help not to lose what constitutionalism theory has historically achieved. In a nutshell its legacy consists in giving legal form – by setting limits – in the end making it liable – to any authoritative decision-making process within and beyond the State.

The bibliography at hand should prompt an even deeper discussion in the near future, in light of the so called question of the constitutionalisation of the European Union, that is to say the matter of the European Constitution in time of European constitutional crisis.

The important transformations of institutional and political systems in Europe and abroad put in question meaning and use of concepts (such as law, democracy and the rule of law) born within the constitutional framework of the State – and more and more used to analyse institutional contests outside the State. Apologizing for not being able to intervene on the other important issues analysed in the book, as privatisation of power<sup>2</sup>, or the even more central question of the so-called

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<sup>2</sup> F. ORREGO VICUÑA, *International Dispute Settlement in an Evolving Global Society. Constitutionalization, Accessibility, Privatization*, Cambridge, 2001.

*Global Administrative Law*<sup>34</sup>, ..... ? *Something's missing*.

First, about this kind of nominal matters, one should declare – settling a conventional agreement – in which sense he or she uses a specific terminology. When one wants to export legal concepts out of their proper system (ie notions elaborated within constitutional theory out of State legal orders) he or she should, in other words, specify in which sense he or she employs this or that legal term in a given context. This is especially important in using the word «Constitution».

By moving from a simple descriptive meaning of the Constitution we might find a Constitution everywhere, even – of course – in the Cromwell's Instrument of Government or in the Nazi's legal order (in a concrete and positivist sense). So I must premise that I will use the term Constitution in a prescriptive sense, building on art. 16<sup>th</sup> of the French Declaration of Man and Citizen of 1789. A normative concept of State Constitution<sup>5</sup>.

So we could assume the question sketched above as the principal topic set out in this bibliography: provided that constitutionalism is a political theory which aims at setting legal limits to political power, how can it still play a role beyond the State? In this sense I understand Loughlin's words when he writes «Constitutionalisation is the term used for the attempt to subject the exercise of all types of public power» (but I would say of power *tout court*)...«to the discipline of constitutional procedures and norms»<sup>6</sup>.

We need to bear in mind that the question of what we should mean by «constitutional norms» in a context beyond the States is still open, but I am quickly approaching it. We have the same problem with the

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<sup>3</sup> P. CRAIG, *UK, EU and Global administrative Law. Foundations and Challenges*, Cambridge University Press, 2015; S. CASSESE (ED.), *Research Handbook on Global Administrative Law*, Elgar, Cheltenham, 2016.

<sup>4</sup> See, also, a huge, relevant bibliography at [www.iilj.org/gal](http://www.iilj.org/gal), and [www.irpa.eu](http://www.irpa.eu), and [www.iilj.org/GAL/default.asp](http://www.iilj.org/GAL/default.asp).

<sup>5</sup> I refer here to the essays of DIETER GRIMM AND ULRICH PREUSS, in P. DOBNER, M. LOUGHLIN, *The Twilight of Constitutionalism?*, quotations on pp. 3, ff. and 23 ff.

<sup>6</sup> *What is Constitutionalisation?*, in P. DOBNER, M. LOUGHLIN, *The Twilight*, 47. ID. 55, «Constitutionalism is a theory of limited government...These norms not only impose limits on the exercise of public power but also on the procedures through which such power should be exercised. Its key principles are independence of the judiciary, separation of governmental powers, respect for individual rights...».

assumption: «the Constitution is now perceived as providing the basis for the legitimacy of legality»<sup>7</sup>. This works in a State context but what about the European or international legal systems?

Many authors keep on distinguishing the two traditional interpretations of constitutionalism (McIlwain would say ancient and modern constitutionalism):

- a) as a system of rules limiting governmental power and subject to the judicial review of a constitutional court (Constitution as ground for the rule of law and as the higher law); or
- b) as a system of rules founded on the will of the people.

