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Territory: between state sovereignty and globalisation of the economic space

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1. Prologue. Territory as a cultural and juridical notion

Man is a territorial animal and territoriality affects human behaviour on all levels of social action. It's hardly surprising, therefore, that territory has a manifold epistemic status and that it can be defined differently, depending on the disciplinary context in which it is examined: physical geography, geology, psychophysiology, social anthropology, geo-economics, geopolitics, law. This being the case, it is futile to search for a general

unifying theory of the human knowledge of territory. On the contrary, we should embrace architecture historian André Corboz's suggestion that it – territory – far from being a homogenous and definable concept, is rather a "palimpsest".[1]

Even within the more defined field of juridical speculation, this notion emerges as multidimensional in the dual root of the term itself, which some trace back to the Latin *terra*, other trace back to *terreo* and *territo*.[2] The first, more intuitive hypothesis connects the word's etymology to the terrestrial spatial element, as distinguished from the *solum*, which identifies the mere surface layer of the land; while the second points at the action of exerting control over a defined space, a "terrifying domination" – better – an authority, making use of coercive force – what Weber called legitimate violence – and that incorporates the quality of permanence, if we want to follow the most recent philological reconstructions.[3] The morpheme *it*, as a junction connecting the constituent components of the substantive *territorium* (the root *terr-* and the suffix *-orium*) makes it plausible that the whole lexeme be derived from the verbal form *terreo* and connects it to the idea of space. It even makes the intensive form

1 See A. Corboz, *Le Territoire comme palimpseste*, "Diogène" 1983, No. 121, p. 14 ss.; now republished in: A. Corboz, *Le Territoire comme palimpseste et autres essais*, Verdier, Paris 2001.

2 This is the meaning found in Sextus Pomponius' *Liber singularis Enchiridii* 50, 16; as well as, in the Middle Ages, in Cino da Pistoia's *In Codicem et aliquot titulos primi Pandectarum tomi: id est Digesti veteris doctissima commentaria*, Frankfurt am Main 1578 (rist. anast. Turin 1964) and Bartolo da Sassoferrato, *In Secundam Infortiati partem (commentaria)*, Venice 1575, L pupillos, paragraph territorium, Tit. *De verborum et rerum significazione*, which highlighted the existing correlation between "populus" and "provincia".

3 See S. Elden, *The birth of territory*, Chicago, London 2013, p. 218 ss. (*max*. 221–222), examines the case of *territorium* in relation to Bartolo da Sassoferrato's *usus scribendi*, attributing the root *terreo* to Pomponius alone. On this point, we share philologist A. Maiuri's observations, and warmly thank him for offering his interpretation. According to Maiuri, dividing the substantive *territorium* into its constituent components, the etymological derivation from *terreo* appears to be more convincing than the one from *terra*. If the first part of the word appears to be reminiscent of the substantive both for the first and the second word, there's one morpheme that betrays the word's origin in the verb form: *–it-*, the junction between the root, *terr-*, and the suffix, *-orium*. If we accept the participle perfect *territ-us*, from the verb *terreo*, as being the root of *territ-orium*, we can explain the presence of the junction *–it-*, which cannot be explained by tracing it back to the substantive *terra*.

territo more fitting than *terreo*, as it stresses the character of stationary permanence. While less immediate than the obvious *terra*, the *terreo-territo* etymon ultimately evokes the stability of the power being exercised over a certain portion of space. This reconstruction is supported by the definition given by Digesto, according to which "territorium est universitas agrorum intra fines cujusque civitatis, quod magistratus ejus loci intra eos fines terrendi id est summovendi jus habent".[4] Here the operation of power and domination is preeminent and space is suggested as submitting to an authority, controlled and atomised, subdivided according to the organs of government's respective *jurisdictiones*, as *magistratus* acquires, in this context an extremely vast scope of meaning, which generically encompasses all the subjects that hold public power.

The conceptual interpenetration of *territorium* and *jurisdiction*, already present in Roman times, was extended and made more complex in the Middle Ages, when the territorial paradigm according to which space had been organised until then proved unsuitable to resolve the burgeoning conflicts among the various *dominationes* overlapping on the same portion of land. That same geographic space was intersected by internal borders, identifying as many specific and different juridical regimes, whose dimension was not always fixed according to the territorial μέτρον, but it was deduced through a personal element. Let's think, for instance, of the *leges barbarorum*, applicable, according to the Theodosian Code, *ratione personae*, that is regardless of the settlement in a *locus* or, emblematically, based on dioceses, which were defined not by physical borders, but by the extension of the bishop's authority over the *plebs devota*, congregating for the celebrations of the baptism and the eucharist.[5]

4 Digesto, 50.16.239, § 8.

5 As written in the letter of Pontifex Gelasius I, *Fragmentum* 19, in Thiel, *Epistolae romanorum pontificum genuinae*, I, Brannsberg 1868, p. 492–493. On the diocesis "territory": *L'espace du diocèse. Genèse d'un territoire dans l'Occident médiéval (Ve-XIIIe siècle)*, ed. F. Mazel, Rennes 2008; and specifically M. Lauwers, *Territorium non facere diocesim… Conflicts, limites et représentation territoriale du diocèse (Ve-XIIIe siècle)*, < https://halshs.archives-ouvertes.fr/halshs-00275567/document >, p. 31 ss.; S. Patzold, *L'archidiocèse de Magdebourg. Perception de l'espace et identité (Xe-XIe siècle)*, in: *L'espace du diocèse. Genèse d'un territoire dans l'Occident médiéval (Ve-XIIIe siècle)*, ed. F. Mazel, Rennes 2008, p. 167–193. On the peculiar value of the territorial paradigm in such institutions as the Church, that have no inherent territory, see P. Biscaretti di Ruffia, *Territorio dello Stato*, in: *Enciclopedia del diritto. Volume XLIV,* Milano 1992, p. 334 ss.

"*Territorium non facere diocesim*".[6] The ties between territory and Church authority were mediated and conditioned by the human element (the community of the faithful), which became the identifying factor within uncertain geographical borders. Already in this phase, territory is disconnected by the mere physical objectivity of the *limes*, and its connection with the operation of a personal authority is established – the authority in question being that of the bishop, who extends his jurisdiction not on a land that he materially conquered (since it usually belongs to counts and viscounts), but on the faithful that practice their cult on their land, or that of the judge, called upon to enforce regulations that apply result in different applications based on people, rather than territory.

The shifting of perspectives, departing from the traditional supremacy paradigm of Roman times, in which the *imperium* proceeded directly from the earthly *dominium*, is accompanied by the acknowledgment of the cultural and historical value of geographical roots, of that sediment of memories, traditions, rituals and beliefs that shapes the *lex terrae* and opposes an insurmountable limit to the very expansion of the monarchy principle. This connection between the political community and the land will be symbolically expressed in the allegoric personification of earthly spaces, meaning the association of each Country with a deity or an animal to embody its character, its virtues and the deep roots of the local communities' morals. An ethnic and moral characterisation of territory that was to gain deep political significance with the establishment of the nationality principle.[7]

Modern positivist law, with its high degree of abstraction, has not always succeeded in grasping the countless nuances and the complex cultural implications to be found in the history of the concept of territory, and to represent its duality between the artificial dimension of an empty, neutral space, of a non-descript portion of earth surface on which political authority operates, and the concrete dimension of a place of "identity, relations and history",[8] which influences – according to Montesquieu's

6 This is the title of M. Lauwers' text, mentioned in the last note.

7 For a historic reconstruction of the affirmation of the nationality principle and the identification of Nation and State, among others, F. Chabod, *L'idea di nazione*, Roma, Bari 1961, p. 61 ss.

8 As defined by anthropologist M. Augé, *Nonluoghi. Introduzione a un'antropologia della surmodernità*, Eleuthera, Milano 2005, p. 71.

theory[9] – the very form of political organisation of the community that resides on it.

Specifically, the juridical doctrine that grew around the conceptual paradigm of the Nation-State has generally disavowed – with remarkable and conspicuous exceptions (Smend, Heller and Schmitt among others) – the cultural identity of territory, rather making the whole notion revolve around national sovereignty and the powers comprised therein.[10] To the point of making the territory as space into a reflected effect of the *imperium,* and of denying – in the context of the French revolutionary doctrine – any form of territorial pluralism, which was deemed incompatible with the unity and indissolubility of sovereign power. Thus – please forgive the extreme synthesis – territory has been variously defined, between the '800s and the '900s: as *res*, detached from the State and subject to a rule of sovereignty (*Eigentumstheorie*); as a constituent part and an immanent quality of the State itself (*Eigenschafttheorie*),[11] with the State extending an absolute and personal rule over it;[12] as the field of extension and therefore limit of sovereign power,[13] according to Rad-

9 See C.L. de Secondat (Montesquieu), *De l'esprit des lois*, Genève 1748, XIX, § 4 ss.

10 A non decisive, but important step towards the "abstractification" of the concept of territory was made at the onset of the XIX Century by the French doctrine, which – meaning to find a rational justification for power, so as to emancipate it from any form transcendent legitimization – devalued its connection to the land. Among others: M. Belissa, *Fraternité universelle et interet national (1715–1795): Les cosmopolitiques du droit des gens*, Paris 1998.

11 See K.V. von Fricker, *Vom Staatsgebiet* (1867), in: *Gebiet und Gebietshoheit: mit einem Anhang vom Staatsgebiet*, Tübingen 1901, p. 100 ss., according to which the territory is simply the spatial manifestation of the State; G. Jellinek, *Allgemeine Staatslehre*, [np] 1928, p. 394 ss.

12 See S. Romano, *Osservazioni sulla natura giuridica del territorio dello Stato*, in: *Arch. dir. pubbl.* 1902, p. 114 ss.; and also in S. Romano, *Il Comune. Parte generale*, Milano 1908, moving from a concept of the State as a real and tangible entity, the author identifies the territory as a part of the material structure of the State itself, and therefore sees the relationship between State and Territory as a matter of "essence", not of domain, because an element cannot "belong" to a subject, if it is a constituent part of that very subject.

13 See E. Radnitzky, *Die rechtliche Natur des Staatsgebietes*, in: *Archiv für öffentliches Recht* 1906, XX, p. 313 ss. Radnitzky's theory is applied within the context of international law by W. Henrich, *Theorie des Staatsgebiets entwickelt aus der Lehre von den lokalen Kompetenzen der Staatsperson*, Wien, Leipzig 1922, and also W. Henrich, *Kritik der Gebietstheorien*, "Zeitschrift f ür Völkerrecht" 1926, vol. XIII, p. 28 ss.; and A. Verdross, *Staatsgebiet, Staatengemeinschaftgebiet und Staatengebiet*, "Niemeyers Zeitschrift für Internationales Recht" 1927, vol. XXXVII, p. 293 ss.; A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft*, Berlin 1926, p. 163 ss.

nitzky's theory of competence (*Kompetenztheorie*) that was brought to its ultimate theoretical completion by Kelsen.[14]

If – both in the theory of property and in the theory of quality – territory has been hitherto considered in its material form, be it as the object of property rights or as an essential quality of the State as a geographical entity, in the theory of competence, and especially within pure kelsenian normativism, it [*the territory*] becomes disembodied, considered as a noetic quality, deprived of any cultural or identity value and reduced to the status of "Geltungsbereich von Rechtsnormensystemen",[15] and therefore to a mere logical derivation of normativity.

This definition of territory as a place of rule[16] dominated the doctrine of the State in the XX Century, establishing itself over Smend's[17] and Heller's[18] visions, that attributed value to the integrational force of territorial roots and therefore to the connection between territory and people, particularly against the lure of Schmitt's *Landnahme* as a concrete ordering of social relationships and as the source of normativity (*Ordnung* deriving from *Ortung*) rather than its object.[19] In Kelsen's pure doctrine, the rule of law is based on a hypothetically postulated *Grundnorm*, which can dispense entirely with any reference, be it in symbols or myths, to having originally conquered the land.[20] And therefore, while Schmitt's decisiveness is grounded in a concrete, earthly bond, Kelsen and his followers postulate the land as separate, with a predominance of immaterial elements on physical and cultural ones, and therefore a predominance

14 See H. Kelsen, *Allgemeine Staatslehre*, Berlin 1925, p. 137 ss.; H. Kelsen, *Grundriß einer allgemeinen Theorie des Staates*, [np] 1926, p. 27 ss.

15 H. Kelsen, *Allgemeine…*, p. 147.

16 See T. Perassi, *Paese, territorio e signoria nella dottrina dello Stato*, "Rivista di Diritto Pubblico" 1912, No. 3–4, p. 151 ss. Seeing territory not as a stretch of land, but a scope of domination over space, identifying the State as the scope of the people's political action and therefore highlighting the State's human element.

17 See R. Smend, *Verfassung und Verfassungsrecht*, Berlin 1928, p. 53 ss., who identifies territory not as mere physical space, but as a factor of cultural integration, instrumental in building a people's identity.

18 See H. Heller, *Staatslehre*, Leiden 1934, p. 139 ss., observations on the natural and cultural conditions of State unity.

19 Obviously referring to C. Schmitt's fundamental opus *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Berlin 1950.

20 See H. Kelsen, *Reine Rechtslehre*, Leipzig, Wien 1934.

of the political element, of a sovereign Will that knows no restraint either in ἔθνος or history.[21]

Territory is no longer an indefectible element of the State, but merely an "ordinary" one, and therefore it is a purely normative space; which also allows Kelsen to attribute the quality of State even to nomadic peoples. One might be tempted to ask, *per incidens*, whether this doesn't betray a subconscious sense of belonging to a "people without a land", cosmopolitan by way of necessity and religious calling, assuming that Judaism – as a form of earthly Messianism (and therefore opposed to the Christian eschatology) – advocates for the homogenous application of universal principles of justice to the whole of humanity.

In the subsequent theoretical developments, some propositions have emerged that mediate between the opposing views of Schmitt and Kelsen, postulating the idea of territory as a factual and *a priori* prerequisite of the State institution and therefore, in agreement with Schmitt's positions, an earth-bound and juridically relevant physical entity,[22] while at the same time identifying it as an immaterial element, consisting of the operation of sovereignty on a given space.

