Comparative Law Review Vol.11/1

Special Issue

For a minimal Vocabulary of Interculturality: a legal comparative perspective

ISSN:2983 - 8993

COMPARATIVE LAW REVIEW
The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.

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Comparative Law Review is registered at the Courthouse of Monza (Italy) - Nr. 1988 - May, 10th 2010.

COMPARATIVE
LAW
REVIEW
SPECIAL ISSUE - VOL. 11 /1
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WHO INTEGRATES WHOM, IN WHAT AND, ABOVE ALL, WHY? A CRITICAL REFLECTION ON THE PARADIGM OF MULTICULTURALITY AND ON THE EPISTEMOLOGIC FOUNDATIONS OF LEGAL COMPARISON*

Ciro Sbailò

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The paradigm of inclusion dominates the contemporary legal lexicon. A fundamental role in this sense is played by legal comparison, divided between relativism and neo-natural law. At the basis of the inclusivist positions there is the idea of a neutral public space that logically precedes political will. This is a self-contradictory thought. The root of public space, according to the Western Tradition, lies in a voluntary act. For this reason, the restoration of a Foundation of Public Space is impossible today, as well as a Foundation of a new Natural-Law: we are living is the age of reticular positivism. So, we have to discover the political role of the Jurist in Western Civilization. The case of citizenship.

I. INTEGRATION / INCLUSION

Inclusion and integration are two key concepts of the contemporary legal debate, marked by the confrontation with the problems of multi-ethnic society, in particular as regards the management of multicultural issues.

There is some confusion in the doctrine. It seems that integration and inclusion are values *in themselves*, regardless of who the subjects and recipients of inclusion are, respectively, what scope the inclusion (or integration) needs to develop and finally, what are the reasons for including (or integrating). It can be hypothesized that the inclusion must be promoted and managed by the agents of social dynamics, that is, first of all politicians, but then also social organizations and jurists. As for the recipients, our thoughts turn to the minorities mentioned above. Finally, the complement of place of integrating or including should consist in Western society as broadly understood, and then, depending on the case, with reference to individual countries or to Europe. If so, then it would be necessary to explain how far the process of inclusion or integration can go without missing the place complement of integration and, with this, the agents that operate in it. Let's take an extreme example: the linguistic community A implements an inclusive policy towards the linguistic

minority B. Now, if inclusion goes so far as to completely replace the language of A with that of B, we are no longer faced with an inclusive process, but to a metamorphosis. This is to say that the massive and uncritical use of the category of inclusion generates confusion in the public space and can provoke violent reactions of identity defense on the part of people.

The comparative jurists play a fundamental role in this regard. Part of the comparative doctrine, in fact, believes that the legal strategies of inclusion (or integration) must also be accompanied by a change in the taxonomic logic, which would be too euro-centric, not very inclusive and not open to the so-called "other legal cultures". All this, of course, has repercussions on legislative activity and administrative decisions, where, when it comes to issues relating to cultures or social groups in some way considered minority (meaning outsiders with respect to cultures or traditionally dominant groups within a public space), the adoption of the inclusive paradigm seems almost mandatory, and intellectuals, opinion leaders and exponents of the entertainment world are also fighting for it.

Now, it is possible that inclusion and integration are indeed absolute values and that comparative doctrine, both in terms of theoretical elaboration and in support of the political decision-maker, does well to promote them. It is possible, but instead it is taken for granted. Since, in an ever complex and sometimes chaotic world, the world looks more and more to jurists, to orient and understand, it is good not to take anything for granted, much less concepts and theories that do not enjoy the undisputed and indiscriminate favor of the population: the risk that the massive and indiscriminate use of the inclusivist paradigm provokes violent defensive reactions of an identity sign, with consequent delegitimization of the same social role of the jurists, is anything but theoretical, as the news shows.

Let's start, therefore, by clarifying the two terms.

The two concepts are only partially overlapping.

Both must be distinguished from assimilation. The latter indicates the dissolution of cultural differences, which entails the total objective adherence of the individual to the system of values and to the rules of society. We are talking about objective adhesion, as it does not necessarily correspond to the awareness or will of the individual: adhesion is presupposed by the social system (of which, in this sense, the legal system must be considered as a subset) and therefore becomes the parameter for the evaluation of its conduct. This is the so-called French republican model, which involved, for example, the banning of the Islamic veil from public places.

The concepts of integration and inclusion, on the other hand, refer to a process of mutual adaptation between society and the individual. In the case of integration, this process develops against the background of an essential but in any case, predetermined axiological and juridical horizon. In the case of inclusion, the horizon itself comes into play in the relationship between the individual and society.

Integration is to be understood as a political process, which governs the adhesion of people to a specific community, through administrative choices and legislative operations aimed at minimizing the points of friction of individuals with respect to the dominant values and the legal system, in view of a mutual adaptation that also involves a renewal of the social pact.

Conversely, inclusion has an eminently juridical structure: it consists in the neutralization of the identity traits of the legal system, in such a way as to make any form of discrimination impossible. To include means to welcome, in the name of a social pact to be built dynamically, relying on inter-individual dynamics, considered as fundamental to the public space.

Exemplifying, using the masters of contemporary thought, we can identify three basic positions: Schmitt and Rawls, in mutual opposition, and Habermas, in an intermediate position.

All the aforementioned authors move within the state-national horizon, albeit in the awareness of the progressive darkening of the latter.

Schmitt's position is marked by a miraculous vision of public space, deriving from an anthropological pessimism of clear biblical origin.[1] Public space arises from a self-founded political will, which responds – in a Hobbesian way – to the need to stem the effects of the original sin, starting with violence. In this sense, public space always has a strongly identity connotation, which primarily affects the legal sphere.

People, self-organizing as a nation, can guarantee equal rights to all. Even to minorities: subjective and human rights, however, not political privileges.

The greatest form of rationalization of public space, in this sense, is found in the Westphalian model, applied in Europe after the Thirty Years' War. The model is based on

* The paper has been selected and reviewed by the Scientific Committee of the Conference "Costruendo un vocabolario minimo dell'interculturalità con approccio interdisciplinare", held on May 19, 2021 via Zoom platform, within the research activities of the PRIN 2017 "From Legal Pluralism to theIntercultural State. Personal Law, Exceptions to General Rules and Imperative Limits in the EuropeanLegalSpace" (PI–prof. Lucio Pegoraro–CUP J34I19004200001).

[1] This aspect of Schmitt's thinking is addressed in C. Sbailò, *Weimar, un laboratorio per il costituzionalismo europeo. Scienza giuridica e crisi dei valori occidentali*, 267 ff., 339 ff. (2007).

rigid conceptual couples, such as "inside" and "outside" or "before" and "after": these are the space-time coordinates of the concept of jurisdiction, which represents the juridical precipitate of sovereignty. It is a system that guarantees symmetry and congruence between decision-making agents and areas in which decisions have an effect, as well as between the individual and the State. The nation is a pre-juridical and, ultimately, pre-political fact. It follows that the set of citizenship rights are deductible from the will that gave rise to the public space.