Three more matters should then be dealt with as related to the main question: 1) constitutional contents; 2) the question of legitimacy of law; 3) the relationship between democracy and the rule of law as a synthesis of points 1) and 2). I will expose here my conclusions first. I will try, then, to make a comparison between State constitutionalism and the so-called «European constitutional law» just working on an example.

*1. Constitutional contents.* I will not discuss another important topic dealt with in this bibliography: the role of nation building of the national Constitution and the lack of a nation, a people or a proper political identity both at European and international level. In a very narrow sense, Constitution has been intended as «a submission of politics to law»<sup>8</sup>, no matter which content this law should have and who are the authors of it. The most important role of the Constitution is, instead, the legitimacy of legal power, law-making power, built on the rights of citizens to participate in the exercise of this power as addressees of binding laws. Participation, of course, through the Parliament. The first individual right is, in fact, the right to Parliament. So we must agree on this: a political act can be assumed as a Constitution in a contemporary sense if it claims – with a way of effectiveness – to issue primary legislation by means open to the participation of the same ad-

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<sup>7</sup> M. LOUGHLIN, *What is Constitutionalisation?*, 50.

<sup>8</sup> D. GRIMM, *The Achievement of Constitutionalism and its Prospects in a Changed World*, in P. DOBNER, M. LOUGHLIN, *The Twilight*, 5.

dressees of these normative acts. In doing so, a Constitution is a higher law *vis-a-vis* statutory law which underpins the legitimacy of the latter and thereby gives shape to the rule of law<sup>9</sup>. Public institutions, ie legislative and governmental powers, are consequently built as instruments at the service of the people and subject themselves to the legal system. In this sense a democratic system must be grounded on the Constitution: as premise and result of a system of constitutional commitments for legal institutions themselves. I wouldn't say that consensus of people is not necessary to set the Constitution, but the former could even come after its foundation if the Constitution *lays down* a democratic legal system<sup>10</sup>. Of course, across the centuries, democratic Constitutions have been usually written down by peoples within their own State organization (country). But the concept of people itself must be intended as a plurality of individuals, never as a whole, say, the Nation. When State sovereignty was changed into people sovereignty, not only sovereignty shifted from a subject to another, but it hugely changed its character. From State to people, indeed, sovereignty moved from a concentrated power to a system of individual fundamental rights. Power has been broken in millions of parts, exactly from a single power to the amount of individual rights<sup>11</sup>.

2. *The question of legitimacy.* Every system and every foundation of legitimacy of normative power (of constitutional power as well) considered in a given historical moment depends on a political principle and on its effectiveness<sup>12</sup>. Such a political principle that governs the legal system creates the foundation of that system. During the his-

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<sup>9</sup> On this I do not agree with M. KUMM, *The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia*, in P. DOBNER, M. LOUGHLIN, *The Twilight*, 5, 211 f., when he says: «Democratic statism is an account of constitutional authority that *does not say anything* about the content of constitutional norms».

<sup>10</sup> And this is my criticism to Kumm's article. If what I am telling here is correct, if it is historically true that a Constitution could have more than one legitimate foundation, I guess it should be much more a question of effectiveness of legitimacy foundation of the Constitution or its function of civilization of legal system: democracy better than violence, for example.

<sup>11</sup> On this G. FERRARA, *La Costituzione. Dal pensiero politico, alla norma giuridica*, Roma, 2006.

<sup>12</sup> G. FERRARA, *La Costituzione*, again.

tory of the State that principle was the will of the sovereign in the absolute monarchy; the will of God in the theocratic state; the will of the bourgeois parliament in (the) liberal state; and the interests of people in contemporary democracy<sup>13</sup>. So in different contexts, Constitution and law can find and have actually found their ground on institutional pluralism, common law, in their own representative character, and so on. If today State constitutions are losing their effectiveness, if they «can no longer secure that any public power taking effect within the State finds its source with the people and is democratically legitimised by the people»<sup>14</sup>, this is just a question of fact. It means that State constitutions as traditional instrument of constitutionalism are on the wane. I claim though that State Constitutions are on the wane, not constitutionalism as a legal theory and as an ideology.