The complexity of the notion, however, has not yet been dispelled, as the perpetual and unconquerable tension between social ontology[23] and State doctrine fails to be resolved: on one side there's territory as a concrete historical and sociological fact, on the other there's territory as a concept, an allegory, made into an artificial construct in order to be reduced to its juridical dimension.

In the most advanced juridical doctrines of the constitutional State, which refine their positions moving from a conceptual revision of the State paradigm,[24] the concept of territory as a cultural product has emerged. This

21 On this point, useful observations can be found in: F. Volpi, *Il potere degli elementi*, afterword by C. Schmitt, *Terra e mare. Una riflessione sulla storia del mondo*, transl. G. Gurisatti, Milano 2002, p. 137 ss.

22 Thus G. D'Alessandro, *Istituzioni e territorio*, in: E. Cuccodoro, *Il territorio misura di sovranità*, Taranto 2016, p. 24–25.

23 Intended as the science exploring the connection between material and institutional entities, in the perspective of D.H. Ruben, *The metaphysics of the social world*, London 1985; and J.R. Searle, *The construction of social reality*, New York 1995.

24 This is the *fil rouge* of A. Di Martino's vast treaty, *Il territorio: dallo stato-nazione alla globalizzazione. Sfide e prospettive dello stato costituzionale aperto*, Milano 2010.

change of hermeneutical framework is particularly evident in pioneering positions such as Peter Häberle's,[25] devising a doctrine of the Constitution textually permeated by science and culture.[26] The German jurist, in picking up on and developing intuitions by Rudolf Smend[27] and Hermann Heller[28] pertaining to the potential for material and symbolic integration of territorial roots, proposed a reform of the three traditional elements of the State (people, government and territory), identifying culture as the State's "fourth element" and rethinking the notion of political spatiality. In the current phase of historical development of the constitutional State – according to Häberle – the notion of territory can't be reduced to the land's mere physical existence or the artificial complex of applicable jurisdiction, but should be intended as a cultural space forming the basis of the State's cultural identity and historical individuality.[29] A culturally formed terrain on which fundamental liberties stand; a "value of the constitution" that should be continually comprehended and accomplished, preserving it through time.[30] Not, therefore, a cold, inert element preceding the State and located outside it, but a cultural product, forged through constant human and institutional labour, becoming a living part of the constitution itself and a component of the *Constitution as culture*.[31]

Among the most notable consequences of this hermeneutical position there is the re-thinking, in the juridical-philosophical debate, of the fundamental justification for the ruling of the State over its territory.

The notion of territory as an object of domination, as it happens, does not befit that of territory as a value, which the State has a duty to preserve in order to protect the specific historic individuality and

25 See P. Häberle, *Stato costituzionale. I) Principi generali*, in: *Enciclopedia Giuridica Treccani*, Roma 2000, p. 1 ss.

26 See P. Häberle, *Stato…*, p. 8.

27 See R. Smend, *Verfassung…*, p. 53 ss.

28 See H. Heller, *Staatslehre*, p. 139 ss.

29 See P. Häberle, *Stato…*, p. 3; although similar observations had already been made in: P. Häberle, *Das Staatsgebiet als Problem der Verfassungslehre*, Basel 1993, p. 397 ss.

30 See P. Häberle, *Stato…*, p. 7, thus: "Each constitutional State continually takes possession of its territory thus turning it into culture". Culture as intended by L. Gallino, *Cultura*, *ad vocem*, Torino 2006, p. 185 ss.

31 See P. Häberle, *Stato…*, p. 8.

cultural identity of a defined political community.[32] By projecting on its constitutional image the protection of the natural environment (and therefore of the "natural foundations of life"),[33] it bonds intimately with the people that inhabit it and their collective and indivisible right to place the territory's resources at the disposal of future generations'. Within this perspective, the State's claims of rights over its territory can only be justified in that it – the State – is "treated as the legitimate representative of the people" residing on that portion of land.[34] Territorial rights, which can be divided into "rights of jurisdiction" (that is, the right to exert authority), rights over the resources and over the control of borders, reside originally with the peoples and not the States that represent them, as they are philosophically justified and legitimized not by the "mere act of occupation, but by the material and symbolic value that is attributed to the territory over time".[35] The State is no longer a *dominus*, free to do with the territory as it pleases, but rather a responsible administrator,[36] whose relationship with its territory is trilateral[37] (rather than binary), as it is mediated by the people. The rights of State *over* territory mutate, in a Copernican upending of perspective, into the people's *right to their territory*, that are granted and administered by the State.[38]

32 Cultural identity in its turn is the object of its own law, as pointed out in Y.M. Donders, *Toward a right to cultural identity?*, Antwerpen, Oxford, New York 2002, p. 327 ss.

33 The expression is to be found in art. 20 a of the fundamental German law.

34 See D. Miller, *Diritti territoriali: concetto e giustificazione*, "Ragion Pratica" 2009, No. 2, p. 446.

35 D. Miller, *Diritti*…, p. 446.

36 Important suggestions in the encyclical letter by Pope Francis *Laudato sì*, par. 116, with a reprise and reiteration of the declaration of *Love for Creation. An Asian Response to the Ecological Crisis*, a dialogue promoted by the Federation of Asian Bishops (Tagaytay, January 31st — February 5th 1993).

37 See D. Miller, *Diritti*…, p. 437 ss. The author sees the "problem of whether States obtain their territorial rights directly or indirectly, as representatives of the populations they rule" as unavoidable even for those who embrace a "territorialist" view of the State.

38 Rights that lay the foundation for the recognition of damage granted by national and supernational Coutrs to the descendants of native communities that have been deprived of their territory and its natural resources. See: sentences of the interamerican Court, August 31st 2001 (*Mayagna Sumo Awas Tingni Community vs. Nicaragua*); and November 28th 2007 (*Pueblo Saramaka vs. Suriname*); the sentence of the SCOTUS of June 30th 1980 (*United States vs. Sioux Nation of Indians*) and the analogue Australian Court on June 3rd 1992 (*Mabo vs. Queensland*).

Beside the concrete and historically rooted notion of territory as a cultural product and therefore a constitutional value that the State should preserve and develop, European Constitutions envision an inclusive political spatiality, open to territorial sovereignty, and opening up to internationalism and functional interdependence of the sovereign State with other political spaces. The construction of a multileveled protective system of the rights that are inherent to human dignity needs to build on the premise of a universal "cosmopolitan legality",[39] capable of projecting the protection of liberties beyond the concept of citizenship and therefore beyond the borders of national political territoriality. Political citizenship is increasingly complemented by a cosmopolitan citizenship of rights, and the State territory, while not relinquishing its traditional dimension as a place of nation-State sovereignty, embraces a wider horizon of peace-oriented, cosmopolitan, de-structured law, in a functional space of acknowledged human rights.

In conclusion, the vision of political spatiality that, within the European continent, connects the territory to the idea of belonging to roots, to safety and to cultural identity has acquired, in its less moderate version, a quality of exclusion and it has thwarted the development of a pluralist dynamic. On occasion, it has fed into downright *xenophobic* tendencies, thus departing from the Anglo-American vision of political spatiality, both in the thalassocratic British version and the anarcho-libertarian American one. Both the British yearning for the open sea – whose in-depth meaning was best explored by Schmitt[40] – and the American frontier myth, that has had a crucial role in shaping the individualistic and democratic American spirit, generated a vision of political space not as closed and exclusionary, as the Continental-European one, but "capable of containing within itself a multitude of 'places' and diverse identities, presenting itself as a form of 'plural liberty'".[41] This vision of political spa-

39 F. Ciaramelli, *Legislazione e giurisdizione*, Torino 2007, p. 96, writes about a universalist illusion of the Constitutions.

40 See C. Schmitt, *Land und Meer. Eine weltgeschichtliche Betrachtung*, Stuttgart 1954, mentioned here in: C. Schmitt, *Terra*…

41 C. Galli, *Spazi politici. L'età moderna e l'età globale*, Bologna 2001, p. 104. On the "founding" value of the American frontier: A. Buratti, *La frontiera americana. Una interpretazione costituzionale*, Verona 2016, p. 9 ss. See also: P. Häberle, *Stato*…, p. 8.

tiality, in its connection with the legitimation of political and democratic power,[42] warns against subscribing unreservedly to overly *abstract* and purely normative ideas of territory, or, on the other hand, to overly *concrete* ones, that lean exceedingly toward exclusionary identities, toward ἔθνος rather than *humanitas*.

The first kind, that – as we will see – are perfectly suited to meet the needs of juridical universalism founded on the idea of global human rights and worldwide economic integration, run the risk of losing sight of the cultural and identity-shaping significance of political territoriality and therefore of the democratic institutions that are founded on and supported by that territoriality. The second kind, that focus on the connection to the land and to specific identities, tend to counter the homologizing push of global markets on one hand, but on the other they are at risk, when not adequately balanced out by opposing cultural stances, of feeding ethnocentric positions and nefarious views of the land not as a defining factor of individual identity, but rather as cause for exclusion and marginalization of the "Other".[43]

The quest for a synthesis – in the Hegelian sense of *Aufhebung* – between the pure abstraction of the territory as a place of normativity and the actuality of the land as a cultural product and a seat of political democracy is the frame for the present observations.

2. Factors in the crisis of State territoriality

Territory and State territoriality, nowadays, appear to be evolving categories, subject to an ongoing blurring of their original and traditional meaning, when not to a downright "crisis of meaning".[44] Such crisis of territoriality can be attributed to a multitude of causes that, for the sake of simplicity, we will summarize with three main

42 See M. Hespahna, *L'espace politique dans l'ancien régime*, in: *Estudos em Homenagem aos Profs. Doutores M. Paulo Merêa e G. Braga da Cruz*, II, "Boletim da Facultade Faculdade de Direito Universidade de Coimbra" 1982, No. 58, p. 445 ss.

43 Useful observations in: S. Sicardi, *Essere di quel luogo. Brevi considerazioni sul significato di territorio e di appartenenza territoriale*, "Politica del Diritto" 2003, No. 1, p. 114 ss., 117.

44 As stated by S. Sicardi, *Essere…*, p. 114.

points: 1. the dissociation between the political stage and the seats of law elaboration; 2. the tension between the principle of universality, as an integral part of the market structure, and the principle of territoriality, as an integral part of the State structure; 3. the web's global spatial revolution.

2.1. The dissociation between the political stage and the seats of law elaboration

The territory is the arena in which the clash of interests in society finds a balance and is assuaged by political mediation, but an increasing share of such interests are no longer manageable within one territory. Juridical regulations that have a strong influence over social life are agreed upon in the context of transnational networks of delocalized *governance*, placed out of the reach of the subjects they apply to, who can attain no knowledge of and therefore no political control over them.

The real powers that define the most important conditions of human activity, of our *Lebenswelt*, fluctuate thus, elusive and distant, in the global space.

The *Political* is being delocalized in the world of global economy, where the seats of jurisprudence no longer coincide with the seats of politics. An increasing number of jurisprudential organs (international organizations such as the IMF, the ECB, the World Bank, the WTO, the ILO, the Basel Committee, and private regulation agencies such as ISO, ICANN,[45] and the Codex Alimentarius Commission) are not also political seats, subject to the procedural discourse of democratic deliberation. And the separation of interests and territories has brought about an increasing abstraction of political representation and the loss of its functional capacity, while the political space is rearranged, possibly foreshadowing new models of society in which democratic citizenship could be significantly weakened and deprived of its real substance.

45 ILO is the acronym for International Labour Organisation. ISO and ICANN are, respectively, acronyms for International Standards Organisation and Internet Corporation for Assigned Names and Numbers.

2.2. The tension between the principle of universality, as an integral part of the market structure, and the principle of territoriality, as an integral part of the State structure

The extension of the economic space beyond the political one and beyond the State is an ancient problem. Politics and law, both needing a locus, have always chased economics, which eludes localization (and therefore regulation), in the relentless search for new spaces for commerce to expand and individual enterprise to prosper.

The so-called planetarization or globalization of economics has definitely broadened the gap between marketplace and State politics, but, if it were merely a question of breadth, there would be no conceptual difference between the current situation and ancient Persia under the Achaemenid Empire (the first geopolitical experiment of a pan-idea with global aspirations),[46] Imperial Rome, Kublai Khan's Mongolia, the Venetian Republic or the British Commonwealth. It would still be the ancient, everlasting tension between the separate spheres of market (as a politically neutral arena where economical activities take place) and πόλις (as a place of cultural socialization and political participation). Even the so-called market globalization is not a new phenomenon. It manifested, in similar forms to the current one, between the first and second world war; and yet XXI Century globalization is an indisputable historical novelty. Not so much because it involves, to an unprecedented degree, all the stages of production rather than limiting itself to the produced goods, but particularly because today's global market is not simply trying – as it always has – to elude political regulation, but is actively trying to *mold* it, taking up the space of politics and society. The market – as predicted by Michel Foucault in his famous lessons at the *Collège de France* – is claiming the *power to shape both State and society*, thus calling into question the traditional reconstructive schemes of the State phenomenon and the hermeneutical value of the State paradigm itself.[47]

46 See K. Haushofer, *Geopolitik der Pan-Ideen*, Berlino 1931, quoted here in the italian translation: *Geopolitica delle Pan-idee*, Edition 2016: *I libri del Borghese*, Roma 2016, p. 95.