On the opposite side we have Rawls' theories. The latter interprets society as the result of the free meeting of individual wills, within a neutral axiological and ideological space. "Rational egoism" is the engine of public space. Space and individuals are thought of separately from their reciprocal interactions, so the latter are always to be considered as reversible. It follows that people are to be considered originally and equally free and owners of their fundamental rights and that the perimeter of the interactions is the negative result of the description of the potential reciprocal conflicts between individual freedoms. According to Rawls, the problem of disagreement between different political visions is resolved with pluralism, on the basis of a substantial sharing of elementary principles of coexistence common to all reasonable people.[2]

Between these two somewhat polarized positions is that of Habermas, who rejects Rawls's neutralizing and individualistic vis, because it leads to an abstract and totally disconnected position with respect to historical reality, but also marks his own difference from Carl Schmitt, whose theory he deems capable of justifying social exclusion if not just nationalism and racism.

According to Habermas, the person, therefore, is originally placed in a double dimension, public and private: democratic procedures have the task of guaranteeing the dynamic balance between the two dimensions, avoiding that one dominates over the other, which would entail, evidently, an impoverishment of both public and private life. Integration is seen as a dialogic process, in which diversity is not denied, but not even uncritically accepted, but juridically "treated" in such a way as to harmonize it with public interests.

According to Habermas, the concept of nation is therefore obsolete and can no longer be the foundation of public space. It is based on a cultural homogeneity of ethnic groups and social groups that is no longer possible and no longer necessary. This homogeneity is still

[2] See J. Rawls, *Reconcilation through the Public Use of Reason* in Journal of Philosophy, 92(3), 132-180 (1995). See also A. A. An-Na'im, *Islamic Politics and the Neutral State: a friendly Amendment to Rawls?* in T. Bailey and V. Gentile (Ed.), *Rawls and Religion*, 242 ff. (2015).

today the theoretical presupposition of a fusion between dominant classes and cultures, which arbitrarily restricts the space of citizenship. Democratic citizenship today is based, on the other hand, on the Constitution, elaborated and launched according to democratic procedures, in a dialogical context dominated by public opinion and political forces. So public opinion and political forces guarantee the cultural homogeneity that forms the basis of the processes of democratic integration.

The inconsistencies of Schmitt and Rawls are highlighted by Habermas. In both positions an ideological background emerges. But Habermas himself pays for an inconsistency. He does not explain why there must be integration. He presupposes the existence of large mass parties (integration must be favored by the "political machine"). It is therefore clear what has led Habermas, in recent years, to re-evaluate the role of religion in the public space, arguing that the redevelopment of the "political", which he now sees totally flattened on technology and administration, must lead to the end of prohibition of access in the public sphere of religious issues such as salvation or redemption. Even Rawls, albeit in a different form, has recently spoken out in favor of a political rehabilitation of religious issues.

Beyond the more or less shared hopes expressed by philosophers, the fact remains that the recent positions expressed by them confirm that their theories on inclusion and integration presuppose the existence of the Westphalian-type national state, in the absence of which transcendent references to public life are sought. It is research that is doomed to failure by definition.

The research is doomed to failure because it presupposes a cultural horizon that is now non-existent. The crisis of the national state is much more than the crisis of an institution. It is the crisis of a paradigm.

II. Deconstructing The myth of relativism by adopting the paradigm of "bebelarchy"

The crisis of the system of sources is common experience.

The reconstruction of congruence and symmetry between decision-making agents and areas in which the decision has an effect – presuppositions of the modern notion of jurisdiction and *conditio sine qua non* for the guarantee of the principle of effectiveness of the legal rule – engages the jurist in the evaluation of an increasing number of variables, to the

point that a "strategic" approach, no longer "paradigmatic", prevails among legal practitioners, in the sense that the criterion of effectiveness tends to absorb that of validity. What happens in the economy and finance is emblematic. The multinational company moves on different legal, fiscal, territorial levels, etc. and develops negotiation strategies with the executives, also thanks to law firms, from whose activity a negotiating use of law arises.

In the specific context of public law, there is a multiplication of the sources of legitimation of political power and a growing uncertainty about the boundaries of the sphere of impact of the decisions of the latter, with consequent multiplication of intra-state conflicts, even in the context of a public space, like that of the European Union, born from the need to rationalize the inevitable progressive intersection and overlapping of political decision-making flows. This entails a growing simplification of internal decision-making processes, in favor of the Executive, and a reduction in the range of action of the legislative Assemblies. Thus, the sources overlap and intertwine and sometimes it is not possible to reconstruct in a unified way the discipline relating to a specific one.

With the Covid-19 pandemic we have all realized what philosophy and sociology have been telling us for at least twenty years: not only has the world changed profoundly after the end of the Cold War, but the way in which things change has also changed. We have moved from a world dominated by Newtonian logic to a world that can often be understood only with the tools of quantum physics.

In yesterday's world, in all the scenarios we were going to analyze there were a subject and an object, a cause and an effect, a center and a periphery. We are not talking about how things actually worked, but about a paradigm, a conceptual scheme that dominated the world and its representation. It was a world in which there were "hierarchies" (hierarchies of problems, of competences, of power and so on, of values). Hierarchy as we know comes from the Greek ἱερός (joined to ἀρχία, which comes from ἄρχω, "to lead", "to begin"), which we can translate as "sacred". The term was used to designate, among other things, the spaces and times of priestly competence. That concept makes an orderly representation of earth and sky possible. Today we live in a messy world. Many call it anarchist. Anarchy is precisely the opposite of hierarchy. It means the absence of government, of command and, therefore, of rules. Ultimately, it means chaos. The challenge of the study centre is that it is not chaos, but something that can be understood and, in some way, dominated. We just need to work on new cognitive tools, on new paradigms.

The way things change has changed.

From the world of the hierarchy, one does not simply pass to its opposite, to chaos: this is still a mechanical way of reasoning. From the opposition between subject and object, we do not pass to the cancellation of one and the other, but to their relationship as something constitutive, original, which must be taken into account in the analysis. If I study a particular strategic threat, I need to know that my firm, for reasons related to culture and technological development, is interacting with that same threat. The relationship between subject and object changes and the relationship between cause and effect changes. Just as the relationship between center and periphery changes. According to the center/periphery paradigm, each input is presented as the emanation from an originating point ("beginning", "nucleus", "vertex" etc.), more or less distant. Today the center/periphery paradigm yields to that of the "network", which is not opposed to the first, but incorporates and "uses" it, partially accepts it and ignores it when it is not needed, reduces it from a presupposition to an option, without never denying its validity. According to the network paradigm, the impulse is consciously reinterpreted, and to some extent recreated at each "node". The αρχία – the "guide", the "address" in the technical sense of "regime", understood as a set of behavioral rules – exists, but is no longer supported only by ιερός, by the "sacred". To support it – the classical world still helps us here – is the "other" from the "sacred", that is to say the "profane", the "open" – in Greek βέβηλος, a term that also indicates the space in front the temple. If we really wanted to find an alternative term to "hierarchy" we would therefore speak not of anarchy, but of "bebelarchy", thus indicating a regime with a tendentially (not absolutely) "horizontal" character, in which communicative capacity counts more than accuracy, relationships tend to be multidimensional and incongruent and the transgression is as important as the rule since the latter is never defined once and for all, but subjected to continuous negotiation.