3. *Democracy and the Rule of Law*. I share with many other constitutional scholars the opinion that democracy and the rule of law have to be effective together to enact the values of constitutionalism. Democracy without constitutionalism means, in contemporary politics, legitimate power without legal limits, which could lead to a totalitarian system. It would allow governments with great consensus to eliminate any protection of individual rights; to refuse division of powers and judicial review. As a judicial guarantee of the Constitution the Constitutional Court could act as a counter-majoritarian institution, ruling on government legal powers. But founding the legal system only on the consent of the people, even a Constitutional Court could be attacked as an enemy of democracy! Democratic legal government itself needs to be protected through legal limits, through the rule of law (even the people is subject to constitutional limits, as for instance proclaimed in art. 1 of Italian Constitution). At the same time the rule of law is not enough to enact a Constitution as capable of copying with the contemporary legal culture. Of course a legal order subject to the rule of law is in a better condition to achieve constitutional values than anybody else without a legal framework, decision-making boundaries,

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<sup>13</sup> The main problem today being, how to translate interests of people into the contents of legal norms.

<sup>14</sup> D. GRIMM, *The Achievement*, 16.

judicial review and separation of powers. But a legal order not rooted on a democratic system has not a constitutional foundation in the sense mentioned above. That is why in my view constitutionalisation of European and global systems have to deal with both a positivisation (legal settlement) of the rule of law and a democratisation of those systems. Of course the first condition is much easier than the second to achieve, at least in the EU. But some elements of the latter should be introduced both at the European and global level to allow us to keep on speaking seriously about the Constitution<sup>15</sup>. As I mentioned before, individuals – I could say citizens – must succeed in participating in public decisions affecting their own needs, rights and destiny, if not directly or through their representatives, at least through their State institutions. As we cannot even imagine a constitutional legal system without an effective protection of individual rights, we should also agree on this other assumption: civil liberties conceived as constitutional rights are firstly rights to political participation<sup>16</sup>. Rights to participate, albeit not directly, in any public decision which brings about a binding obligation on the same individuals. This means that the contents of political decisions must deal with individual needs in a way which takes into account that what it has been handling are their corresponding constitutional rights.

It seems to me that the conclusion set forth by Loughlin's reconsideration of the theory of constitutionalism beyond the State at an international level could be summarised in these words: «Constitutionalisation is the process of extending the main tenets of liberal-legal constitutionalism to all forms of governmental action»<sup>17</sup>. He talks about «a purely normativist claim»<sup>18</sup>.

But let us concentrate now on the European level, regarding which I would subscribe the conclusion that European present constitutional-

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<sup>15</sup> A deep analysis through scientific debate on these issues is now dealt by P. CRAIG in his important book *UK, EU and Global Administrative Law. Foundations and Challenges*, already quoted above, especially in the *Introduction* and in *Chapters 5 and 6*, 566 ff., 671 ff. See, particularly, 623 ff., 635 ff., 654 ff., 674 ff.

<sup>16</sup> See, again P. CRAIG, 674 ff., about the so-called «democratic question» within GAL.

<sup>17</sup> P. 61.

<sup>18</sup> P. 65.



ism can only leads us to «a form of liberal-legal constitutionalism allied primarily to market freedom...undermining the social rights established in member states»<sup>19</sup>.

Also in the liberal State of the nineteenth century, in fact, the essential meaning of law as a political system was not the one presupposed by the contemporary theories of democracy: the will or needs of the people. This is particularly true for Germany, where the supremacy of the law was derived from its attribution to the State, to the sovereign body (the will), and to the supreme institutions. Conversely, the law of contemporary legal culture is assumed to be the voice of political representation, as an expression of the general will. Probably such an idea can be considered an illusion, but it represents the political principle upon which the modern concept of democracy has been founded.