47 See M. Foucault, *Sicurezza, territorio, popolazione. Corso al Collège de France (1977–1978)*, Milano 2005.

The market is no longer the "politically neutral place of the *homo oeconomicus*' free activity", but rather an anthropomorphized subject on a global scale, that purports to exist in a purely economic dimension, while actually manifesting a distinct political nature.[48] Even within the atomized and often elusive nature of financial economy's techno-structures (rating agencies, investment funds, big corporations, international institutions such as the IMF, the WTO, the World Bank and the ECB), the market – a modern *macroanthropos* – operates along the side of the Nation States, from a position of influence.[49] Better, it positions itself between the citizen and the State, fighting the political government organs over the power to establish the guidelines for social life, no longer content with circumventing political regulation, but forcing the State to shape the national economy in a certain way. All this is accomplished through tools that still, to this day, lack a juridical structure capable of ensuring their transparency, objectivity and manageability; and to attach them to any measure of political accountability. [These tools are] non-compulsory ones, elements of soft law, unlike those traditionally employed by sovereign States, but equally if not more effective, because they can result in the destruction of national wealth, with potentially disastrous and easily activated economic effects (money never sleeps!) on national distribution regulations that depart from the dictates of the *Washington consensus*. "Financial sanctions" that are not only extraordinarily persuasive, but also present the advantage of acting faster than any form of democratic, parliamentary or popular control, conditioning it with the irresistible force of economic interest. Those who fail to please the financial marketplace see their global exchange privileges revoked; which creates a condition of vulnerability, particularly in the case of economically weaker States, plagued by high debt and that largely depend on their credit score and their international reputation. Such states can be brought swiftly to the brink of budget default and therefore unfailingly made to bow and acquiesce to the conditions imposed by the techno-structures of world finance.

48 Meaning that the nature of the market "is economical and political at the same time" – M. Terni, *Stato*, Torino 2014, p. 80 ss.

49 As succintly noted by S. Cassese, *Territori e potere. Un nuovo ruolo per gli Stati*, Bologna 2016, p. 37: "through rating agencies, markets control States, not vice-versa".

Not just those decisions that directly and immediately affect the economy, but also the ones that can influence the psychological "climate" in favour or against certain financial interests, creating a positive or negative "mood", are scrutinized by the market, that passes judgment and imposes its own solutions, establishing itself as the active subject of a sovereignty that is diffused and hard to pin down, but no less tangible for that. A "sovereign" power that operates through the cyberspace, the new a-territorial dimension of global financial power in which the clear-cut separation of power and politics takes place.[50] The markets' drift towards an increasingly financial dimension brought about a disassociation of the economy from any defined public space of debate; it detached economic interest from local policies and their territories, transposing such interests in an elusive *elsewhere*, making it especially complicated to represent and compose them within the context of parliamentary politics.

2.3. The Web's global spatial revolution

The technological revolution brought about by the Internet is acting as a historical accelerator of the aforementioned dislocation process that separates politics form national territoriality. The ubiquitous connectedness, made possible by the omnipresence of computers and, particularly, smartphones – with which vast segments of the population, specifically the younger generations, have a symbiotic relationship – caused a veritable global spatial revolution. It created a super-physical world, an artificial territory that is superimposed on the natural and physical one; a 'non place' in which growing portions of our economic, social and political life, as well as our emotional and personal one take place. The very notions of space and time are altered by this phenomenon. Each internet user can be "cybernetically" present anywhere on Earth in real time, which has an effect on anthropological coordinates, on socialisation processes and on community life. Individual action, be it of a civil, political or economic nature, is projected in a wholly new spatial and temporal dimension, removing the physical and psychological boundaries in which it used to be enclosed. Human beings lead "globalized" lives and a show

50 This space has been called "il campo giochi dei poteri" (the playground of power) by Z. Bauman, *Fiducia e paura nella città*, Milano 2005, p. 18.

a growing tendency to look beyond one's own national horizon, not just to further one's professional education or visit a dentist, but also to access information freely, doing away with the filters of "official" news outlets, to support global campaigns or to practice forms of lobbying that transcend the boundaries of State territoriality. We are witnessing a "dislocation of [the very notion of] 'being together' as human beings outside of the closed territory of the *polis* in a transnational society coinciding with the worldwide marketplace".[51] Our political life too is progressively losing contact with its territorial dimension and occupying the Web's virtual spaces, where citizens can develop forms of democratic aggregation and exert political pressure over those who make public decisions, without ever leaving their desks. As a consequence, the locations in which political action is planned are no longer easily identifiable and geographically definable. On the contrary, we are witnessing a proliferation of *non-places* of political action and an increasing uprooting of the *global citizen*'s τόπος, as we eschew the need for a physical place in which to enact economic exchanges and human relationships. Changes on this scale can't help but be reflected on the political existence of the state.

From an enthusiastically open and modern point of view, we could say that political institutions have no further need for territory, seen as virtual spaces and domains are now free of physical limitations and detached from the historically assumed ideas that opinions and juridical relationships should be formed in a given physical space. And the most enthusiastic fans of the Web do indeed consider the traditional models of democratic interaction to have been made obsolete by the new technologies and claim the new, virtual forms of political action to be more incisive and engaging.[52] Consistent with this vision, we are already witnessing attempts to substitute the traditional accoutrements of political territoriality with the modern tools of digital democracy. Forms of public consultation in view of collective decision making, online referenda, the online sanctioning of candidacies for public offices are calling into question the relationship between direct and representative democracy,

51 M. Terni, *Stato…*, p. 86.

52 Convincing observations in S. Sassen, *Territory, authority, rights*, Princeton, Oxford 2006, p. 328 ss.; S. Sassen, *Sociologia della globalizzazione*, Torino 2008 (tit. orig.: *A sociology of globalization*, New York 2007).

with a new balance in favour of the former, while voters, in significant numbers, openly question the idea that free parliamentary representation as the highest form of political representation, demanding direct involvement of the people in the making of public deliberations, possibly in the form of imperative mandate of elected officers – that could therefore be recalled.

However, there is no shortage of more sceptical – or simply *desenchantée* – arguments on the internet revolution. On one hand, the "virtual" dimension could encourage forms of solipsistic isolation, severing the social and geographical ties that contribute to the defining of individual identities, on the other hand the Web as a space still doesn't seem to be the best arena for the enacting of effective participatory democracy, since it does not involve personal and direct confrontation, with rational mediations attained through dialogic relations that allow for an intersubjective exchange of experience and culture, unmediated by a screen and by the possibility of masking one's identity. Then again, the call for direct popular participation to public decision-making is still being expressed in forms that are ambiguous and lack transparency, running the risk of identifying the sovereign "people" with a television audience or the community of Internet users. To the point that democracy 2.0 could be said to be not so much "direct" as "directed" by someone, who controls it from above, while shrouded in a cloud of opaque elusiveness.

Within the limited context of an analysis of territory, however, it is unadvisable to speculate any further on which position might be more persuasive, nor is it possible to formulate an articulate response to the question of whether traditional representative democracy and the new Web democracy are necessarily to be mutually exclusive and in conflict, or whether they could find fruitful forms of mutual integration.[53] The only relevant aspect to our enquiry is that, as a result of the increasing delo-

53 It would actually seem possible to conceive a middle way, between the binary alternative of a de-territorialization of politics and their all-embracing and darkly identitarian bond with territory and representation. This would require starting from the evident consideration that the levels of participation and individual mobilization granted by the Web are potentially higher than those achieved by traditional political tools. If we accept that Internet channels cannot be considered to be radical alternative tools, destined to replace the traditional instruments of democracy, and that the community of internet users cannot be a substitute for the People, in its relationship to the territory, nevertheless it is apparent that the Web could

calisation of the processes of socialisation and individual political action in the virtual space, territory is no longer the only physical-material substrate for the State's political community, nor is it the only necessary element of social and political control,[54] as it now contends with the new, a-territorial dimension of cyberspace, the post-modern ἀγορά in which new forms of socialisation happen, that can dispense with physical, direct intersubjective relationships.

If, in Schmitt's time, the crisis of the νόμος came from the sea, nowadays it comes from the Web's virtual space. This space, which – just like the sea – can't be occupied entirely or portioned, the economic and cultural race for power on Earth takes place.[55]

3. "Miniaturisation" of the national territory, disaggregation of the State and reallocation of powers among different orders of political action

The vast and complex phenomena described above fuel two conflicting tendencies: a tendency to the miniaturisation and disaggregation of the State and a tendency to the increasing of control over national territory through a re-articulation of power.

The National State, partly because it participates in international organisations and super-national Unions that deeply influence its politics (to the point of submitting the very "reasons of State" to the jurisdiction of international penal Courts), partly because of its static terrestrial element, ill-suited to the frantically dynamic global economic space and to the a-territoriality of virtual reality, has seen the scope of its sovereign jurisdiction shrink and, in this sense, it has "miniaturised". In order to attain a global purview, it tries therefore to "globalise": it fragments its

strengthen the instrument of territorial democracy and representation and revive them without leaving them devoid of meaning.

54 See A. Di Martino, *Il territorio…*, p. 290; on the crisis of territorial sovereignty, among others: S. Sassen, *Losing control. Sovereignty in an age of globalization*, New York 1995; B. Kingsbury, *Sovereignty and inequality*, "European Journal of International Law" 1998, No. 9, p. 599 ss.; A.M. Slaughter, *Sovereignty and power in a networked world order*, "Stanford Journal of International Law" 2004, p. 283 ss.

55 Thus S. Ortino, *Il nuovo Nomos della Terra, Profili storici e sistematici dei nessi tra innovazioni tecnologiche, ordinamento spaziale, forma politica*, Bologna 1999, p. 24.

unitary sovereignty into a series of functional capacities, divided according to the policies to be followed on a transnational scale by the highest ranks of State bureaucracy. The State is "disaggregated",[56] it foregoes its monolithic structure and, thus atomized and reduced to clusters of functions, it departs its territorial jurisdiction and enters a reticule-like system made up of a variety of subjects: other States (also represented by their own bureaucracies), super-national public powers, private powers whose position is propped up by economic might or by the ability to prompt political mobilization in specific fields of interests (multinational enterprises mostly, but also NGOs working in the fields of human rights and environmental protection, such as *Amnesty International*, the WWF or the Red Cross). None of these subjects, observed separately, could ensure an effective and acknowledged governance in their respective fields. There is no top authority – and, in that sense, a sovereign authority – with ultimate decisional power and therefore able to create order around it, within the multitude of other private and public subjects that form these networks. There is no political space per se, but rather a functional interconnectivity of bureaucratic élites, and the forms of power manifested therein are not attached to corresponding systems of accountability.

Parallel to the miniaturization of the national territorial jurisdiction and the delocalization of the seats of power – nebulized between the techno-structures of the global economy and the cyberspace – another phenomenon has been growing, almost as a reaction to both: a resurgence of local identities, of regionalisms, a return to the solidity of real spaces as opposed to artificial ones, fraught with identitarian references. We are "missing community".[57] The impossibility, for individual States, to take part, with the tools of democratic policies, in the government of extra-territorial cyberspace in which the race for global power is run, prompts national politics to look inwards, to their local dimension, the only one in which it is still possible to make choices that have a direct and measurable impact on relevant aspects of collective life.

National politics, thanks to their "local" dimension, take back its role as a source of identity, capable of generating a sense of community.

56 Definition of disaggregated state by A.M. Slaughter, *A new world order*, New York, Oxford 2004.
57 From Z. Bauman, *Missing community*, Cambridge 2000.

On a local level, they find the needed "ingredients" to spice up the idea of citizenship, which are hard to locate in the distant and artificial concepts of global and European citizenship. And thus politics are confronted by a resurgence in demands for self-governance [of local communities], that call for a more direct relationship with their "micro-territory" and for a larger degree of involvement in the managing of their natural, cultural and environmental resources, which make [the territory] an *unicum*.[58] The disaggregation of the State's sovereign functions, caused by its projection towards the global scenery, is countered by the juridical reorganization of the national space.

Further proof that politics tend to look inwards to their local dimension – which could be mistakenly seen as contradictory of the world's progressive tendency towards global dynamics[59] – can be found in the growing relevance of regional districts[60] and particularly of metropolises, which are vital hubs of the global economy. The global market is strongly inclined to the mobility of factors of production and of geographic displacement, but at the same time it needs "high territorial concentrations of resources in order to manage such displacement"[61] and to keep providing the services that the economic system needs (hence the talk of *agglomeration economies* and *agglomeration dynamics*). Such high concentrations of capitals and offices are more easily achieved in cities, that are connected through a trans-border network allowing the multinational enterprises on the global marketplace to access complex professional services.[62] The cities that are connected by such networks subtract themselves from the regulations imposed on the national territory, as most of the functions of such networks (especially those that support the needs of global finance), are governed by technical standards set by private agencies (regulation agencies or major law firms), rather than national

58 A Country made unique by its culture, according to P. Häberle, *Stato…*, p. 7.

59 See M. Castells (*The information age: Economy, society and culture. Volume II. The power of identity*, Oxford 1997, p. 61 ss.) talks of a paradox, but localisation is nothing but the flip side of globalisation (which generated the concept of glocalisation).

60 Particularly appreciated by territorialist economists. The territorialist school in Italy is headed by G. Becattini, by whom we recommend *Ritorno al territorio*, Bologna 2009 and *La coscienza dei luoghi. Il territorio come soggetto corale*, Roma 2015.

61 S. Sassen, *Sociologia…*, p. 27.

62 See again S. Sassen, *Sociologia…*, p. 23 ss.

or international legal principles. Metropolises such as London, New York, Shanghai, Singapore, Hong Kong and Dubai get "de-spatialized" and become "global" cities, *non-places* experiencing the contradictory status of *pivot*, but also "dumping grounds"[63] for the unresolved problems of globalization: pollution, mass migrations and a demographic explosion of urban areas.

This conflicting tension between the "miniaturization" of the State in the context of global action and the focusing of political action on an infra-state level of government results in the "partial dissolution, or at least a loosening, of the concept of nation as a spatial unity"[64] and the rising of new spatial unities both on a smaller scale (cities, regions, trans-border districts), and a larger one (trans-national free-trade zones, global cyber markets).