This molecular change of the social space, in the juridical comparison, is causing two symmetrical attitudes.

On the one hand, there is an exaltation of absolute relativism, which goes so far as to question the very notion of law ("there are rights, there is no law": it is therefore not clear what are the characteristics of a social experience to be qualified as "juridical": how can there be rights if there is no law?). It starts from the obvious observation that there are many ways, in addition to the typically Western ones, to build and manage a public space and pay greater attention to cryptotypes, which often work in a religious or cultural context. The comparison is carried out in the principle of the most genuine *Voraussetzungslosigkeit*.

Not only there are no better legal systems than the others, but the taxonomy itself appears to be devoid of any foundation. It follows that relativism is the king. Legal comparison has the mission of bringing to light the relativity and growing fragility of the juridical and taxonomic categories of the West and of opening the scholar's gaze to "other" juridical experiences.

On the other hand, we have, in a decidedly minority position, the Habermas theories, which demand an opening of the legal debate to the issues of religion, in a clear neo-naturalistic perspective.

Now, the question is of no small importance, if we consider the essential function performed by juridical comparison in doctrine. It is worth trying to understand to what extent this *cultural mood*, which now seems to be dominant in comparative public law, is compatible with the very existence of comparative public law itself.

Just think of the weight that comparison plays both in the legislative activity and in the jurisprudence – and not only of the constitutional one – of various Western countries.

From this point of view, therefore, it can be said that in those positions there is a defect of abstractness. The phenomenon of the broadening of the comparative horizon is seen in isolation from the awareness that the same scholar has of it. In other words, it is reconstructed as something objective and external, not as the result of the development of legal comparison. For example, it is not taken into account that this enlargement – that is to say the entry of non-Western legal cultures into the jurist's horizon – is part of a process of westernization of the globe, in which the legal comparison itself carries out an essential role. Just think of the role played by comparatists, starting from the end of the Cold War, to legitimize the idea that common law systems and instruments are particularly suitable for the development of market integration and finance rationalization processes.

III. LEGAL COMPARISON AS THE ORIGIN AND STRUCTURE OF LEGAL KNOWLEDGE

The internal aporias of the comparative doctrine are the contradictions of the juridical doctrine itself.

There is an original link between juridical doctrine and comparison.

All the great breakthroughs in Western legal culture are related to comparison.

Just think of the role played by glossators in the rearticulation of European public law, after the "discovery" (an operation of diachronic juridical comparison) of Justinian. We should consider how the foundations of the rule of law in Eurocontinental legal experience were

laid by Montesquieu, who re-elaborates Lockean doctrine and the English experience, adopting the paradigm of the "circulation of models": the principle of separation of powers, identified at the time in the recent English constitutional history, was reworked on the basis of the characteristic data of the French public space of the time, already characterized by a strong administrative centralization, with the relative growth of the bureaucratic elite, and by a growing weight of the judiciary. Legal comparison played a decisive role in the birth of the Constitution of the United States of America, in the European constitutional movement of the nineteenth century, in the democratic constitutions of central Europe between the two wars (Germany, Austria, Czechoslovakia), in the post-war Constitutions of Italy and Germany, in the constitutional movements of the Islamic world after decolonization (Tunisia, Egypt 1970), in the post-communist constitutional experiences, in the constitutional reforms of the Islamic world starting with the Arab Spring.

It is therefore necessary to start from this hotspot, in other words from the original relationship between comparison and Western public law. The fact that at a certain point the juridical comparison separated from the doctrine casts a shadow over the original relationship existing between juridical comparison and Western public law. That separation – or the birth of legal comparison as a specific discipline – took place during the second industrial revolution: this was the era of great specializations; the era in which the power of ἐπιστήμη is maximum and is expressed in the tumultuous development of capitalism, supported by technoscience. The comparison was born, in the age of colonialism, as a reaction to the Enlightenment rationalistic universalism, in a historicistic key, to defend the particularity and specificity of non-European legal cultures. But in doing so it becomes an essential tool for the westernization of the planet. The expansion of the spatial horizon involves an expansion of the temporal one, towards the past and towards the future, in search of the foundation – that is, the form of evolution – of the *ius publicum*.

According to Nietzsche, this is the Age of Comparison: «The less men are fettered by tradition, the greater becomes the inward activity of their motives; the greater, again, in proportion thereto, the outward restlessness, the confused flux of mankind, the polyphony of strivings. For whom is there still an absolute compulsion to bind himself and his descendants to one place? For whom is there still anything strictly compulsory? As all styles of arts are imitated simultaneously, so also are all grades and kinds of morality, of customs, of cultures. Such an age obtains its importance because in it the various views of the world, customs, and cultures can be compared and experienced simultaneously, – which was

formerly not possible with the always localised sway of every culture, corresponding to the rooting of all artistic styles in place and time. An increased aesthetic feeling will now at last decide amongst so many forms presenting themselves for comparison; it will allow the greater number, that is to say all those rejected by it, to die out. In the same way a selection amongst the forms and customs of the higher moralities is taking place, of which the aim can be nothing else than the downfall of the lower moralities. It is the age of comparison! That is its pride, but more justly also its grief. Let us not be afraid of this grief! Rather will we comprehend as adequately as possible the task our age sets us: posterity will bless us for doing so – a posterity which knows itself to be as much above the terminated original national cultures as above the culture of comparison, but which looks back with gratitude on both kinds of culture as upon antiquities worthy of veneration».