As an example, in the draft Treaty Establishing a Constitution for Europe (the Treaty signed in Rome in 2004) it was proposed for the first time to modify the name of the EU acts of legislation. Regulations would have been called European law while directives European framework-law. That name, «European law», which has been cancelled from the Lisbon Treaty after the French and Dutch referendum in 2005, clarifies what the role of this legislative act had to be or should be in an actual constitutional system. We cannot use the same word «law» at European level pretending to share the same concept as State law within States' constitutional systems. The EU system, in fact, is still not founded on the principle of the separation of powers. There is no theory of legal sources in EU law, and no attention is given to the formal and substantial characteristics of legislative acts. We do not have appropriate legal terms to understand the following questions: why should legal acts have a specific procedure (typical formal requirements) and the provisions thereby issued a specific formal content (general, abstract, normative, driven by the interests of the people)? Why should they be identified by such formal characters? Why should we look at the subject (the body) that adopts a legislative act to classify this act?

Furthermore, European law does not recognize autonomous legiti-

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<sup>19</sup> M. LOUGHLIN, p. 66; F.W. SCHARPF, *Legitimacy in the Multi-level European Polity*, in P. DOBNER, M. LOUGHLIN, *The Twilight*, 89 ff.

mation for political action as such. In national systems, each government is free to decide its own policy within the framework of constitutional rules (UEM rules and *Fiscal compact* apart, of course). Is it the case for the EU? The structure of EU Treaties produces the neutralization of any political motion (action). The institutional aims of the European system, in fact, are all described in the provisions concerning the market economy, competition, and EU policies<sup>20</sup>. Out of the legally established competences, there is no room for political autonomy. It is States that, in building the system of Treaties, have already set all the targets of the EU.

We should also consider that EU system is strongly influenced by case-law of the Court of Justice, which is implemented in States legal systems as compulsory European law. On the question of the protection of human (fundamental) rights this order is constitutionally implemented more by Courts than by primary legislation of the Parliament and Council<sup>21</sup>. The Court of Justice case-law represents the historical, legal and political foundations of the Charter of Fundamental Rights itself. But this case-law is still not able to create a new European «common law» as traditionally meant, because European law is not «common» at all, as it is not based on equality among citizens (there are no peers), although it is «common» for every subject within the EU system, in which individuals and big corporations are considered as «equal»<sup>22</sup>. And where law proceeds from a specific, predetermined, political program, which is well-known and gives rise to a compound system of interests.

As a methodological question, we should move on to compare state constitutional concepts with the same topics at the European level. However we should not confuse terms and words as if they could have the same meaning as unfortunately some scholars are used to do and the book edited by Petra Dobner and Martin Loughlin suggests to avoid: the European Court of Justice is not the Constitutional Court of the EU; Treaties are not the European Constitution<sup>23</sup>; EU decision-

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<sup>20</sup> W. SCHARPF, *Legitimacy*, *passim*, and 104.

<sup>21</sup> Dealing with GAL, see again P. CRAIG, esp. 592 ff., 680 ff., where he speaks of «judicial foundations of global administrative law» and «legitimation of it through Courts».

<sup>22</sup> See, on this, SCHARPF criticisms, *Legitimacy*, 100 ff., 110 ff., 117 ff.

<sup>23</sup> So says, if I don't misunderstand his thought, M. KUMM, 218 f.

making is not statutes; the European Parliament is not with yet an actual representative political body; EU is not yet a federal State. Otherwise there would be no difference between State and European constitutionalism. I would define this approach as «nominal constitutionalism».

We should, instead, use the constitutional approach as a means to analyse the European system, by way of comparing it with the legal tradition of the State to make out analogies and differences and measure what are the consequences on the effectiveness of constitutional theory.