The thrust towards a local dimension is well exemplified by the rising, within the European States over the past twenty years, of the tendency to organize the political space around regional or federal models, as well as by the central role given, within the European system and in the context of a constitutional distribution of administrative powers, to the concept of subsidiarity. Globalization, which drives the δῆμοι away from the seats of political elaboration, is met with a shifting of public administration responsibility on territorial institutions, thus bringing the rulers and the ruled closer and injecting new life into often stagnant systems of accountability. The redistribution of powers on different scales of political action (from a national to an international or planetary one or from a national to a local one, with a special autonomy granted, in a global context, to large metropolises) is an extremely interesting phenomenon from a theoretical point of view, not only because it shifts portions of sovereignty across different stages, but, on a deeper level, because it changes the meaning of the State's territorial dimension from the point of view of the deployment of human activities and therefore from the point of view of the law which is supposed to rule such activities. This is the aspect we shall now examine.

63 An expression by Z. Bauman, *Fiducia…*, p. 19, who calls metropoles the "discariche dei problemi causati dalla globalizzazione" (dumping grounds of the problems caused by globalization).

64 S. Sassen, *Sociologia…*, p. 29.

4. The consequences of decreased relevance of State political territoriality

4.1. Constitution of the global space as a homogeneous and isomorphic "non-place" and substitution of the *civis* with a cosmopolitan consumer

Within the context of what Schmitt called conquest of land (*Landnahme*) – as observed by a refined exegete[65] – "the relationship between law and land is not resolved by the mere search for an applicable 'where', but it raises to the level of a synthesis of life, in which the context is at once an act of will, a legal principle and the constitution of a people". But what is the effect of a *Landnahme* of global space by multinational enterprises and financial institutions? It is possible to say that it does not reflect identities, but rather enacts instances of assimilation and homologation; it does not contribute to the constitution of peoples and individual cultures, but of indistinguishable communities of global consumers. The global market space needs to be homogenous, smooth, not a place of separate identities, but an indistinct, isomorphic *non-place*. If the telluric force of Schmitt's *nomos* laid the foundations for political identity and people's unity, the conquest of globalized space by the forces of finance dims specific identities, assimilates cultures and reduces the human dimension to the sphere of economic consumption.

As the individual strives to attain the world's vast space, he/she seems destined to let go of social bonds; the *civis* is thus replaced by an ahistorical agent. A cosmopolitan consumer that "seems to thrive in casual daily *bargaining*, dominated by the tendency to accumulate that is typical of homo *oeconomicus*".[66] The apparently boundless expansion of the rights sphere and the marginalization of public discourse – particularly the European one – on the dimension of shared duties, can also be read within the interpretative framework of "consumption". Universal human rights – setting aside any consideration on their actual juridical substance[67] – are attributed to an individual unbound

65 See N. Irti, *Norma e luoghi. Problemi di geo-diritto*, Roma, Bari 2006.

66 See M. Terni, *Stato*, p. 60.

67 The conclusion is slightly over the mark, and yet it captures an element of truth, W. Sofsky, *Rischio e sicurezza*, Torino 2005, p. 138 (transl.: *Das Prinzip Sicherheit*, Frankfurt am Main 2005,

by social ties, attachments, and by the responsibility of participating actively in a political community. By those elements, in short, that set the systemic limits to individual interests and allow for a reasonable balance of individual rights and social duties.

This "consumeristic sovereignty", while it can bestow a false sense of omnipotence,[68] proves to be an unfortunate power, when the sovereign-consumer loses sight of their own territory, culture and roots,[69] doing away with society and State. The individual, whose collective vision of the greater good and whose accountability in the endeavour of coexistence were grounded in a solid, earthly attachment to the *civitas*, can end up being deprived of the social protection, of that network of public and intersubjective solidarity that used to steady the precarious path of existence. Ultimately, the individual would end up being the subject of an unprecedented level of freedoms and opportunities, and yet entirely free of bonds, alone in the empty space left by the delocalization of the law and the deconstruction of the State and of the sovereignty that used to be the founding principle of political unity.[70] A man with no πόλις, moved chiefly by commercial concerns and aspirations and only weakly attached to community values, becomes a *homo impoliticus*, a consumer in the global market rather than a citizen. Isolated and fragile, the global Man can fall prey to the illusions and the spells of consumeristic idolatry, the new religion of a post-metaphysical world. In the city-states in classical Greece, the distinct pre-eminence of collective values over individual and selfish ones caused the private and public sphere to come close, to the point of blurring into each other and "absorbing individual identities and will in view of the global political goals of the *polis*",[71] whereas

p. 140) in that it notes how, until there is a World State, capable of granting full and effective protection of human rights, the "rhetoric" of human rights will be but "a moral weapon attempting to overthrow the traditional wisdom of the Law of War".

68 See R. Castel, *L'insécurité sociale: qu'est-ce qu'être protégé ?*, Seuil 2003, p. 22, who talks of "survalorisation" of the individual.

69 See R. Sennett, *L'uomo flessibile. Le conseguenze del nuovo capitalismo sulla vita personale*, Milano 2006 (tit. orig.: *The corrosion of character: the personal consequences of work in the new capitalism*, London 1998); S. Ortino, *Il nuovo…*, p. 32.

70 See Z. Bauman, *La solitudine del cittadino globale*, Milano 2015 (transl.: *In search of politics*, Cambridge 1999); on the reduction of social bonds as a consequence of the increased life opportunities created by globalisation, see also R. Dahrendorf, *La libertà che cambia*, Roma, Bari 1994.

71 M. Terni, *Stato…*, p. 18.

modern, hedonistic consumer society cause the opposite to occur. Everything is private, everything is individual, particular and unique. The individual disengages from their own citizenship, from the social attachment it entails and from the duties that come with it (taxes being the chief example), and seeks refuge in those States that offer better conditions for their financial and commercial activities. "Economic citizenship" takes the individual where the greatest advantages are to be found and, when a conflict arises with a pre-existing political citizenship, the latter can be discounted in favour of the former. An emblematic case is that of actor Gerard Depardieu, who applied for Russian citizenship, abandoning his French one, in order to escape the wealth tax introduced by the Hollande administration. This is a perfect example of the economic sphere's preponderance over every other aspect of life and of the loss of meaning of political citizenship which can, in cases such as this one, be reduced to the ownership of a passport.

4.2. Eclipse of the criteria of juridical legitimisation pertaining to the principle of territoriality

The criteria of juridical legitimisation pertaining to the principle of territoriality and to the substantial values of civic engagement, of representation, of democratic self-regulation (the legality principle) make way, within the global normative space, to procedural legitimisation criteria that depart from the principle of territoriality and from the dynamics of political elaboration of law. Another general criterion of assessment for the legitimacy of juridical actions gains traction: the *Rule of Law*, with its procedural requisites (*fairness*, *due process*) that cloud the question of whether collective decisions that affect social freedoms or goods that are essential to social life can be attributed to "localised" institutions, representative of territorial interests, and they focus instead on answering the one question about the reasonable or appropriate restriction of rights.[72] The affirmation of the principle of *due*

72 Within the context of the EU law, this notion of *Rule of Law* is especially vague. Note I. Ward, *Europe and the "Principles" of article 6*, "King's College Law Journal" 2000, No. 11 (105), p. 107 ss., 109: "There is no coherent concept of a rule of law in the new Europe, because neither the judges nor the politicians dare to venture what it might be". Among the pronouncements

process, in fact, was facilitated by the worldwide diffusion of the principle of proportionality and balancing as judicial techniques for the composition of conflicting interests.[73]

The rise of universally acknowledged security warranties can be seen as the outline of a founding core of a *global constitutionalism*, that relies on non-territorial organs for the protection against the abuses of power committed by States or private agents. "Isles of legality" – in the words of Gaetano Silvestri[74] – begin to surface in the sea of global law; and by doing so they reduce the areas that lack any form of regulation, and create actionable juridical bonds for both old and new forms of power. While relevant and promising, these security warranties are not without their flaws, which would be remiss of us to ignore. Beside noting that the scheme that informs the judgment on proportionality, in all of the steps of which it consists, comprises vastly discretional and therefore highly subjective evaluations, we should also point out that it has a tendency to translate into formal imperatives (transparency, mandatory motivation of and participation in the procedure) that do not pose a definitive and binding limit to the compression of rights.[75] Procedural rules applied under contingent circumstances, and therefore changeable (because there is no "definitional balancing" and each balancing is based on the individual case) are at risk of separating their targets from their intended goal of increasing the level of preservation of rights and therefore protecting, above all, the weaker subjects of globalisation. As theorized by Franz Neumann in 1937, a law that consists in a set of procedural

that observed a violation of statutory reserve in the EU sphere, the most famous is the *Lissabon Urteil* by the *Bundesverfassungsgericht* (BVerfGE 113, p. 273 ss.).

73 See vol. XXV of the *Annuaire Internationale de Justice Constitutionnelle 2009*, 2010, that collected the contribution of scholars from all over the world (Brazil, Egypt, Japan, Kuwait, South Africa, the USA and obviously Europe) on the theme: *Le juge constitutionnnel et la proportionnalité*. Among the most complete and in-depth monographies on proportionality, see: A. Barak, *Proportionality. Constitutional rights and their limitation*, Cambridge 2012; and S. Cognetti, *Il principio di proporzionalità. Profili di teoria generale e di analisi sistematica*, Torino 2011.

74 See G. Silvestri, *Costituzionalismo e crisi dello Stato-Nazione. Le garanzie possibili nello spazio globalizzato*, in: *Costituzionalismo e Globalizzazione*, "Annuario AIC" 2012, Napoli 2014, p. 152.

75 For a poignant critic of the logical structure of proportionality control and its "pathologies", see T. Endicott, *Proportionality and incommensurability*, in: *Proportionality and the rule of law*, ed. G. Huscroft, B.W. Miller, G. Webber, Cambridge 2014.

principles applied according to "flexible" logical schemes can be subjected to transactive adjustments that generally favour, among conflicting sides, the side with the most cultural, relational and economic resources and the strongest influence.[76] An extremely principled and predominantly jurisprudential law, such as this "global constitutional law" tends to be, could prove to be more on the side of multinational companies, rather than that of the socially and economically disadvantaged subjects, which find in an inflexible application of the rules a stronger assurance that their handicap will not translate into a liability from a legal (and judiciary) point of view.

4.3. Shift of the traditional criteria of normative legitimisation in global a-territorial law

The normativity of global a-territorial law rests increasingly on effectiveness and custom, rather than democratic legitimation. When the elaboration of law no longer draws its legitimacy from democratic territoriality (i.e. from pertaining to an area of influence of political democracy), the dominant validation criteria are functionality, efficiency and, ultimately, effectiveness, which pushes the principle of legality to the margins.[77]

Real life relationships, negotiations, commercial relationships and trading happen outside the sphere of general and abstract norms, therefore without the mediation and selection of the State's directive political organs, based on private agreements; and they generate contractual procedures disjointed from the law (such is the case with *grey markets*), which generally arrives later, when those forms of market regulation have gained consensus and visibility. This kind of law is mostly made up of general clauses, in which the principle of good faith and the correctional value of equity fulfil a closing function, not unlike the one executed, in internal constitutional law, by the principle of common sense. A law that taps into diverse sources, all sharing a *bottom-up* quality, meaning they were born

76 See brilliant observations in: F. Neumann, *Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft*, in: F. Neumann, *Demokratischer und autoritärer Staat*, Frankfurt am Main 1937.

77 Among the first to develop this observation organically: F. Galgano, *Lex mercatoria*, Bologna 2003, p. 229 ss.

out of chance and circumstance and thus have progressively stabilized and become universal by force of homogenous reiteration: the customs of international trade, the law of international courts of arbitration and the more common types of international contracts. Global law is shaped around life in a perpetual process of fine-tuning and empirical trial of its efficacy in solving practical problems and, by means of international arbitration, it outranks imperative norms of national law. This is compounded by the fact that, in the absence of regulation by specific national authorities, the *lex mercatoria* "takes on a function of regulation and redistribution", albeit without being subjected, not even indirectly, to criteria of democratic legitimation.[78] Private subjects, operating in specific market areas, autonomously adopt certain contractual conditions whose value is not merely personal and synallagmatic, but "sets a precedent", in that they are offered as general norms for the regulation of that specific segment of global market, without finding their legal strength and the legitimacy of their imposed norms in anything else than the reiteration of mutually agreed practices.

The customary law that is thus formed in the de-territorialized space of global market are in their turn adopted and validated by state jurisdictions and, in a constant dynamic of mutual references, applied in a variety of national jurisdictions, thus creating a global customary law. This trans-state customary law, which is already heavily present in the sphere of commercial and private law, and is now gaining traction in the sphere of public (particularly administrative) law, is what States tend to conform to, particularly when the national regulations on the matter are lacking or inadequate, or their application would require controversial and divisive political choices. The State, just like corporations and private individuals, offers a pragmatic response to the complex regulatory problems of the global market and it uses economic efficiency as a criterion on which to assess the advantages of opposing the national legal framework, resulting from political choices, to the one derived from the adoption of the publicized precedents and the universalization of private regulations, autonomously adopted by market agents.

The ultimate consequence of this tendency to continuous negotiation and case-by-case regulation, based on a systemic institutional cooperation,

78 See A. Di Martino, *Il territorio…*, p. 360.

is that private agreements and judiciary deliberations gain traction over the law. In an increasing number of instances, sentences and contracts (in the form of the *lex mercatoria*, receptive of commercial customs or great international arbitrations mediated by law firms) tend to substitute political deliberation. As a result, one of the structuring principles of civil law systems is called into question: the idea that public, collective deliberation should display a superior rational force and have a higher moral value than practical individual choice.

Then again, the growth of the contractual form and particularly of the judiciary decision, to the detriment of the law is understandable. On one hand, the juridical form that is best suited to transcending the confines of state territoriality and to be adapted to a global scale is the jurisdictional one. On the other, the forms of the contract and the sentence appear to be better suited to application within exceedingly pluralistic systems than general and uniform precepts. Both the contract and the sentence consider the actors in their individuality and devise case-by-case applicable solutions, unfit for the definition of stable hierarchic orders among the interests and principles that are highlighted in each separate case. They therefore deactivate the ideal conflict that would deflagrate if those same conflicting positions were to be composed as general principles, in legal texts with general effects.