In this piece by Nietzsche, the connection between ἐπιστήμη and comparison is seen in a dramatic way, in the process of westernization of the globe. The fact that juridical comparison from opening towards "other" cultures becomes an instrument of assimilation (first conceptual, but then also political) of those same cultures is sometimes read as a sort of "Heterogony of ends". This is a serious error of perspective, as it leaves the original relationship above mentioned in oblivion. In general, Eurocentrism, opportunely denounced by authoritative doctrine on several occasions, can be seen not so much as a pathology of comparative law, but as an original and, in some way, constitutive characteristic of the latter. In this sense, the "subversive" function of comparative law and the role it plays in the westernization of the planet are two sides of the same coin. [3]

IV. ORIGINARY RELATIONSHIP BETWEEN COMPARISON AND PUBLIC LAW AND CRISIS OF THE FOUNDATION

The relationship between comparison and law is rooted in the original link between public space and ἐπιστήμη. It is still necessary to clarify why the original link between the birth of political thought and ἐπιστήμη is a matter of extreme interest for the constitutional doctrine. It is clear that the opening, at the dawn of Western thought, of the question about ἀρχή[4]

[3] F. Nietzsche, *Human, All Too Human: A Book for Free Spirits*, 23, transl. by H. Zimmern (1910). See L. Pegoraro, *Imposición cultural, la búsueda de denominadores comunes y la "misión comparatista" de las Revista de Derecho constitucional*, Revista N. 371, Academia Colombiana de Jurisprudencia (Enero-Junio de 2020); A. Somma, *Per un dialogo tra comparazione e diritto positivo*, in A. Somma, V. Zeno-Zencovich (Eds.), *Comparazione e diritto positivo un dialogo tra saperi* (2021).

[4] G. Reale, *Il pensiero dei Presocratici*, cit., p. XXIII.

does not concern, as has long been assumed, "nature" understood as a counterpart to the world of "politics", but it concerns the whole, that is the set of entities and relationships in the world, starting with the entities and the relationships in which the question about the principle and about the whole is constituted. [5] If the political dimension is originally constitutive of ἐπιστήμη, it is in Parmenides – or in the philosopher who, as Severino says, poses the problem of nothingness for the first time – that the idea of politics as a project, or of human planning as an eminently *political* problem, arises. For the first time explicitly, according to the accurate philological work carried out by Giorgio Colli, Parmenides raises the problem of the *distance* between thinking and acting, or rather of the primacy of the concept over acting: the commitment in πόλις is necessary because the whole itself, in its intimate unity, cannot be reduced to an object of mystical contemplation.

Classical philology confirmed this: the epistemic *vis* can then be traced back to Herodotus and Aeschylus, where the sense of the separation of the Greeks – and, with them, of Europe – from Asia emerges strongly, understood precisely as something "different". [6] A link is found between axiological universality and the relativity of (comparison between) legal systems – a link that remains central to Western politics. The idea of comparing the various forms of organization of public space is thus presented as co-originary with respect to the idea that public space must be founded on the basis of a consciously chosen purpose.

We remain within this ideal horizon even when we try to reconcile juridical universalism and cultural relativism. When, for example, Habermas[7] reconstructs the universality and primacy of rights on a pragmatic-transcendental basis, demonstrating that one cannot but consent to those principles, since they are the very foundation of communicative

[5] G. Colli, *La sapienza greca*, 32-33. (II, 1994). As regards Pericles' speech (Thucydides, *Peloponnesian War*, 1, 139-144), see the introduction by Davide Susanetti in Tucidide, *I discorsi della democrazia* (Ed.) D. Susannetti, 7-46 (2015). We also refer to C. Sbailò, *«Ad Atene facciamo così»: l'elogio della democrazia nel discorso di Pericle*, held in the cycle of conferences «La parola e la storia. I grandi discorsi che hanno cambiato il mondo», GEODI-Research centre on Geopolitics and Comparative Law, Università degli Studi Internazionali di Roma – UNINT, Roma, www.unint.eu, November 4th 2020, forthcoming. See C. Sbailò, *Sul sentiero della notte – La πόλις. Introduzione alle imminenti sfide del diritto pubblico* (2020).

[6] In this sense, there is an illuminating passage from Burkhardt: «In the troubled and troubled life of the polis, one of the most expensive results achieved was that the Greek spirit learned to consider and describe political forms objectively, comparing them the one with the other». In the view of the Greeks, «the Oriental, with its sacred right and effective despotism, was a prisoner of the narrow horizon of its state». It is the Greeks of Ionia who opened the discussion «on the best form of government (on the occasion of the advent of Darius)» and Herodotus should be credited with having «presented in literary form the discussions, both political and on other topics, which were held at the Court of Xerxes» (my translation).

[7] Especially in J. Habermas, *Discourse ethics: Notes on a program of philosophical justification* in *Moral consciousness and communicative action,* 43–115, (1990).

elaboration, centered on the individual, he is moving within the Greek epistemic approach, as it presupposes – because it is a presupposition, in which one has *faith* – that the individual represents himself as an entity that wants and knows to want and consciously elaborates values. Habermas, in fact, is forced to recognize that the evolution of the intercultural discourse on rights presupposes the willingness of the participants to look at their own tradition with the eyes of their interlocutors, or to (again) adopt the aforementioned universalistic-relativistic Western paradigm. The very identification of the nomological necessity of an abstract regulation of public life is possible within a voluntaristic-discursive representation of reality (i.e. within the faith in becoming, in the presumed evidence that things become other than themselves and are, therefore, placed between the nothingness and the being), or through a vision of the world essentially centered on man as the architect of his destiny. Outside of such a perspective that need is a mere fact, not conceptualized, or no longer conceptualized of other needs that weigh on humans, from food to reproduction, hygiene and so on.

The nomological instance and the juridical comparison are, therefore, to be considered in the light of the originary relationship between public space and ἐπιστήμη, as two sides of the same coin.

Taxonomy comes from τάξις, order, and νόμος, meaning law / rule / discipline. By definition, therefore, the taxonomic activity – that is to say, the essence of legal comparison – must separate the subject from its predicate, or keep the semantic dimension distinct from the apophantic one. This entails the qualification of the predicate as something accidental, or potentially "nothing" with respect to the subject being preached. Taxonomic activity, in this sense, implies in itself the assumption, by the scholar, of a tendentially rational and universalistic position, that is, in the Severinian perspective, epistemically oriented (the scholar has faith in becoming and thinks the nothing as "something") and, therefore, internal to the history of Western nihilism.

These concepts are based on an idea of foundation (or of the impossibility of the foundation) as the opening of a neutral space, which pre-exists the subjects that populate it.

The idea of comparing the various forms of organization of public space thus coincides with the idea that public space should be founded on the basis of a consciously chosen purpose. We remain within this ideal horizon even when we try to reconcile juridical universalism and cultural relativism.[8]

[8] According to Burkhardt, among the Hellenes, the very birth of the polis cannot be thought of without a prior deliberation; then the agora immediately arises with its inevitable consequences: the discussion of

V. Constitutional Mereology and the Will to Power

Therefore, we have seen that the "foundation" of public space and the comparative instance are two sides of the same coin. Comparison is made because, consciously or not, one's notion of "foundation" is tested. The foundation of the public space is sought because new and unknown juridical experiences arrive in the horizon of the jurist. Moreover, that very arrival arises within the link between the comparison and the foundation of public space. The precomprehension of the "comparability" of legal systems (and the awareness of the problem of comparability is already present in Herodotus) in turn opens the question of the foundation. The will to find the foundation of the public space comes into contradiction with itself, as the foundation, being "placed", remains under the dominion of the will.