To make an example, generally scholars propose a parallel analysis between the legislative procedure of the EU, which involves the Commission, the Council, and the European Parliament, and the one of a given member State. Such a comparison, even though useful, is not simple. In the EU there is no trace of the division of powers between legislative institutions and governmental institutions. The analysis should be conducted by separating interests of the European Union (defined by the Treaties but decided by the States), interests of each single government, needs of the citizens, interests of the firms and corporations, and so on. But one cannot make such a calculation in order to allocate all these interests to different institutions, as it occurs in national constitutional systems. In other words, I believe that it is not easy to imagine for the EU the same institutional balance that has characterized the mixed English government for several centuries. I am referring to the historical balance among interests of different social classes in the trilateral relations between the English Crown, Lords, and Commons. Moreover, an important point for me is that legislative acts of the EU are not like primary legislation of the States. They do not represent fundamental political choices of the system. Such choices are already written in the Treaties. European acts of legislation are mere acts of execution of such choices — my point stems from this very fact. If we think about how the mixed English government was created, how parliamentary regime came about in that system (since the first signs written in the *Magna Charta* of 1215), and how some institutions have evolved (such as the Privy Council, first, and the Cabinet at a later stage), we can learn an important lesson in order to evaluate the role played by panels as political institutions. The power of the panel was established in opposition to the monocratic power of the King. English constitutionalism teaches us that diffusion

(separation) of power is to be obtained through the political panel. Panel means pluralism in the selection process, as well as synthesis of interests to be represented in decision-making (Ferrara).

In England, as regards such interests, barons were considered first, then interests of commons, and finally interests of the populace. Conversely, what is the representative role played by the Council of Ministers — the highest political authority of the EU? Is it also a panel created to diffuse the power into pluralism? No, it is not. Rather, it represents EU governments, their own policies, and the various interests separated by nationality.

Indeed, we face the opposite case: the Council of Ministers is a panel created to concentrate power and to separate political responsibility of each of its members from the control of the citizens of each member State (Ferrara, again). Citizen interests are not anymore the constituency of State politics, which has become European politics, better States politics itself presented through European institutions.

The panel, through the mutual legitimacy of its members, breaks the link between such members and their own responsibilities toward citizens. Each decision made «in Europe» is then «imposed» on Member States.

Yet, the deficit of representation in European institutions will remain the same. In abstract terms, any representative body, to be actually representative, must reproduce the same structure as the represented people<sup>24</sup>. Therefore, the Parliament of a complex society should represent the latter as a whole in all its plurality. In other words, Parliament should reproduce the organic structure of the source of its own legitimacy.

In conclusion we could accept that the building of a constitutional theory beyond the State is at stake as a cultural matter and that a sort of legal order does in fact exist both at the European and international level at least as a formal and procedural question. Yet to imbue such legal orders with deeper constitutional values a long way forward is still necessary.

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<sup>24</sup> Here, I cannot go through the important questions and criticisms analysed by D.J. GALLIGAN, *The People, the Constitution, and the Idea of Representation*, in D.J. GALLIGAN, E. VERSTEEG (EDS), *The Social and Political Foundations of Constitutions*, Cambridge, 2013.

However, we can note a paradox in the EU legal system, that the Court of Justice is the only authority enjoying political initiative, and in the past it was strongly determined to use all its power, well beyond the contents of the treaties and sometimes against the will of the States. The Court of Justice has been almost the only institution which tried to sustain the system on political grounds, except for States within the European Council, of course. So the Court might do it again in the near future, as many scholars try to foresee, using principles within European treaties *magis ut valeant*, to deduce as much constitutional values as possible from them. This is what constitutionalism as a political theory still demands. For now it is a cultural dispute but it could become a political issue determining States to change their politics, as members of European institutions and as privileged holder of political initiative charged to plan the future of European Union as well<sup>25</sup>.

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<sup>25</sup> «The EU does not decide upon its own legal foundation», as GRIMM says, *The Achievement of Constitutionalism*, 17.



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