Some welcome this transformation of contemporary law – that contaminates Anglo-Saxon modules with institutions and models of law elaboration derived from the *common law* tradition – applauding it as an overcoming of the limitations of strictly positivist law, centred on the national State and therefore unsuitable for a constitutional and cooperative state (*Offene Verfassungstaat*), connected to the transnational networks of law elaboration and ruled by a golden standard of functional interdependence.[79] Within this perspective, in the context of a globalized post-national State, it is natural to direct expectations for the system's

79 Among several representatives of this school of thought, see Sabino Cassese and the several works in which he contributed to the definition of the very notion of global right. See: S. Cassese, *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Torino 2009; S. Cassese, *La globalizzazione del diritto*, Roma, Bari 2003; S. Cassese, *Oltre lo Stato*, Roma, Bari 2006; S. Cassese, *The globalization of law*, "Journal of International Law and Politics" 2005, vol. 37 (4), p. 973 ss.; S. Cassese, *Territori…*, in which he acknowledges the increased relevance of the States and the reprisal of the territories.

efficiency at its jurisdictional actors and independent regulators, rather than its representative political institutions.

There is, however, no shortage of critical opinions from those who maintain that the *big regulators* of the *big society* are civil servants, magistrates, *law firms* executives and generally subjects entrusted with power that is not countered with any form of accountability. Focusing specifically on the European system, when even the "law" (in the sense of "secondary legislation") does not entirely reflect the founding principles of the formal rule of law (i.e. legality and the separation of powers), some fear that the crisis of the political sources of law, both on a national and European level, might be a "danger for European civilization itself and for its cultural identity".[80]

The real problem seems to be that Politics, as they lose their territorial roots, don't migrate to another home, but appear to scatter and become volatile. The disappearance of the traditional places of democratic deliberation is not accompanied by the identification of new and comparable arenas for debate and democratic participation – and therefore of social and political integration. And even the alignment of the democratic principle with the logic of non-places isn't fully accomplished. If the State looks increasingly like a white-haired monarch, close to abdicating, a new ruler capable of taking charge has so far failed to appear. Thus confirming Massimo Luciani's observation that the techno-structures of global law could only expose the destructive force of the outmoded State categories, but not show the constituent force of a new democratic νόμος.[81]

5. The praxis of theory: the problem of the "European territory". The European space from the inside and from the outside and the paradox of the "politicisation" of Constitutional Courts

The tendency to de-spatialization of State territory, as described in previous paragraphs, is further enhanced in the specific European context, which is the most advanced model of modern law. What is taking place in Europe is in fact the most refined – and problematic – attempt ever

80 Thus A. Carrino, *Il suicidio dell'Europa*, Modena 2016, p. 49.

81 See M. Luciani, *L'antisovrano e la crisi delle costituzioni*, "Rivista di Diritto Costituzionale" 1996, No. 129, nt. 20.

made at organizing the political space without recourse to the territorial paradigm, by overcoming the association – which has informed what we call Modern Times – between sovereign political organizations and territory. The common reflection upon the European "territory" is the ground on which modern and post-modern law meet, the melting pot in which new analytic categories are forged and, at the same time, the hardest testing ground for the complex theoretical questions that the present theme entails.

From a merely geographical point of view, tracing the borders of European territory is anything but simple. Europe does not have clear natural boundaries and its borders are therefore unstable and constantly shifting, making it particularly hard to agree on a defined border between Europe and Asia – the only two continents that have no natural delimitations to refer to for geographical and political frontiers. While the traditional topographic border sees the European *limes* as coinciding with the Ural Mountains end the Pripet woodlands, the pan-Slavic school sets it between the Finland gulf and lake Pejpus up to the Danube delta. In the partition between Western and Eastern Europe, we can trace echoes of the entirely artificial and not at all geographical division that the Yalta Pact imposed upon the old continent and that, to this day, makes us think of nations such as Slovenia and Serbia as "Eastern Countries", despite the fact that they are geographically located farther west than Sweden, which is easily perceived as a Western European Country. This is enough to deduce that the very positioning of the European border is an inherently political and ideological question.

It is equally difficult to apply the notion of territory to the EU. The European Union does not have its own territory in any juridical sense, but it determines it by referring to the internal constitutional right of the member States, as well as to international law that determined the territorial borders of individual States (art. 52 TEU, art. 355 TFEU).[82] It also refers back to national territories for the determination of two among the most important corollaries of political identity: citizenship and voting rights.

82 Territory is discussed in the TEU and in the Charter of Fundamental Rights, exclusively with regard to the territories of national States, not of the EU. Thus artt. 21; 23; 35; 42 § 7; 43; 45; lett. b 2 d; 49; 50 § 2 lett. d, e, f and § 3; 55 § 2; 79 § 4 and 5; 88 § 3; 89; 91 § 1 lett. a; 111; 153 § 1 lett. g; 172 § 2; 199; 200; 201; 222; 299; 343 CDFUE.

Both European citizenship, which is automatically attributed to "Every person holding the nationality of a Member State" (art. 20 TFEU),[83] and the right to vote and run for the European Parliament are directly descended from the corresponding rights within member States, without any further requirement specified by EU law.[84] The European Union, in short, is the *sum* of several and different national political seats, rather than a *united seat* of European politics.

The European space is treated as a whole and addressed with policies of "economic, social and territorial cohesion" (art. 3 § 3 TEU), which is "vital to the full development and enduring success of the Union" (as per Protocol n. 28 of the TFEU) and also an area in which the shared competence between the Union and the Member States applies (art. 4 § 2 lett. c TFEU; title XVIII TFEU).

It is obvious, from these brief references, that the EU "territory" is not defined as primary, but as secondary, and it is identified differently,

83 Art. 20 TFEU states that "Citizenship of the Union shall be additional to and not replace national citizenship"; J. Shaw, *Citizenship: Contrasting dynamics at the interface of integration and constitutionalism*, "Robert Schuman Center for Advanced Studies: Working papers" 2010, No. 60, p. 21, [the author] derives from the merely additive character of European citizenship to national citizenship the conclusion that [the European citizenship] has no intrinsic value. The same character is valued instead by A. Schrauwen, *European Union citizenship in the Treaty of Lisbon: Any change at all?*, "Maastricht Journal of European and Comparative Law" 2008, p. 55 ss., in which he notes: "If Union citizenship is additional to national citizenship, then there might one day be Union citizenship without national citizenship". On European citizenship as a fundamental status of the citizens of Member States, also. CGUE, sent. September 20th 2001, case C-184/99, *Grzelczyck*. Also see the EU Parliament resolution of June 14th 1991 on the Citizenship of the European Union (lett. f).

84 The Court of Justice, however, deliberated that criteria of attribution of citizenship that violate the non-discrimination principle are unacceptable (sent. June 15th 1978, case C-149/177, *Airola*) and established the criteria that member States should abide by in revoking national citizenship, after consideration of the consequences that this can lead to in terms of European citizenship (sent. July 7th1992, case C-396/90, *Micheletti e altri vs. Delegacion del Gobierno en Catabria*; sent. March 2nd 2010, case C-135/08, *Janko Rottmann vs. Freistaat Bayern*). In the sentence of March 8th 2011, case C-34/09, *Ruiz Zambrano*, the court of Luxembourg established the right to Union citizenship as a right of its own, without having it descend from the right to move and stay freely within the territories of the Member States, and as a premise for the effective exercise of the fundamental rights proclaimed in the Charter of Nice and in the ECHR (specifically, the right of minors with European citizenship to not be separated from their parents if the latter do not have residence and work permits). The extensive view of European citizenship theorized by *Zambrano* was partly reconsidered in the following *McCarthy* sentence (sent. May 5th 2011, case C-434/09, *McCarthy*).

depending on the individual Treaty and the area it refers to. We cannot therefore speak of a literal Union territory and any attribution of territorial sovereignty to the subject of the European Union would be devoid of meaning, as only the member States can claim such sovereignty. On one hand, the notion of territorial sovereignty is liable to be eroded by time and by the changing of the theoretical conditions that contributed to its traditional definition; on the other, so far no convincing dogmatic and analytic categories have emerged to decode the unique "modernity" of European territorial sovereignty. We can only say that the disassociation – from the point of view of State doctrine – between territorial sovereignty and the scope of action of sovereignty itself has laid the foundation for the dismembering of "European sovereign power" into a range of competences that share the same earthly space with equally sovereign attributions of the member States, thus allowing us to set aside the problem of the State identity of the Union and of the necessary authority over a territory as a constituent element of sovereign political institutions. The European Union is therefore an "Ordnung without Ortung".[85]

This is the key that unlocks the deep ideal and cultural meaning of the choice not to use the word "territory" to define the area of influence of European law, opting for the definition of common space (artt. 3, 8, 12 TUE, and art. 4, 26, 67–80, 170 TFUE). Despite their apparent similarities, the notions of territory and space present relevant conceptual differences.

Territory – as observed above – is a product of culture and therefore, according to André Corboz's fitting metaphor, a "palimpsest" resulting from the progressive layering of rituals, customs, shared sentiments and traditions.[86] Not an empty space and a *tabula rasa*, but a tangible historical reality.

Space, on the other hand, is an abstract notion, detached from history and more likely to be employed within the context of exact sciences. It does not evoke a specific localization and defined limits,[87] but a fluid circulation and porous and shifting borders. Thus the common European

85 As excellently summarized by L. Mari, *Ordinamento, localizzazione, uniformità: quale nomos, dopo Schmitt, per l'Europa?*, "Teoria del Diritto e Dello Stato" 2011, No. 1–2, p. 76 ss.

86 See A. Corboz, *Le Territoire…*, p. 14.

87 See the Oxford Dictionary, which defins space as "A continuous area or expanse which is free, available, or unoccupied" or "The dimensions of height, depth, and width within which all things exist and move".

space aims at being identified. As a functional rather than geographical space, detached from exclusionary historical identities, permeable, open to pluralism and interculturality, founded upon multiple intertwined and interdependent State sovereignties, that do not share the same geographical area. A new model of political spatiality, inspired by a wider economic and cultural integration, whose principle of "material constitution" can be found in the four freedoms of circulation (of people, of goods, of services and of capitals) and in the subsequent elimination of internal borders (art. 28 TEU).

The proposal – which has been publicly debated – of accepting Turkey into the European space, is the patent sign of how that concept is independent from history and culture, from tradition and religion. What we have here, just like the Chinese Emperor described by Borges, is a desire to erase memory that is inherent to the positioning of a *limes*, and also the devaluation of the territory's original identity value, which substitutes it with an artificial space, a "non-place". The European unitary geographic space – which is the sum of the territories of its Member States – is fragmented in different functional spaces: the internal market space and the space of shared freedom, security and justice, which are intertwined with the space of the Euro-zone. The first is an actual shared juridical space, free of internal barriers and frontiers. Its goal is to eliminate all the regulatory differences that bar the way to a fully fluid and free, competition-based market. Such goal is achieved by harmonizing different legislations and making them as close to one another as possible. The space of freedom, safety and justice, on the other hand, traces the path for the ambitious project of community integration, projected towards areas that have so far been the purview of national States: crime policies, security and justice. It prefigures the creation of a new European public policy, which would push the Union to the brink of effective federalism. To achieve a uniformity of prevention and repression of crime, of judiciary practices, of safety and border control (see the recent proposal of creating a common European border patrol, to guard European coasts), would mean giving up the full and exclusive national control over aspects that are at the heart of national sovereignty. The two spaces we have been considering share the capacity for normative homologation,

which is put into practice through the principle of mutual recognition.[88] However the declination of that same principle can produce different effects in the two different contexts. While it results in policies that extend rights to those who access the first space, the space of the shared market – in order to deploy the full potential of economic freedoms – the policies it informs in the second space, the space of security, are often restrictive and pose limitations to individual rights.[89] This explains why attempts at achieving regulatory uniformity in the second space are met with stronger resistance on a national level (as proven by the not infrequent recourse of the Constitutional Courts to the weapon of counter-limits[90]). Having thus described, *in apicibus*, the European regulatory abstract design, we should also point out that the situation is not without its contradictions and moot points, particularly with regard to the common market space. Specifically, with the jurisprudential line of *Dassonville-Cassis de Dijon – Keck*,[91] the norms protecting the free circulation of goods have been considered applicable to any national regulation liable of creating unjustified obstacles to the free, competition-based market,[92] even when those obstacles were not discriminatory or protectionist in nature, and therefore [those norms] have been extended even to national regulations pertaining to social policies, such as environmental protection,[93] or policies whose aim it was to implement systems of social solidarity.[94] This

88 Affirmed in CJEU, sent. February 20th 1979, case C-120/78, *Rewe–Zentral AG vs. Bundesmonopolverwaltung fuer Branntwein (Cassis de Dijon)*, according to which a member State cannot bar access to its own market to goods that have been produced in accordance to the approved regulations of the their Country of origin. The application has been generalized in the Single European Act of 1986.

89 Keen and on point observations on this by A. Di Martino, *Il territorio…*, p. 472 ss.

90 Referencing the German *Bundesverfassungsgericht* sentence of July 18th 2005 (2 BVR 2236/04) and the Polish Court P1/05 sentence of April 27th 2005, both regarding the European Arrest Warrant.

91 CJEU, July 11th 1974, case C-8/74, *Dassonville*; sent. February 20th 1979, case C-120/78, *Cassis de Dijon*.

92 CJEU, February 10th 2009, case C-110/05, *Commissione/Italia*; CJEU, March 20th 2014, case C-639/11, *Commissione/Polonia*; CJEU, September 21st 2016, case C-221/15, *Établissements Fr. Colruyt NV*.

93 CJEU, February 7th 1985, case C-240/83, *Oli usati*; CJEU March 13th 2001, case C-379/98, *Preussen Elektra*; CJEU, April 7th 2011, case C-402/09, *Ioan Tatu*.