Now, taking up the thread of the reasoning on inclusion, if the identification of the scope and the purpose of inclusive processes must refer to principles that transcend the domain of positive law, or to transcendental conditions of legislation, that identification is sucked *ab origine* in the context of the will of power.

It may be helpful here to carry out some considerations of constitutional mereology referring to the Italian case, starting with the obvious observation that the constitutional text presupposes the ordering principle in the way in which the part presupposes the whole. This is why, on the one hand, there can be major textual changes, without deep constitutional revisions and, on the other hand, there can be major constitutional revisions – and at least changes – in the absence of significant changes to the text. The constitutional revision indicates a change that can be reconstructed as an evolution of the legislation, or a transformation that does not affect the substance, the *identifiability* of the Constitution itself. The change is to be understood as the destruction of the substance: it is no longer *that* Constitution. It is the state of health of the ordering principle that makes the difference.

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the state as a whole and of all the single problems of daily political life. The philosophers devoted their best energies to the polis. And not only the Hellenic state was studied; in fact, from the Greeks we have everything that, until the discoveries of our century, we knew about the Egyptians, the Persians and Carthage, relating to political institutions of other ancient peoples; Polybius himself said the most solid and conclusive things about the Roman State in its golden age than has ever been written. The Greeks alone saw and compared everything. (See J. Burkhardt, *Griechische Kulturgeschichte,* Ed. by J.J. Oerrli, 360 ff. (I, 5th ed., 1908). Here we take up again the well-known thesis of François Châtelet, with particular reference to the reworking of the theories supported on this point by W. Dilthey and WF Hegel. See F. Châtelet, *La Naissance de l'Histoire. La formation de la pensée historienne en Grèce* (1962). For the anthropological-cultural aspects, see W. H. Mecnell, *The Rise of the West. A History of the Hyman Community*, 189 ff. (1990).

The identification of the supreme principles as "limits" to the revision or "counter-limits" to the entry of foreign regulations (Constitutional Court of Italy, 1146/1988) presupposes, therefore, the notion of the ordering principle, the violation of which makes the revision becoming a constitutional change, or annihilation of the Constitution. In the judgment cited, the Court does not say what the criterion for identifying these principles is, nor could it say so.

This does not mean that they are arbitrary principles. A concrete and hermeneutically oriented approach to law and to the problem of the foundation of the legal system must hold together the part with the whole, considering the transcendence of the whole and its inenarrability, as something inseparable from immediacy. Conceiving the foundation and the founded as two separable entities or conceiving inseparability as identity or distinction as separation – all this means thinking about nothing, or staying in the contradiction without being aware of it and not being able to understand the essence of the normative datum. The shift of the center of gravity of the regulatory system from the law to the Constitution and from this to the ordering principle does not involve the "opening" of the system. The Court is affirming itself as an interpreter of the ordering principle. It adopts a self-expansive logic, which has made the Court the major protagonist of constitutional mutations.

Constitutional jurisprudence is increasingly oriented towards a hermeneutic of the ultimate principles of the legal system, which, by definition, transcend the constitutional text itself. For this reason, on the one hand it increasingly directs the activity of the legislator, who now looks less at the constitutional text and more at the values that inform it. On the other hand, it pushes ordinary judicial activity more and more towards the adoption of extra-legislative parameters, derived directly from constitutional law, also understood in a reticular key.

The growing role of jurisprudential activity is explained precisely by the affirmation of this legal-positivistic and reticular paradigm, which in the system of sources moves the Constitution from the super-legislative sphere, ontologically close to the legislative one, to the meta-legislative sphere. This entails a downsizing of the role of the parliamentary legislator and a strengthening of the role of the judge, where the latter must be seen as part of a phronetic community. Therefore, the Court must draw up the limits within which the Legislator can operate. But these limits are not derived from immutable and transcendent values, but, in a horizontal key, from the "network" constituted by the dialogue between the courts.

The reading "according to values" – in Barbera's opinion[9] – opens the way to cultural relativism, which is ultimately incompatible with the very notion of "Constitution", as this presupposes the *identification* of the constituent subject and therefore the reconstruction of the *constitutional pact*, or rather of the *principles* and the *people.*

The observation is well founded.

We can draw a classic example of this risk from the Italian debate on citizenship. The interpretation of the Constitution by values leads towards a potentially unlimited extension of citizenship rights, or towards an absorption of this within the sphere of fundamental rights. Taken to its extreme consequences, the interpretation of values seems to lead to an extension of citizenship to all.

The supporters of the *ius soli* justify their position by referring to the "popular" character of sovereignty, relying on the "factual data" of the changes that have taken place in the *demos* ("society is increasingly multi-ethnic", etc.). But this is a logically incorrect operation. The "people" referred to in the aforementioned sovereignty has nothing to do with the "population": the people of 2017 are not "other" than the people of 1947. For this reason, the discipline that regulates the *identification* (think, for example, of the electoral register for the elections of the Chambers) cannot be subject to considerations of an ethnic-demographic-sociological nature, but only to choices of a political nature, which refer to *that* people and to the political project around which the Republic was built. One could therefore ask why the Constitution does not provide for particular legislative precautions in the matter of citizenship (as it does, however, for example in matters of constitutional reform or electoral laws). The answer is that the question of citizenship is originary, that is, it logically precedes the reconstruction of the constituent process itself. If the "people" is not *identified* (and the people is identified through the discipline relating to citizenship), therefore, a Constitution is not given.

The voluntaristic foundation is evident here. Augusto Barbera rightly speaks of nihilistic drift. Barbera, on the other hand, is wrong in believing that it is a reversible process, of something that springs from a specific ideology and can, therefore, be stopped. This trend cannot be stopped because it represents the essential destiny of our time. But it can be guided, so it can become part of the awareness that legal doctrine has of itself. The trend

[9] See A. Barbera, *Costituzione della Repubblica italiana*, in *Enc. Diritto.*

described by Barbera must rather be brought to light, so it must somehow be grasped by reason and taken to its extreme consequences.

Going to the root of this trend, it will be seen that it is not a degeneration. The voluntarism denounced by Barbera – which can be defined as a voluntarism of a eudaemonistic nature – is, in fact, internal to the process of secularization, of which it is an essential part, not an accidental one. It is its core. This form of voluntarism is rooted in modern intramundane anthropology, which makes man a self-referential entity, devoid of transcendent references, since the latter are reconstructed as his direct emanation.

