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The Relevance of the Notion of Time for Constitutionalism Beyond the State: Towards Communal Constitutionalism?

MASSIMO FICHERA

*Associate Professor of EU and Comparative Constitutional Law
Faculty of Law, University of Helsinki (Finland)*

✉ massimo.fichera@helsinki.fi

ABSTRACT

The overproduction of material hinting at or announcing the emergence of a form of constitutional law beyond the State (sometimes defined as transnational constitutional law) has caused sceptic reactions increased in recent years. Many scholars have either been wary of employing the constitutional vocabulary too easily or as a form of crystallization of power structures, or have attempted to elaborate new concepts while emphasizing the descriptive and normative appeal of pluralism, or resorting to the less ambitious vocabulary of administrative law. While it is not the purpose of this essay to do justice to the complexity of the debate on constitutionalism beyond the State, its aim is to single out one distinctive element of this project: its *transformative* nature. In particular, it argues, against H. L. A. Hart's idea that international law is a static legal order, that the notion of constitutional time is crucial for the purposes of framing the contours of the debate on constitutionalism in general and on its applicability beyond the confines of the traditional State.

Keywords: constitutionalism, transnational constitutional law, international law, constitutional time, kinds of constitutionalism, domestic law

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1. Introduction: A Short Overview of the Debate on Constitutionalism beyond the State

A growing circle of legal scholars has for years inquired upon not only the existence of a form of constitutional law beyond the State (sometimes defined as transnational constitutional law), but also how to describe it, which features should be identified as permanent, and whether the development of a so-called constitutionalism beyond the State should be seen as legitimate or even desirable.¹

Inevitably, the overproduction of material hinting at or announcing the emergence of a new form of constitutionalism has caused sceptic reactions (see, e.g., Somek 2008; Grimm 2016). Yet, although the latter have increased in recent years – partly as a result of the considerable political backlash that globalising trends have suffered across the world, the rise of populist leaders and movements and the erosion of rule of law standards in many rich countries, where economic prosperity seemed, at least on the face of it, often associated with liberal democracy – it must be admitted that many scholars have always refrained from depicting idealistic scenarios. They have either been wary of employing the constitutional vocabulary too easily or as a form of crystallisation of power structures (Koskenniemi 2006; Koskenniemi 2007), or have attempted to elaborate new concepts that could operate in a post-Westphalian environment while emphasising the descriptive and normative appeal of pluralism (Walker 2002; Walker 2014), or resorting to the less ambitious vocabulary of administrative law (Kingsbury, Krisch, and Stewart 2005).

While it is not the purpose of this essay to do justice to the complexity of the debate on constitutionalism beyond the State, its aim is to single out one distinctive element of this project: its *transformative* nature. Whether it merely describes an emerging phenomenon, or it also points towards a more

¹ For an inquiry into the appropriate methodology and the configuration of a “transnational legal theory” more generally, see Dickson (2015, 565), Roughan (2013).

desirable state of affairs, or it forcefully adopts a critical stance towards the legal and political implications of global and/or transnational law, reflecting on these recent developments *is already altering* the terms of the debate and some of the fundamental premises that were traditionally associated with legal systems. This sort of “observer effect” (a term borrowed from physics), i.e. a modification of the nature of the object of study through reflection and interpretation, takes place in addition to the activities of law production or application that characterise law itself. This is particularly true as regards the curious phenomenon called “law beyond the State.” In this sense, this is one important reason why H.L.A. Hart’s idea that international law is a static legal order, because it lacks rules of change, is incorrect (Hart 1994, 92-93), not only because “international law” as a label is nowadays competing against other relevant labels – such as “transnational law,” “global law” or “supranational law” – which describe similar but not identical phenomena or projects (Fichera 2016a). This article’s claim is that, regardless of the position one may have in relation to constitutionalism’s desirability, importance, or appropriateness, the notion of constitutional time is crucial for the purposes of framing the contours of the debate on constitutionalism in general and on its applicability beyond the confines of the traditional State. The premise of this work is that an overview of constitutionalism beyond the State cannot separate radically international from domestic legal orders, in the sense that we are witnessing a growing interpenetration between them. The diffusion of norms and practices across legal orders implies that, even when the intention is either to criticise the use of the constitutional vocabulary, or to supersede traditional categories anchored to State-centred conceptions, it is not possible to ignore the role of domestic legal orders.² In light of this, the first argument developed in the article is that constitutional time as a concept is much more important than it seems in order to understand the functioning of a legal system (section 2).

² One consequence of this is that comparative constitutional methodologies must also be taken into account. See, e.g., Husa (2021).