94 CJEU, February 17th 1993, cases C-159/91 and C-160/91, *Poucet vs. Pistre*; CJEU, June 17th 1997, case C-70/95, *Sodemare*.

hyper-extensive interpretation of the idea of free market, which equates any form of disparity, even when reasonably justified by non-commercial value, to a violation of the principle of free competition, combines with the application of the principle of mutual recognition and with the imposition of strict goals of price stability and budget policies, and produces a powerful push towards deregulation in the Member States.[95] When any public regulation, even when it is intended to protect collective goods and interests that are not inherently mercantile, is judged on its functional character with respect to the free market, the scope of the national legislator's intervention is fatally shrunk, and the most liberal instances within the European sphere become the benchmark, the accepted archetype of public regulation.[96] The result is an inverted symmetry between the national and European sphere. In a national context, every internal measure that poses even indirect limits on competition faces the accusation of amounting to State aid, which fuels a tendency to public deregulation of the market. In the context of the European Union, on the other hand, in order to protect a homogenous environment and avoid violations to the principle of free competition, every last detail is heavily regulated by an inflexible bureaucracy, which occasionally pitches the law against basic common sense – as is the case with the regulations that describe in minute detail, with a level of attention that could be better employed elsewhere, the exact colour of a leek or the minimum size of a clam.[97]

A general shirking from regulation on a national level, corresponds to a tendency to detailed planning on a European level.

The European space is also divided into *external* (a) and *internal* (b):

95 See A. Di Martino, *Il territorio…*, p. 430.

96 This conclusion might have guided the Constitutional Court in the sentence n. 443/1997, declaring the unconstitutionality of the regulation that prevented producers of pasta from employing certain ingredients "in that it does not state that companies with facilities in Italy be allowed […] the use of legitimately employed ingredients, based on Community law, within the European Union territory".

97 As cited in the Commission Regulation (EC) No 2396/2001 of 7 December 2001: "The white to greenish white part of the leeks must represent at least one-third of the total length or half of the sheathed part. However in early leeks(1), the white to greenish white part must represent at least one-quarter of the total length or one-third of the sheathed part." Annex III to the Council Regulation (EC) No. 1967/2006 of December 21st 2006, banning the fishing of clams smaller than 25mm has sparked controversy and protests by fishers of the Adriatic Sea, where clams are physiologically incapable of reaching the prescribed size.

a) The external space has fixed borders, strongly guarded, that have all the characteristics of an actual frontier[98] both in the geopolitical and ideological sense. On one hand, Europe sets a limit to the expansion of the Russian Eurasian pan-idea.[99] On the other, the European border traces a political and ideological divide, enclosing a space in which the Rule of Law lays the foundation for the general political organisation and human rights are juridically protected. In this sense, the Union constitutes a "community of law and fundamental rights" and it acts as a new *Kat-hecon*, a restraining force. However, it no longer identifies as the "*res publica Christiana*" as theorized by Schmitt in the *Nomos der Erde*, but rather spearheads a republican constitutionalism with a strong cosmopolitan vocation, operating as a force of opposition to the two alternative models of State organization: to the East, the Russian one, still based on the idea of a State as the Almighty State; to the South the Islamist one, that puts religion at the centre of public discourse and social organisation.
b) The internal space, the shared European space, has no borders, it is homogenous, isomorphic, uniform and free of rooted identity, and it can be defined in strictly normative – and therefore Kelsenian – terms, as the material jurisdiction of EU regulations. As pure form, it has shifting functional limitations, as their extension (which coincides with the extension of the shared juridical space) can expand or shrink, it can encompass all the member States or exclude some, depending on how the principles guiding the distribution of competences between the Union and the member States are applied. Such competences include subsidiarity, national identity of the member States, margin of appreciation and mutual recognition.

Within such a conceptual construction, the problem of the internal negotiation of that space between the Union and the member States becomes a question of "jurisdiction". The borders of the European territory are defined by the Constitutional Courts, which decide on the spatial

98 Tracing the conceptual difference between space and frontier, as a border between civilizations and jurisdictions, G. Lombardi, *Spazio e frontiera tra eguaglianza e privilegio. Problemi costituzionali di storia del diritto*, "Diritto e Società" 1985, p. 51 ss.

99 See K. Haushofer, *Geopolitica…*, p. 35, defined pan-ideas as the mediating structures between nations and unions of peoples.

application of European regulations when they are in contradiction with internal ones, and therefore shape the normative space by applying, in each case, the flexible rules that govern the distribution of internal jurisdiction (Constitution) versus external jurisdiction (EU law).

The German *Bundesverfassungsgericht*, incorporating within the control on *constitutional identity*[100] (*Identitätskontrolle*) the verification of the correct application of the subsidiarity principle in the European context (*Ultra-vires-Kontrolle*), has been the most consistent in the clarification of the terms of this *actio finium regundorum*; and while that pronouncement might not be entirely free of nationalistic narcissism, the logical inference that it draws from the primacy of the supreme Constitutional principles on European (as well as international) regulations cannot be said to be juridically inaccurate.[101]

The Supreme Courts are therefore the new *agrimensores* of the European normative space. And like, in the Middle Ages, the western definition of *non-spatial* borders between different secular and religious *jurisdictiones* pertaining to the same territories was the result of their conflicts, mediated by jurisconsults,[102] in the same way the "territorial" purview of European regulations is marked by the Courts' conflicts, rather than by their dialogue.

The principle of national identity, as per art. 4 § 2 TEU, in its ordinary functions, actually counters the primacy of European law, by limiting

100 BVerfGE 123, p. 267 ss.; on "identity" controls and "Ultra-vires", see §§ 239–242 of the sentence. The premise for the German pronouncement is that national identity, protected by art. 4 § 2 TEU is 'external' to the integration process, and therefore it falls on the member State to define its contents and preserve it. A different conclusion was reach by the European Court of Justice in the sentence of Dec. 22nd 2010, case C-208/09, *Ilonka Sayn-Wittgenstein vs. Landeshauptmann von Wien*, according to which identity poses an 'internal' limitation to the integration process, and its contents should be defined by the community's institutions (and ultimately by the Court itself).

101 The predominance of the supreme principles of the Constitution on Community law, on which the doctrine of counter-limits is founded, was proclaimed by the Constitutional Court in the sentence n. 183/1973 (confirmed, *ex multis*, by sentt. n. 170/1984, 1146/1988, 232/1989, 168/1991, 284/2007, 238/2014), and it feeds on the conceptual difference between *limitations* and *transfers* of sovereignty.

102 As documented by F. Mazel, *Cujus dominus, ejus episcopatus? Pouvoir seigneurial et territoire diocésain (Xe-XIIIe siècle)*, in: *L'espace du diocèse. Genèse d'un territoire dans l'Occident médiéval (Ve-XIIIe siècle)*, ed. F. Mazel, Rennes 2008, p. 213 ss. – in relation to the conflicts between religious and secular authorities.

both those jurisprudential interpretations that greatly devalue the principle of attribution in favour of Euro-unitary competences, and the deliberations of European legislators that appear to be unreasonably unbalanced in favour of the EU.[103] It is, however, mostly in the hard cases, in the moments of severe friction between the Euro-unitary normative framework and the national constitutional order that the decisive function of the Constitutional Courts is revealed. The use of discretionary and adjustment powers, the practice of *distinguishing* and the threat or actual implementation of counter-limits,[104] allows them to protect the cultural identity value of democratic territoriality, as opposed to the assimilating powers of European law, preserving the specific historical dimension of rights in their systemic balance. In short, they combine innovation and tradition.

Constitutional judges thus appear as the main actors of what we could call a *paradox of politicization*. The judicial review of legislation was designed as a counter-balancing of the party politics dialectic and the majority principle. In the current situation, however, instances

103 National identity is protected by art. 4 § 2 TEU, but also by art. 67 TFEU, which compels the Union to respect the fundamental right and juridical traditions of the Member States.

104 Recent applications of such doctrine are: the deliberation of the Bundesverfasungsgericht of December 15th 2015 (BVR 2735/1) and July 18th 2005 (2 BVR 2236/04), as well as the sentence of the Polish Court P1/05 of April 27th 2005 on European arrest warrant, the sentences by the Court of the Czech Republic Sugar Quota III and Eaw of 2006, and also the sentences by the same Court on the Lisbon Treaty (Lisbon I of 2008 and Lisbon II of 2009); the pronunciation of the *England and Wales High Court* (*Administrative Court)* in the *Thoburn vs. Sunderland City Council* case of February 18th 2002. And while, technically, it does not constitute the application of a counter-limit, the sentence of the Constitutional Court of Portugal of April 5th 2013, n. 187 (Acórdão 187/2013) looks a lot like one. In Italy, counter-limits have been posed against EU law in the sentence Cons. Stato, sec. V, August 8th 2005, n. 4207. The Italian Constitutional Court, which so far has merely envisioned the possibility of a community counter-limit, while declaring the whole issue inadmissible, (sent. n. 232/1989), has twice pitched the principles of the Constitution in opposition to international obligations (derived from pacts and customs) in the sentences n. 264/2012 and 238/2014. In ord. 24/2017, with which it referred to the EUJC a question of interpretation of art. 325 § 1 and 2 of the TFEU. The Court also announces the activation of a counter-limit, when it claims that its own assessment on the presence of an obstacle, that might prevent the national judge from directly applying the regulation as pronounced in the sentence of the Grand Chamber of the CJEU on September 8th 2015, case C-105/14, *Taricco*, "if, on one hand, it preserves the *constitutional identity* of the Italian Republic, on the other it does not interfere with the need for homogenous application of Union law, and therefore it presents itself as a solution in accordance with the principle of loyal cooperation and proportionality".

of de-politicization have moved beyond the confines of the individual States, taking residence in the super-national jurisdiction of rights. As a consequence, it falls on the national Constitutional Courts, in their interaction with the European Courts, to uphold the connection between national law and democratic territoriality, that is to say, to endorse the cultural and political identity of the law itself. Hence the apparent paradox that sees the *a-political*[105] Constitutional Courts as the last bastions of protection of the *political* nature of national law.

6. The crisis of European space and the territories' revenge

The artificial nature of the European territorial space represents a reaction to the establishment, of ethnic-territorial ideas of territory that plagued the "short XX Century". It also seems to be a necessary preamble to a conceptualization of the relationship between space, sovereignty, citizenship and rights that sits outside the State paradigm and tends towards a post-state model of cosmopolitan republican constitutionalism. A *Government without Statehood* of distant Kantian derivation,[106] founded on the assumption that political sovereignty can be effectively limited by "sharing" it, that is, by imposing upon it external bonds that derive from super-national and mostly technocratic organs.[107]

As it happens, while the functionality of the principle that structures the national Rule of Law (legality, statutory reserve, division of powers) was predominantly entrusted to the legislator and the organs of government, the founding values and organization modules of multilevel constitutionalism (proportionality and reasonableness as general parameters of effective adequacy of the norm to the matter it regulates; subsidiarity as a regulatory principle in the relationship between authority and freedom and as a criterion for the dynamic organization of public affairs, overcoming the rigid distribution of competences; human dignity as the founding and final principle of human rights and the juridical limitations of the State's scope of action) seem to leave it to the jurisdictional

105 As defined by G. Zagrebelsky, *Principî e voti. La Corte costituzionale e la politica*, Torino 2005.

106 See I. Kant, *Zum ewigen Frieden* (1795), transl.

107 See W. Wallace, *Government without statehood. The unstable equilibrium*, in: *Policy making in the European Union*, ed. H. Wallace, W. Wallace, Oxford 1996, p. 439 ss.

authorities and to the high bureaucracy to enact them effectively, thereby prompting a more direct involvement of the latter in the elaboration of the law. It is therefore not surprising that judges and jurists, rather than legislators or the European people, so far, have proven to be indispensable subjects in the smoothing of the complex European juridical infrastructure. In this sense, the common European space is not, strictly speaking, a democratic space, but rather a space in which a minimum level of liberal constitutionalism has been imposed, consisting in the protection of fundamental human rights – a fact whose historical relevance is paramount and should not be discounted. The misalignment between the national models of democratic participation and the European system, which is designed along the lines of a constitutionalism that is only partly democratic (if not downright post-democratic)[108] explains the miscommunication between those who search the European Union in vain for democratic institutions, forms and models similar to their national equivalents, and those who, in their optimistic thrust to move "beyond the State" leave the deliberation-participation problem of the European institutions in the twilight zone.[109]

In the immediate aftermath of the war, the European building was inevitably erected upon the foundations laid by the decisions of the enlightened *élites* and of the bureaucratic techno-structures, while the masses took the back seat. An oligarchic approach was essential, in order to set out on a path that was remarkably ahead of the times. The wounds of the world war were still "too fresh and too painful for the national communities to make the endeavour – of which only individuals are capable – of keeping their resentments at bay".[110] Therefore, with no constitutional passages and no direct popular deliberations – at least in Italy[111] – the economic community has turned into a Union

108 On the risks that the technocratic liberalism growing within European institutions might be the carrier of a soft authoritarianism, deep observations in: A. Somek, *Delegation and authority: Authoritarian liberalism today*, "European Law Journal" 2005, p. 342 ss.

109 A problem that many scholars find overrated: among others, B. Kingsbury, *Sovereignty…*, p. 599 ss., and S. Cassese, *Oltre…*, p. 29 ss.

110 The quote can be found in: A. Camus, *L'avenir de la civilisation européenne*, Paris 2008.

111 Other Countries have decided to mark the phases of the integration process through the introduction in the Constitution of specific *Europa-Artikeln*: see, e.g., art. 23 and 24 German GG; artt. 88/1-4 e 93 Spanish Const.; art. 9 § 2 and artt. 23 a–f; 34, 168 and 169 Belgian Const.

and the common market into a community of rights. There was no shortage of critical opinions, particularly among constitutionalists, but those have been smothered by the cheering over the indisputable successes of the European project. The integration progress has ensured peace, extended individual liberties and opportunities, and increased the wealth of the European people, to the point that what was originally the intuition of a handful of pioneers has now been accepted as common sense, and the idea of an increasingly close Union of European populations is now perceived as a historic necessity. A slope whose progression, until a few years ago, appeared to have the slow but relentless pace of historic developments.