VI. DIALOGUE BETWEEN COURTS & RETICULAR POSITIVIZATION

The public space arises from the «Isolation of the Earth»,[10] understood as a decision of individuation / separation: here the subject is placed at the center of reality and here, with Plato, the move from truth as unconcealment to truth as correctness began.[11] In other words, politics has an original nihilistic matrix: it arises from the decision to separate the public from the private sphere, or to identify a private sphere as something autonomous. But for this to be possible, first of all it is necessary to "separate", meaning the act of will that "isolates" a part from the whole – that is, that reconstructs the whole as the sum of the parts. Therefore, it is originally necessary to decide that the whole world is isolated from the whole, that is, that the world floats in nothingness and that all things, as things, or objects of knowledge and manipulation, or of individuation, are placed in nothingness, going out and back into nowhere. It is necessary that man himself is separated from his being-self, that is, from his being in relation, and that he is therefore an individual, to whom relations with other individuals pertain only at a later time.

The fact that individualism is a typically modern phenomenon should not distract our attention from the fact that the (voluntaristic) foundation of public space in itself involves

[10] «Nessuna decisione (dei mortali o dei divini) può condurre al tramonto dell'isolamento. Ogni decisione si fonda infatti sull'isolamento della terra. Nessun salvatore (artefice di salvezza) è possibile. Ma ogni decisione appartiene al destino dell'isolamento. Se il tramonto dell'isolamento della terra è destinato ad accadere, allora è necessità che tutte le decisioni siano prese e il decidere portato al suo compimento» [«No Decision (neither of mortals nor of gods) can lead to the sunset of Isolation. In fact, every Decision is based on the isolation of the earth. No savior (creator of salvation) is possible, but every decision belongs to the fate of isolation. If the sunset of the isolation of the earth is destined to happen, then it is necessary that all Decisions are made and Deciding brought to its fulfillment»], E. Severino, *Destino della necessità. Κατὰ τὸ χρεών*, 448-449 (2010).

[11] A move to be considered not as a simple "mistake" o "traison", but, in a certain sense, as a primitive posture of the Western way of thinking. See M. Heidegger, *Zur Sache des Denkens*, 78 ff. (1969).

the creation of a space, the one of the private sphere, subtracted from it. Nietzsche's denunciation of Euripides and Socrates, of having opened the way to bourgeois individualism and secularization, or rather to the reduction of truth to a "method", appears to be well founded in this sense. On the other hand, Nietzsche is wrong in not seeing how the turning point of Euripides and Socrates is a destiny, something inherent in the very concept of ἀρχή.

The *political* character of the very demarcation between the public and private spheres is, according to Weber's well-known reconstruction, a peculiarity of Western civilization: «A systematic theory of public law was developed only in the West», because only in the West the political group assumes a complete institutional character, with rationally articulated competences, and it is only in the West that there is a clear check and balances system between powers. Public law regulates actions relating to the state, while private law regulates actions relating to private subjects. But the structure of the "regular", in both cases, has its origins in the legal sphere. This is not a historical reconstruction: the historical interpretation is used by Weber as a hermeneutic strategy, for the understanding of an original and structural characteristic of Western civilization. [12]

Politics, therefore, is born within the ἐπιστήμη, or it is the original manifestation of the ἐπιστήμη. For this reason, already with Plato, *the positive laws are the "natural" laws of man*. If politics arises after (from the fact) that the gods have abandoned the world, legislative activity can only be based on human qualities, such as common sense and reasonableness. Which means that the search for a foundation of public life will never be found, but also that this search will never have an end. [13]

The epistemic *vis* is aimed at «saving the world», at giving ontological dignity to appearances, in other words, to the «opinions» of men, therefore to the *polis*, which for the Greek language is the original dimension of men (the context in which the man "knows" that he is a man). The path of madness, in this sense, is the path of politics, understood as the foundation, organization and management of public space (it is possible to found, organize

[12] M. Weber*, Vorbemerkung*, in *Gesammelte Aufsätze zur Religionssoziologie,* 1-16 (Bd. 1, 1920).

[13] Francesco Adorno observes in this regard: «In the latter [*The* Laws] Plato operates, resorting to the laws, the moment of the establishment of the living unity of intelligence as one with the first soul, understood as activity, and, therefore, of the 'speech one' (*logos*), emphasizes that positive laws correspond to the very moments of the unfolding of logos, so that positive laws become obligatory because they become the 'natural' laws of man, such inasmuch as it is politically constituted, and, therefore, the natural laws of the State, and without which it would not have existed, nor would it be the States of today» (F. Adorno, *Introduzione a Platone*, 224 (1978).

and manage only what is separated from the activity of founding, organizing and of managing).

The affirmation of legal positivism, therefore, must be interpreted not only as a specific historical event, which can be explained in the light of a certain number of cultural and social phenomena, but as an original trait of the Western jurist. In the age of legal positivism and codifications, the voluntary character of the norm –that is, its being enforceable only by virtue of an auctoritas is explicitly stated.

This structural datum of the western public space appears today difficult to understand as the subject of the *ponor* is identified with the territorial national state. The progressive erosion of the monopoly of legislative activity by the State, strictly connected to the affirmation of the transnational character of jurisdiction together with the primacy of fundamental rights, generates the impression of a symmetrical crisis of sovereignty and positive law.

In reality, juridical experience continued to develop according to the model of positive, or secularized law, but the *positum* ceased to be univocal and centralized, as it was in the state-centered juridical universe, and it began to have a reticular character, since it is entrusted to the dialogue between the courts, within which the procedural element necessarily prevails over the substantive one, which can only lead to the exasperation of the desacralization of the rule, or the exaltation of the *affected* character of the latter compared to the *will*. In this sense, the *technical* character of law has been accentuated, that is, its being a means for the effective pursuit of aims, regardless of the purposes.

A school case, in this regard, is constituted by the Superior Courts Network (SCN), born on the initiative of the European Court of Human Rights, in 2015, to promote the exchange of jurisprudential experiences in the field of fundamental human rights and the dialogue between the courts. The purpose of the network is to increase itself. The network orients the courts not on the basis of certain principles, but on the basis of the intrinsic value of reticularity. To demonstrate the validity of his thesis, today, the jurist usually no longer refers to extrajudicial contents, as happened in continental Europe up to the end of the Eighteenth Century and in common law countries up to the beginning of the Twentieth Century. Legal reasoning develops within the legal universe, made up of positive norms (laws, sentences, etc. are nothing but norms, placed at different hierarchical levels). The very alleged "creativity" of the courts is part of this sphere.

The voluntary character of the norm remains, already present in the Westphalian model, with the difference, compared to what happens in the state-national universe, that the will is not understood as an expression of the State or of a centralized subject, but as a

widespread will. Widespread, not anonymous, as it can be reconstructed as the result of the intersection of various wills on the network. The will creates not only new rights, but also new subjects of law. For years, we have witnessed a geometric growth of rights, the perimeter of which gradually tends to coincide with that of desires. The desire to procreate even in the absence of the natural conditions of procreation becomes a right to procreation. The desire to change sex or to end one's suffering through assisted suicide become in turn rights.

The solution cannot be in neo-natural law, as Norberto Bobbio demonstrated,[14] when he brought to light the impossibility of finding an absolute foundation for human rights. This hermeneutic situation can also be read – or represented – as an intimate contradiction of the ἐπιστήμη itself. The ἐπιστήμη, in fact, is the considering itself of the foundation problem. The epistemic *vis* wants to find a foundation, but it cannot presuppose it as an original and undiscussable datum. The foundation is constituted as such within the ἐπιστήμη. So the foundation can be conceptually reconstructed. But if the foundation is conceptually reconstructable, it means that it is dominated by what it is reconstructed with, that is, the epistemic *vis* itself. This means that no foundation is *certain*. Every foundation is exposed to the corrosive critique of reason, in other words, dominated by the same *vis* that created it.

In this way, we face the problem of nihilism. Here nihilism is to be understood not as a radical scepsis on the congruence of historical values with respect to an absolute value, but as a denial of the possibility that a universally valid evaluation parameter can be determined. In this sense, to say, as Böckenforde does, that «the liberal, secularized State lives by prerequisites which it cannot guarantee itself» means to say an obviousness. [15] The assumption can never – by definition – be guaranteed, since to be guaranteed it would have to be represented. But if it were the object of representation it would cease to be a presupposition. [16] The idea that something must have a "foundation" that saves it from becoming, from which the need arises that the search for the foundation must in turn be founded and founding, is the very essence of ἐπιστήμη. But, as we have seen, in the essence of ἐπιστήμη we also find the instance of overcoming the foundation. The only foundation

[14] See N. Bobbio, *L'età dei diritti*, 5-16 (1990).
[15] See E.-W. Böckenförde, *Staat, Gesellschaft, Freiheit*, 60 (1976).
[16] The theme of the aporia of the "foundation that asks to be founded", with reference to the neo-Kantian genesis and the theological-Jewish roots of Hans Kelsen's Pure Theory of Law, was addressed in C. Sbailò, *Principi sciaraitici*, cit., 14 ff.

that can always be demonstrated, in fact, is that of the possibility of undermining any foundation.

VII. RECOGNIZING THE STRUCTURAL APORIAS OF "CITIZENSHIP"

Foundational requirement and positivistic proceduralism are therefore the two poles of an original aporia that affects the European concept of public space. This aporia is found in the concept of sovereignty and, obviously, in the subjective reflection of the latter, which is the concept of citizenship. Just as a universal sovereignty is self-contradictory, the concept of universal citizenship is also self-contradictory. But this contradiction is desired by the will of power.

Being a citizen is always a being a citizen of, within a determined space-time, voluntaristically founded, structured on specific values and interests. Citizenship, in this sense, is linked to the "isolation of the earth", desired by the epistemic will. The "isolation of the earth" involves that of the individual: modern individualism is sovereignty itself, considered from the point of view of legal obligation. Rights are rooted in sovereignty and sovereignty is incompatible with rights. The aporia is original.

Man is a political animal means that «the *polis* exists by nature, that human beings are political animals, and that the city is by nature anterior to every single citizen».[17]

But who deserves to be a citizen and who doesn't? Aristotle asks himself. Aristotle does not answer. He says: «To identify a citizen in the true sense of the term all is needed is the right to participate in the administration of justice and government». Then comes the decisive point, of eligibility for citizenship: «In fact, a citizen is defined as a child of two citizens and not of just one – the father or the mother; others go back even further, up to the second or third generation or even more. However, having established this in political and coarse terms, some ask themselves to what title an ancestor of the third or fourth generation was a citizen».[18]

The question concerns the essence of constituent power. It is connected to the other fundamental question of constitutional continuity: is a city the same city even if it changes its constitution? It is the problem of the persistence of legal and political obligations towards other States by a State that has radically changed its constitution. Aristotle says no: if a city changes its constitution, it is no longer the same city. As has rightly been noted,

[17] R. Kraut, *Introduzione* to Aristotle, *Politica* [Greek text and Italian translation] (Vol. I, XCIII, 2014).
[18] Aristotle, *Pol.* III, 1275a - 1257b.

this doctrine, although perhaps not entirely devoid of logical coherence, does not find correspondence in any other passage of the *Politics*, and seems somewhat incompatible with the overall structure of the work. In general, it seems incompatible with Aristotelian mereology: everything is the same and different at the same time, according to the criteria adopted. It does not always happen that «changing into a different species» determines the end of one particular being and the beginning of another. For example, a person ceasing to be a child does not mean that person's end. The constitution is not the criterion by which we define that a city or a State is that particular thing. If this were the case, the absurd consequence would follow that a city cannot change its constitution without committing suicide.[19]

Indeed, Aristotle is telling us that the political space has a voluntaristic-decisional root. But isn't the city a given of nature? In fact, even this connotation of the city has a voluntaristic-decisional character.

To return to the initial question, "who" includes "who", where and why, the answer is unitary: the will of power. It is the political will that includes and at the same time decides the object of inclusion, the space of inclusion and its reason.

All the constitutional systems of the West, including those in which citizenship is acquired jure soli, are constructed with a state-national paradigm, according to which access to citizenship is subject to the rules set up to protect the originality and independence of State power. In the Republic, this originality and independence has been legally reconstructed with the principle of popular sovereignty, the application of which encounters constitutive limits in the recognition of fundamental rights (which obviously cannot include citizenship by definition) and, in some ways, in the acceptance of the fundamental principles of *ius gentium* as well as of the obligations deriving from accession to the European Union (in both cases, the discipline of citizenship is recognized, however, as an exclusive prerogative of the States). In fact, constitutional jurisprudence has built a system of access to fundamental rights – which now include welfare rights – independent of Italian citizenship, while the citizen has the exclusive political rights and access to offices and public offices. Now, the "people" (referred to in the aforementioned sovereignty) should not be considered historically by the jurist (from these sociological-juridical hybridizations derives, in my opinion, the excessive ease with which projects of global constitutional reform are

[19] R. Robinson, *Comments*, *Pol.* III, 1275a-1277a (1,2,3), in Aristotle, *Politics*, (III and IV, 1962).

launched: but this is another discourse), but, precisely, juridically: in this sense, the "people" of 2017 is the same as in 1947. The discipline that determines its identification is not in the absolute availability of the Legislator.

It is precisely the history of the countries where the *ius soli* is in force that demonstrates that the reform of citizenship is always the expression of a political plan.

In the USA, the acquisition of citizenship *iure soli* is a right recognized only since the end of the Nineteenth Century, when it came to integrating black people into the political and economic system of the nation, after a war that costed over 600 thousand deaths (the Indians, on the other hand, or the "native" Americans in the historical sense, had to wait until 1924).