In the course of this long progress, the financial and migration crises caused a rude awakening, an unexpected reckoning with reality. The political and social climate has changed quickly and the theoretical tension between democratic territoriality and European spatiality has shaped up to be an age-defining clash.

The common ideal of assimilation of national territoriality into the wider space of European law is confronted with the sharp call of localism and, ultimately, of the national State as the highest seat, to this day, of political action, participated democracy and overall protection of fundamental rights.

Those constitutionalists who did not celebrate the demise of State territoriality are unsurprised by history's harsh rebuttals: the endless list of exceptions to the Schengen Treaty (France, Germany, Austria, Croatia, Czech Republic, Sweden, Slovenia); the raising of new walls – *historia* non *docet* – in Hungary, Bulgaria, Estonia, Latvia, Lithuania, Calais, Ceuta and Melilla; Denmark's refusal to increase integration on the matters of justice and home policies; Wallonia's vote against the free trade agreement between the EU and Canada and the negative outcome of the Netherland's consultative referendum for the ratification of the Dutch Ukraine–European Union Association Agreement; England's announced withdrawal from the ECHR; the EU's patent inability to agree on a common policy with regard to the most political activity of them all, that is war. At the top of this list, Brexit, which changed the course of history, accelerating the crisis of European territoriality.

It is comforting – and it dispenses us from having to embark upon a subtler analysis – to discount these phenomena as the by-product of a populist and warmongering culture that seeks to reinstate ancient barriers, and to label them as the loutish expressions of irrational sovereignists. However, it is more useful to ask ourselves whether the re-localization of law and rights is not also a desperate attempt at "humanizing" globalization, by bringing its social and environmental effects under closer democratic control, and if – specifically in a European context – the return to land is not also the expression of an identitarian resistance to the artificial nature of the Union's law, which affects growing areas of our lives without ensuring the social and political integration that is typical of national law, without a similar relation between power and accountability, and with political decisions being sheathed in a mist of general opacity.

In this clash between the isomorphic spatiality of European politics and the varied cultural landscape of the member States, we witness the resurgence of a question that was first posed in 1931 by Karl Haushofer – one of the fathers of modern geopolitics – as part of a reflection on the possibility of developing a model of territorial aggregation of States "Can we possibly create a grand geopolitical design from the support of bureaucracies and juridical abstractions, without the propelling power of a 'people' behind it?".[112]

This is not a new theme, but the present moment poses it in terms that depart from those examined by the most enlightened philosophers and jurists.[113] To the point that, in order to prevent misunderstandings, we would do better to call it a "constitutional" problem of the European political space, rather than reductively labelling it as a question of democratic deficit. It is in fact pointless to look for a common, political, socially

112 See K. Haushofer, *Geopolitica…*, p. 120.

113 Just to mention the most important names: D. Grimm, *Una Costituzione per l'Europa*, in: *Il futuro della Costituzione*, ed. G. Zabrebelsky, P.P. Portinaro, J. Luther, Torino 1997, p. 356 ss.; E.W. Böckenförde, *Il potere costituente del popolo: un concetto limite del diritto costituzionale*, in: *Il futuro della Costituzione*, ed. G. Zabrebelsky, P.P. Portinaro, J. Luther, Torino 1997, p. 234 ss.; J. Habermas, *Una Costituzione per l'Europa? Osservazioni su Dieter Grimm*, in: *Il futuro della Costituzione*, ed. G. Zabrebelsky, P.P. Portinaro, J. Luther, Torino 1997, p. 369 ss.; J. Habermas, *La costellazione post-nazionale*, Milano 1999; and J. Habermas, *Perché l'Europa ha bisogno di una Costituzione?*, in: *Una Costituzione senza Stato*, ed. G. Bonacchi, Bologna 2001, p. 153 ss.

homogenous and culturally consistent δῆμος, that could enrich the common European space with the characteristics of a true political territory. And, at a closer look, this homogeneity (which is impossible in a short-term perspective and would require centuries to be achieved), is not even strictly necessary.

European citizenship is not the result of a transposition of the ideology of the Nation-State to a higher level that forms the basis for national citizenship. It is rather the product of the Enlightenment philosophical concept of universalism of human rights.[114] Reconsidered within an intercultural paradigm, it is based on the acknowledgment and protection of liberties in a shared space, and therefore presents as a force for inclusion and harmonic integration of various identities – local, regional, national – not in a confrontational way, but with a view to enriching them and creating diverse and fertile combinations.

In this sense, there's no denying that Europeans, without giving up their national identities, now consider themselves to be the citizens of a veritable "cosmopolis of rights".[115] Kant's necessary premise of perpetual peace, that "a violation of rights in *one* place is felt throughout *the world*" has therefore realized itself on the Old continent. It is similarly beyond doubt that the growing nomadism of intellectual *élites* and the establishing of public transnational communication are overtaking territorial affiliations and allowing the new generations and the top cultural tiers of society a wider European, continental perspective.

Nevertheless, we should ask ourselves whether the practice of liberties and the Rule of Law in a unitary geographical space are enough to create an *idem sentire* of the European populations, enough to make a difference on a political scale (not merely a cultural and sentimental one) and to shape a proper European political community.

What is undermining this proposition? Not the studies according to which individual culture and political identity are still strictly

114 See P. Ridola, *I diritti di cittadinanza, il pluralismo ed il "tempo" dell'ordine costituzionale europeo. Le "tradizioni costituzionali comuni" and l'identità culturale europea in una prospettiva storica*, "Diritto Romano Attuale" 2003, No. 9, p. 111 ss.

115 See A. Carrino, *Il suicidio…*, p. 149, that polemically names it "a cosmopolis of good intentions".

connected to local, ethno-territorial collective representations;[116] nor the acknowledged fact that the "Erasmus generation" and the cosmopolitan intellectual bourgeoisie do not have the energy to become culturally and politically dominant. Nor is it the observation that the European public opinion is still erratic, to the point that we could call it – in the words that Antonio Tabucchi puts in the mouth of Professor Silva in his most celebrated novel – "a trick invented by officials in Brussels"![117]

Doubts on the existence of a European political community – and a citizenship that is not a mere title, but carries profound meaning – are incited by the fact that a community, which does not base its origin on foundation myths or military conquest, on the seizing of land, on a cultural uniformity strengthened by a shared language and a shared history,[118] cannot be formed unless it is shaped by intense political action. We see it in Thomas Mann's story *Das Gesetz*, in which he shows Moses drawing the scattered tribes of Israel and giving them political unity by imposing shared rules that are defining of their specific identity, bringing them under the rule of shared responsibility and mutual obligations.[119] The people, unless it is a sociological entity pre-existing the State, needs to be politically created by establishing bonds of solidarity between men, having them share duties and risks, and drawing them closer into one community with one destiny.

In this sense, we must admit that a true European political community is still largely to be built and that, so far, Europe has missed the historic opportunity of aggregating along the principle of "federal" solidarity rather than national interest. The ambitious path traced by the Constitutional Treaty and later by the Lisbon Treaty, which stressed certain

116 See the research by A. Ait Abdelmalek, *Le Territoire: Entre l'Europe et l'Etat-Nation*, Paris 2006, specifically: A. Ait Abdelmalek, *Cultures de l'espace: mono-territorialité et pluri-territorialité*, p. 23 ss.; also M.N. Sarget, *De l'identité locale à l'identité européenne: une mutation?*, p. 55 ss., 60, referencing: "L'identité européenne, à défaut d'être "pour", a-t-elle besoin d'être "contre", contre un ennemi qu'il faudrait peut-être inventer de toutes pièces?".

117 A. Tabucchi, *Sostiene Pereira*, Milano 2016, p. 64. The original quote mentions: "a trick invented by the Anglo-saxons".

118 See A. Carrino, *Il suicidio…*, p. 113 doubts that "European culture" can work as a unifying factor, since he believes it to be the product of an artificial contstruct, rather than the acknowledgement of pre-existing instances worthy of respect, protection and development.

119 See T. Mann, *Das Gesetz*, Stockholm 1944.

elements of solidarity (artt. 2, 3, 21 TEU; art. 9 TFEU),[120] has been brought to a grinding halt on several occasions and, recently, has been going backwards due to the sovereign debt crisis.

The historical comparison with the United States – a textbook example of founding of an interstate Union – is dramatically enlightening, not to say brutal. In 1789, in order to face the debt crisis that plagued the young Confederation, George Washington passed the *Tariff Act*,[121] an early form of federal tax collection, and employed the significant amount subsequently raised as an equalizing tool, thus marking a definitive step towards a "more perfect union". To the point that, approximately a century later, Republican leader James G. Blaine, who served as Speaker of the U.S. House of Representatives and ran for the presidential election of 1884, defined that act a "second declaration of Independence". Two-hundred and twenty years later, faced with a similar crisis, the European Union chose the opposite route: it did not "federalize" revenue in view of a mutually supportive redistribution, but it centralized control on national expense, imposing on the Countries in debt a level of austerity that was not always justifiable from a technical and economical point of view,[122] thereby weakening the already fragile forms of social protection for the most vulnerable classes.

The debt crisis, doubled and increased by the mass migration crisis, made it clear that Europe has been shaping up to be a shared space of rights, freedom and formal equality, but so far it has failed to provide an adequate cultural and normative elaboration for the principle of solidarity,

120 This latest article, that compels the Union to "take into account requirements linked to […] the guarantee of adequate social protection" has been considered a social clause or rather "against social regression", protecting an adequate level of welfare (see G. Bronzini, *Le misure di austerity e la giurisprudenza "multilivello". Verso lo scollamento tra protezione europea e protezione interna?*, "Questione Giustizia" 2015, No. 3, p. 87 ss.).

121 The *Tariff Act*, also known as *Hamilton Act*, passed by President George Washington on July 4th 1789, was founded in the competence attributed to the United States Congress by art. 1 sect. 8 of the Constitution "to lay and collect Taxes, Duties, Imports and Excises" and "to regulate Commerce with foreign Nations". Among other provisions, the Act established import fees and added a 10% extra fee on goods imported with ships "not of the United States".

122 An internal IMF report shows how the deliberations made with regard to Greece following the sovereign debt crisis were not strictly necessary from a technical and economical point of view (see the article *Il ritorno dell'Ellade* on the issue of Italian newspaper *Il Foglio* of August 5th 2016).

a modern version of the revolutionary *fraternité*.[123] No political choice has been made in the direction of forming a community of people. Sure, we live together in the same physical space, in one inextricable tangle of economic, geopolitical, strategic and even military partnerships. And yet the crisis we are facing made us aware that a community of free travellers and happy consumers – or rather a community of individuals that enjoy rights in a common area – is far from being a political community. The latter, in fact, is defined by shared duties, that is to say, by the founding fact that collective burdens should be distributed according to a vision that aims for the greater good, which is not the result of the mere sum of individual interests, but a synthesis with a higher level of elaboration.

Shared rights are not enough to make a people, as art. 2 of the Italian Constitution reminds us, by mentioning the *mandatory* duty of political, social and economic solidarity. Therefore, European citizens that enjoy fundamental liberties and move freely between the Continent's cities, resemble a *multitude* of monads rather than the individual elements of a political organism. They look more like an ὄχλος than a δῆμος.

The choice of defining Europe's shared political spatiality as a "common space", rather than a "territory", proves revealing once again. An economic space can develop just from the unrestrained expansion of market forces, whereas a territory can only claim its name if it incorporates, alongside the citizens' economic life, the idea or the expectation of forms of solidarity, of brotherhood bonding the members of the community that inhabits it.[124]

The EU's policies of internal territorial cohesion have been essential in reducing regional imbalances and, over the years, they have assimilated a development strategy for the European space – as established in Potsdam in 1999. Among its goals is the adoption of a polycentric model, intended to protect local and regional identities, while at the same time guaranteeing a general improvement of the European citizens' living

123 There has long been a need to give substance to the European citizenship through the sharing of horizontal duties of solidarity J.H.H. Weiler, *La cittadinanza europea*, in: *L'Unione europea. Istituzioni, ordinamenti e politiche*, ed. B. Beutler, R. Bieber, J. Pipkorn, J. Streil, Bologna 1998, p. 670 ss.; also J.H.H. Weiler, *Perché è fallito il progetto di cittadinanza europea?*, "Cultura giuridica e diritto vivente", < http://ojs.uniurb.it/index.php/cgdv >.

124 See D. Le Bihan, *Espace communautaire ou territoire de l'Union Européenne?*, in: A. Ait Abdelmalek, *Le Territoire: Entre l'Europe et l'Etat-Nation*, Paris 2006, p. 99 ss., 107.

standards.[125] Such policies, however, cannot make up for the absence of a system of fiscal equality, of a proper Union budget[126] and of European revenue authorities, that is to say, of the main instrument of social redistribution and territorial solidarity. Within this scenario, the traditional answers to the Union's constitutional problem appear to be increasingly less persuasive, in their insistence on the progressive "parlamentarization" of the European government and the indirect legitimation of the Community's institution, descending from representative national Governments and Parliaments that have entered into specific pacts limiting their sovereignty, in compliance with their own Constitutions.

The integration progress has reached the point of requiring the kind of decisions that cannot fall under the definition of mere limitations of sovereignty, but need to touch the supreme level of decision-making. A level that is not attainable by expanding bureaucratic functionalism to its extreme, but only by adopting a higher and more courageous political leadership and by involving the European populations directly. As Giuliano Amato said, while it is not impossible to reach a true European democracy, it is impossible to reach it through inter-governmental channels.[127]

This is Brexit's warning, setting aside its possible geopolitical explanations.[128] The UK's withdrawal has made it clear that the European *Entstaatlichung* cannot be considered within the Treaty's scope of action nor can it be the ultimate goal of the Courts' interpretative constructivism, rather it calls for sovereign political decisions at least on two ever-relevant fronts when it comes to State territoriality: the definition of the level

125 As per point 1.1 of the European Spatial and social cohesion Development Perspective (ESDP) Agreed at the Informal Council of Ministers responsible for Spatial Planning in Potsdam, May 1999.