The same can be said for the two European colonial superpowers, France and the United Kingdom. As far as France is concerned, today's *ius soli* is the result of the need for personal and fiscal rationalization and the strengthening of the production base that arose in France during the industrial age, when the country was populated by workers from the colonies, who escaped their obligations towards the Republic (military service, taxes, because they were not citizens). In the United Kingdom, after centuries of imperial-inclusive policies, with the downsizing of the Empire and the increase of migrants, increasingly restrictive orientations prevailed, up to the 1984 reform, when the birth in Britain ceased to be a sufficient condition for the recognition of citizenship.

The political nature of a law on citizenship essentially consists in identifying both the community to be integrated and the conditions to which integration is subordinated. What is, then, the political project that supports the choice of integration.

Thinking of going beyond this horizon is madness. The concept of citizenship can be rejected, as some authors consistently do, saying that it is a constricting concept, which ends up limiting freedom. We have doubts that such a position could have a future, given that, it seems to us, it lashes out against Western culture, immersing itself more and more into its subsoil (its humanitarian universalism is unthinkable outside the epistemic horizon).

EPILOGUE

Awareness of the original connection between ἐπιστήμη and public law obviously entails awareness of the political role of the scientist, starting with the scientist of law. This may seem contrary to the value free ideal of science. In truth, today it is clearly coming to light that the value free character of Western science does not coincide with the neutrality of the

latter, but is the expression of a certain vision of the world, of a way of seeing and "manipulating" things, not at all universal, even if it can now be defined as global, as it concerns the entire planet. Max Weber himself was deeply aware of this, as clearly emerges from his treatment of "intramundane ascesis", that is, the structure and origin of modern secularization processes.

Among the main tasks of the jurist today there is certainly a correct reconstruction of the question of integration. Speaking of integration in the abstract is a sign of intellectual dishonesty. It is always necessary to explain who integrates whom, in what area and, above all, why.

In this regard, we will give the example of the Italian case.

When in Italy we talk about integration or inclusion we can only refer to the Islamic question. Thinking of reconstructing the Islamic question in Italy from a juridical point of view as a mere question of religious freedom and confessional pluralism means not knowing Islam. Mediterranean Sunni Islam, which is the closest to Italy, historically and geographically – cannot be assimilated *sic et simpliciter* to a religious confession: those who know Islam also know and respect the community paradigm and the expansive natural *vis* in the legal space, that is, they experience its significant political-social weight, its great proactive and innovative capacity on a cultural level as well as its potential antagonism towards some pillars of Western public law, such as the pre-eminence of the individual over the community or the tendential neutralization of public space. In summary, we are faced with a legal syntax that has its own history and its own solid philosophical foundation, which does not interact automatically with that of the social realities of the West.

According to ISMU data, Islam, among non-Christian religions, is the first religion among non-Italian residents in Italy: Muslims are about 1,200,000, or 33.3% of the non-Italian population and 3.7% of the total population.

Despite this, the Italian State has not yet signed an Agreement pursuant to article 8 of the Constitution with Muslim communities, while it did so with much smaller groups, such as, for example, Buddhists (2.3% of the non-Italian population and 0.55 of the total population) and Hindus (respectively 3.1% and 0.35%).

We will not repeat here already made analysis about the reasons of this delay. It is evident that the problem cannot be traced back - as has often been done - to the ideological conflicts existing in the Islamic sphere and to the absence of a true priestly hierarchy. In this sense, similar conflicts can be registered between Christian confessions, but this has

not prevented the State from entering into agreements with the various denominations. Let us recall only, by way of example, the cases of the Union of Seventh-day Adventist Christian Churches and the Baptist Evangelical Christian Union of Italy. The problem is that ideological conflicts, in the case of Islam, arise in the context of a holistic vision of the public space, based on the principle of *din wa dawla*, as already underlined above. The various proposals of understanding born in the Islamic sphere, in fact, contain strong demands of a legal-public nature, inhospitable in the Italian system. For example, in the hypothesis of an agreement drawn up by Co.Re.Is - (Islamic religious community in Italy) an association of indigenous Muslims known for its moderation and its commitment to religious and cultural dialogue - the Republic is expressly asked to "recognize" the ("the Republic takes note of") the foundations (the Pillars) of Islam. Now, by virtue of the combination between the sense of "recognition" in Italian legal language (which also represents a commitment to justice), on the one hand, and the meaning of the aforementioned Pillars in Islam, on the other, this act could produce expansive effects of Islamic law in the Italian legal system.

The regularization of Islam in Italy cannot ignore geopolitical and legal-comparative evaluations. Italian Muslims still have strong national roots. The phenomenon of second or third generation Islam, where national identity tends to downsize in favor – depending on the case – of social integration or adhesion to the religious community in a universalistic and ultra-national key, already known for decades in Northern Europe, is definitely irrelevant in Italy. The Italian one is, to a large extent, an Islam "of the States", in the sense that most of the Muslims present on the national territory were born in Islamic countries or from young couples, born in Islamic countries. Moreover, they are not here because they are fleeing despotic regimes or wars, but because – perhaps also in the wake of the geopolitical criticalities of the Mediterranean, which have made it difficult to control flows – they want to enter Europe and stay there to live better. In this way, it could be possible to encourage the formation of religious guides and authorities in Italy, initially under the supervision and control of North African religious authorities, with a fundamental role of mediation and guarantee of political authority, also based on the evolution of bilateral relations between Italy and the country concerned from time to time. This whole preparatory phase, of course, could only have a purely geo-political nature, not a strictly juridical one. The juridical precipitate of this process – that is, the Understanding – could only take place after certain communities and authorities of reference had been identified, within the framework of Italian and European policy in the Mediterranean, with reference to the problem of migratory flows.

Let's make an example.

In Morocco (a country from which a very significant part, if not most of the Muslims present in Italy, come from), the King is also at the top of religious authority, as head of believers. Islam, therefore, is strongly nationalized. In that country there are some important training schools for imams, controlled by the government. Therefore, it could be possible to agree with the Moroccan government the arrival in Italy of accredited imams, who will help the Italian government to counter the phenomenon of do-it-yourself imams, in particular as regards Moroccan immigration. Thanks to these imams, it would be possible to encourage the creation of courses (in the form of masters, first or second level of training for aspiring religious guides. In this sense, there are already interesting experimental experiences in Italy: it would be a matter of generalizing and institutionalizing them, country by country), where a very large space would be reserved for the teaching of Italian and European law, but with a significant difference: the religious part would be handled directly by experts accredited in the countries of origin of the Muslims and the qualification awarded, for this reason, it would be something more than a mere certificate of participation.

In a certain sense, based on the perspective outlined above, it would be the Republic itself to guide the formation of the Italian Islamic community and to build, in a certain sense, the subject of the Agreement pursuant to article 8 of the Constitution. It would be an operation of "legal hermeneutics", inserted in the framework of a geopolitical strategy in the Mediterranean. It is evident that such operations require an enhancement of the political role of the jurist, as indeed is the case in the glorious tradition of European legal science.

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