126 The EU budget amounts to approximately 140 bn Euro, a trifle, when compared with the sum of the member States' national budget, which is over 6.300 bn Euro.

127 See G. Amato, *Il costituzionalismo oltre i confini dello Stato*, in: *Costituzionalismo e Globalizzazione*, "Annuario AIC" 2012, Napoli 2014, p. 9.

128 From a geopolitical point of view, Brexit was not entirely unpredictable. A full and happy marriage between the tellurocratic idea that is proper of the continental European powers and the traditionally thalassocratic British one would have been nothing short of a miracle. Once again, land and sea have clashed: the European forces of land against the maritime might of Albion – that does not relate to the Land and its ways of organizing the political space, and it looks toward the Ocean and towards the other continents, rejecting regimentation and bureaucratic homologation, just like pirates and seafarers (as Carl Schmitt called the English in *Land und Meer…*, p. 42 ss.).

of cultural uniformity necessary to build a steady social construction and achieve democratic unity, and the essential configuration of economic and social relationships that, in the absence of sovereign acts of abdication, still fall under the purview of representative territorial institution, albeit in the context of an intense and deep super-national integration.[129]

Summary

Territory and State territoriality appear to be evolving categories, subject to an ongoing blurring of their original and traditional meaning, if not in a downright crisis. Such crisis can be attributed to a multitude of causes. Among them: the dissociation between the political state and state of law; the tension between the principle of universality, as an integral part of the market structure, and the principle of territoriality, as an integral part of the State's structure; the web's global spatial revolution. All of these complex phenomena fuel two conflicting tendencies: the "miniaturization" of the State and the increasing of control over national territory through a re-articulation of powers. The tendency to despatialization of State territory isfurther enhanced in the specific European context, where the most refined attempt ever made at organizing the political space without recourse to the territorial paradigm is taking place.

Keywords: territory, state, sovereignty, European space, globalization

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Bibliography

Ait Abdelmalek A., *Le Territoire: Entre l'Europe et l'Etat-Nation*, Paris 2006.

Amato G., *Il costituzionalismo oltre i confini dello Stato*, in: *Costituzionalismo e Globalizzazione*, "Annuario AIC" 2012, Napoli 2014.

Augé M., *Nonluoghi. Introduzione a un'antropologia della surmodernità*, Eleuthera, Milano 2005.

Barak A., *Proportionality. Constitutional rights and their limitation*, Cambridge 2012.

Bauman Z., *Fiducia e paura nella città*, Milano 2005.

129 As established by the German *Bundesverfassungsgericht* in the Judgment on the Lisbon Treaty (BVerfGE 123, p. 267 ss.).

Bauman Z., *La solitudine del cittadino globale*, Milano 2015.
Bauman Z., *Missing community*, Cambridge 2000.
Becattini G., *La coscienza dei luoghi. Il territorio come soggetto corale*, Roma 2015.
Becattini G., *Ritorno al territorio*, Bologna 2009.
Belissa M., *Fraternité universelle et interet national (1715–1795): Les cosmopolitiques du droit des gens*, Paris 1998.
Biscaretti di Ruffìa P., *Territorio dello Stato*, in: *Enciclopedia del diritto. Volume XLIV,* Milano 1992.
Böckenförde E.W., *Il potere costituente del popolo: un concetto limite del diritto costituzionale*, in: *Il futuro della Costituzione*, ed. G. Zabrebelsky, P.P. Portinaro, J. Luther, Torino 1997.
Bronzini G., *Le misure di austerity e la giurisprudenza "multilivello". Verso lo scollamento tra protezione europea e protezione interna?*, "Questione Giustizia" 2015, No. 3.
Buratti A., *La frontiera americana. Una interpretazione costituzionale*, Verona 2016.
Camus A., *L'avenir de la civilisation européenne*, Paris 2008.
Carrino A., *Il suicidio dell'Europa*, Modena 2016.
Cassese S., *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Torino 2009.
Cassese S., *La globalizzazione del diritto*, Roma, Bari 2003.
Cassese S., *Oltre lo Stato*, Roma, Bari 2006.
Cassese S., *Territori e potere. Un nuovo ruolo per gli Stati*, Bologna 2016.
Cassese S., *The globalization of law*, "Journal of International Law and Politics" 2005, vol. 37 (4).
Castel R., *L'insécurité sociale: qu'est-ce qu'être protégé ?*, Seuil 2003.
Castells M., *The information age: Economy, society and culture. Volume II. The power of identity*, Oxford 1997.
Chabod F., *L'idea di nazione*, Roma, Bari 1961.
Ciaramelli F., *Legislazione e giurisdizione*, Torino 2007.
Cognetti S., *Il principio di proporzionalità. Profili di teoria generale e di analisi sistematica*, Torino 2011.
Corboz A., *Le Territoire comme palimpseste*, "Diogène" 1983, No. 121.
D'Alessandro G., *Istituzioni e territorio*, in: E. Cuccodoro, *Il territorio misura di sovranità*, Taranto 2016.
Dahrendorf R., *La libertà che cambia*, Roma, Bari 1994.
de Secondat C.L. (Montesquieu), *De l'esprit des lois*, Genève 1748.
Di Martino A., *Il territorio: dallo stato-nazione alla globalizzazione. Sfide e prospettive dello stato costituzionale aperto*, Milano 2010.

Donders Y.M., *Toward a right to cultural identity?*, Antwerpen, Oxford, New York 2002.
Elden S., *The birth of territory*, Chicago, London 2013.
Endicott T., *Proportionality and incommensurability*, in: *Proportionality and the rule of law*, ed. G. Huscroft, B.W. Miller, G. Webber, Cambridge 2014.
Foucault K., *Sicurezza, territorio, popolazione. Corso al Collège de France (1977–1978)*, Milano 2005.
Galgano F., *Lex mercatoria*, Bologna 2003.
Galli C., *Spazi politici. L'età moderna e l'età globale*, Bologna 2001.
Gallino L., *Cultura*, *ad vocem*, Torino 2006.
Grimm D., *Una Costituzione per l'Europa*, in: *Il futuro della Costituzione*, ed. G. Zabrebelsky, P.P. Portinaro, J. Luther, Torino 1997.
Häberle P., *Das Staatsgebiet als Problem der Verfassungslehre*, Basel 1993.
Häberle P., *Stato costituzionale. I) Principi generali*, in: *Enciclopedia Giuridica Treccani*, Roma 2000.
Habermas J., *La costellazione post-nazionale*, Milano 1999.
Habermas J., *Perché l'Europa ha bisogno di una Costituzione?*, in: *Una Costituzione senza Stato*, ed. G. Bonacchi, Bologna 2001.
Habermas J., *Una Costituzione per l'Europa? Osservazioni su Dieter Grimm*, in: *Il futuro della Costituzione*, ed. G. Zabrebelsky, P.P. Portinaro, J. Luther, Torino 1997.
Haushofer K., *Geopolitik der Pan-Ideen*, Berlino 1931.
Heller H., *Staatslehre*, Leiden 1934.
Henrich W., *Kritik der Gebietstheorien*, "Zeitschrift f ür Völkerrecht" 1926, vol. XIII.
Henrich W., *Theorie des Staatsgebiets entwickelt aus der Lehre von den lokalen Kompetenzen der Staatsperson*, Wien, Leipzig 1922.
Hespahna M., *L'espace politique dans l'ancien régime*, in: *Estudos em Homenagem aos Profs. Doutores M. Paulo Merêa e G. Braga da Cruz*, II, "Boletim da Facultade Faculdade de Direito Universidade de Coimbra" 1982, No. 58.
Irti N., *Norma e luoghi. Problemi di geo-diritto*, Roma, Bari 2006.
Jellinek G., *Allgemeine Staatslehre*, [np] 1928.
Kelsen H., *Allgemeine Staatslehre*, Berlin 1925.
Kelsen H., *Grundriß einer allgemeinen Theorie des Staates*, [np] 1926.
Kelsen H., *Reine Rechtslehre*, Leipzig, Wien 1934.
Kingsbury B., *Sovereignty and inequality*, "European Journal of International Law" 1998, No. 9.
L'espace du diocèse. Genèse d'un territoire dans l'Occident médiéval (Ve-XIIIe siècle), ed. F. Mazel, Rennes 2008.

Lauwers M., *Territorium non facere diocesim… Conflicts, limites et représentation territoriale du diocèse (Ve-XIIIe siècle)*, < https://halshs.archives-ouvertes.fr/halshs-00275567/document >.
Lombardi G., *Spazio e frontiera tra eguaglianza e privilegio. Problemi costituzionali di storia del diritto*, "Diritto e Società" 1985.
Luciani M., *L'antisovrano e la crisi delle costituzioni*, "Rivista di Diritto Costituzionale" 1996, No. 129.
Mann T., *Das Gesetz*, Stockholm 1944.
Mari L., *Ordinamento, localizzazione, uniformità: quale* nomos, *dopo Schmitt, per l'Europa?*, "Teoria del Diritto e Dello Stato" 2011, No. 1–2.
Mazel F., *Cujus dominus, ejus episcopatus? Pouvoir seigneurial et territoire diocésain (Xe-XIIIe siècle)*, in: *L'espace du diocèse. Genèse d'un territoire dans l'Occident médiéval (Ve-XIIIe siècle)*, ed. F. Mazel, Rennes 2008.
Miller D., *Diritti territoriali: concetto e giustificazione*, "Ragion Pratica" 2009, No. 2.
Neumann F., *Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft*, in: F. Neumann, *Demokratischer und autoritärer Staat*, Frankfurt am Main 1937.
Ortino S., *Il nuovo Nomos della Terra, Profili storici e sistematici dei nessi tra innovazioni tecnologiche, ordinamento spaziale, forma politica*, Bologna 1999.
Patzold S., *L'archidiocèse de Magdebourg. Perception de l'espace et identité (Xe-XIe siècle)*, in: *L'espace du diocèse. Genèse d'un territoire dans l'Occident médiéval (Ve-XIIIe siècle)*, ed. F. Mazel, Rennes 2008.
Perassi T., *Paese, territorio e signoria nella dottrina dello Stato*, "Rivista di Diritto Pubblico" 1912, No. 3–4.
Radnitzky E., *Die rechtliche Natur des Staatsgebietes*, in: *Archiv für öffentliches Recht* 1906.
Ridola P., *I diritti di cittadinanza, il pluralismo ed il "tempo" dell'ordine costituzionale europeo. Le "tradizioni costituzionali comuni" and l'identità culturale europea in una prospettiva storica*, "Diritto Romano Attuale" 2003, No. 9.
Romano S., *Il Comune. Parte generale*, Milano 1908.
Romano S., *Osservazioni sulla natura giuridica del territorio dello Stato*, in: *Arch. dir. pubbl.* 1902.
Ruben D.H., *The metaphysics of the social world*, London 1985.
Sassen S., *Losing control. Sovereignty in an age of globalization*, New York 1995.
Sassen S., *Sociologia della globalizzazione*, Torino 2008.
Sassen S., *Territory, authority, rights*, Princeton, Oxford 2006.
Schmitt C., *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Berlin 1950.

Schmitt C., *Land und Meer. Eine weltgeschichtliche Betrachtung*, Stuttgart 1954.
Schmitt C., *Terra e mare. Una riflessione sulla storia del mondo*, transl. G. Gurisatti, Milano 2002.
Schrauwen A., *European Union citizenship in the Treaty of Lisbon: Any change at all?*, "Maastricht Journal of European and Comparative Law" 2008.
Searle J.R., *The construction of social reality*, New York 1995.
Sennett R., *L'uomo flessibile. Le conseguenze del nuovo capitalismo sulla vita personale*, Milano 2006.
Shaw J., *Citizenship: Contrasting dynamics at the interface of integration and constitutionalism*, "Robert Schuman Center for Advanced Studies: Working papers" 2010, No. 60.
Sicardi S., *Essere di quel luogo. Brevi considerazioni sul significato di territorio e di appartenenza territoriale*, "Politica del Diritto" 2003, No. 1.
Silvestri G., *Costituzionalismo e crisi dello Stato-Nazione. Le garanzie possibili nello spazio globalizzato*, in: *Costituzionalismo e Globalizzazione*, "Annuario AIC" 2012, Napoli 2014.
Slaughter A.M., *A new world order*, New York, Oxford 2004.
Slaughter A.M., *Sovereignty and power in a wetworked world order*, "Stanford Journal of International Law" 2004.
Smend R., *Verfassung und Verfassungsrecht*, Berlin 1928.
Sofsky W., *Rischio e sicurezza*, Torino 2005.
Somek A., *Delegation and authority: Authoritarian liberalism today*, "European Law Journal" 2005.
Tabucchi A., *Sostiene Pereira*, Milano 2016.
Terni M., *Stato*, Torino 2014.
Verdross A., *Die Verfassung der Völkerrechtsgemeinschaft*, Berlin 1926.
Verdross A., *Staatsgebiet, Staatengemeinschaftgebiet und Staatengebiet*, "Niemeyers Zeitschrift für Internationales Recht" 1927, vol. XXXVII.
von Fricker K.V., *Vom Staatsgebiet* (1867), in: *Gebiet und Gebietshoheit: mit einem Anhang vom Staatsgebiet*, Tübingen 1901.
Wallace W., *Government without statehood. The unstable equilibrium*, in: *Policy making in the European Union*, ed. H. Wallace, W. Wallace, Oxford 1996.
Ward I., *Europe and the "Principles" of article 6*, "King's College Law Journal" 2000, No. 11 (105).
Weiler J.H.H., *La cittadinanza europea*, in: *L'Unione europea. Istituzioni, ordinamenti e politiche*, ed. B. Beutler, R. Bieber, J. Pipkorn, J. Streil, Bologna 1998.
Weiler J.H.H., *Perché è fallito il progetto di cittadinanza europea?*, "Cultura giuridica e diritto vivente", < http://ojs.uniurb.it/index.php/cgdv >.
Zagrebelsky G., *Principî e voti. La Corte costituzionale e la politica*, Torino 2005.