The second argument is that the transformative nature of constitutionalist discourses can be traced in six ideal-types: legal, political, identitarian, societal, transformative and democratic constitutionalism (section 3). Each of these ideal types has developed within the State but may be employed in the more general debate on constitutionalism beyond the State, too. They are broad models, which are able to encompass different examples of constitutional frameworks. They are useful for our purposes, because they provide a rather accurate account of the directions taken by current constitutional reflections. Moreover, each of them presents a different understanding of constitutional time: their various articulations of the nature of commitment and of the relationship between constitutionalism and democracy may help us understand better the extent to which they are applicable beyond the State. Roughly, I define constitutionalism as the idea that government action should be at the same time enabled and limited by law (thus corresponding to the idea of the rule of law), and should protect individual rights.³ Democracy can be – equally roughly – identified with a set of mechanisms ensuring that the voice of the people is heard and that their decisions on fundamental issues are taken into account (Sunstein 2001; Michelman 1999; Palombella 1997) – although both people and public sphere are the outcome of constructions that tend to be subject to power dynamics.⁴ The need to strengthen both elements, without emphasising one to the detriment of the other, leads to suggesting, towards the end of the article, a seventh form of constitutionalism, i.e. communal constitutionalism, as a possible way forward in the debate (section 4).

2. Constitutional Time

The purpose of this section is to examine the nature of self-government for a complex transnational polity and its commitment to the future. In this light, it employs the notion of constitutional time, understood as a crucial notion

³ See e.g. McIlwain (1940); Wheeler (1975).

⁴ As regards the European Union (EU), see Fichera (2018).

for every legal system,⁵ because it encompasses not only the time of foundation, characterized by a variously formulated binding commitment to a long-term project, but also the time of self-amendment and adjustment. The reason why temporality is bound up with normativity (Christodoulidis 2003, 416) is that engagement with a project over time presupposes a special kind of commitment, conceived as a “normative embrace of the future” (Rubinfeld 2001, 128). In essence, constitutionalism can only live up to its promise of regulating society according to rule of law standards if it incorporates the dimension of the future.⁶ To be sure, modern constitutionalism is characterized by the attempt to rise above time and exercise control over an extended period, thereby reducing uncertainty and limiting contingency. Norms protecting the core values of a community may be laid down (such as in the case of the so-called “eternity clauses”). Nevertheless, constitutionalism’s effort to limit contingency is pointless if the possibility of renegotiation and revision of fundamental norms is not allowed, at least to some extent. As a result, the “self of ‘self-government’” of a constitutional arrangement is not pre-determined once and for all. It is not true that the past exercises a strict control of the possibilities of norm-changing (Christodoulidis 2003, 419), because the past is a construction made in the present: constitutionalism can only be reconciled with democracy if the past is not fixed, but re-presented over and over again, and therefore never identical with itself but always already projected towards the future. In a sense, the continuous re-presentation and re-interpretation of this past and its extension into the future – which we may call “cyclical time” – enables the democratic component of a legal system. As observed by Rubinfeld, constitutionalism as commitment produces “democracy over

⁵ There is an extensive literature on the relationship between (constitutional) law and time. See e.g. Bjarup and Blegvad (1995); Barshack (2009); Linden-Retek (2015); Postema (2018).

⁶ See e.g. US *Hurtado v. California* 110 U.S. 516, 530-531 (1884) (Matthews, J., Opinion of the Court): “The Constitution of the United States [...] was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues.”

time” because it permits self-government: it is only in this sense that constitutionalism – typically expressed by the rule of law – and democracy can be synchronized. However, constitutionalism as commitment can only be *persuasive* if it is expressed through a democratic procedure of collective re-negotiation of its values. Instead, “present-tense temporality,” as upheld by constitutionalists and political thinkers across a line of thought that begins with Rousseau and Jefferson, by viewing democracy as a promise to live in the present, places (written) constitutionalism and democracy directly in opposition to each other (Rubinfeld 2001, 46). The reason is that a written text is viewed as constraining the voice of the people in the present and should be therefore entirely replaceable. Yet, as Rubinfeld notes, “A people must have law from the past, and it must project law into the future, to be self-governing. We can achieve liberty only by engaging ourselves in a project of self-government that spans time” (*ibidem*, 177).

Having this in mind, two points need to be raised. First, while the possibility to question the existing constitutional settlement and envision alternative settlements should be preserved within a polity at any moment in its evolution, there should always exist at the heart of a liberal-democratic legal order an epistemic core, which ought to be left untouched.⁷ Second, methodological openness and the related inclusiveness of as many social actors as possible are one of the factors that allow a constitutional settlement to endure over time (Elkins, Ginsburg, and Melton 2009).⁸ In order to consider the above statements more carefully, I set out to explore in the next pages the nature and meaning of a commitment extended over time.

⁷ Instead, Christodoulidis seems to suggest (against the idea of “cyclical time” proposed here) that “the suspension of the foundation over and above political time, the dictate to return and to repeat overwhelms the possibilities of becoming” (Christodoulidis 2003, 407). On a similar wavelength was Thomas Jefferson, who believed that, because no generation has the right to bind another, no society can have a perpetual constitution and ultimately every constitution ought to expire at the end of 19 years. See Jefferson (1958, 392). Jefferson (2013) expressed a slightly more moderate view in his “Letter to Samuel Kercheval” of 1816.

⁸ Note also Williams (2010, 11): “The weight of past practices repeated over and again and past decisions affirmed across time lies heavily on the behaviour of those who come within its domain.”

One of the main paradoxes stemming from the relationship between constitutionalism and democracy is the following. On the one hand, constitutionalism's illusory – at times overweening – ambition to control the future through a binding commitment placed at the beginning of constitutional time is liable to compromise the consensus that is assumed to underpin a liberal democracy.⁹ On the other hand, excessive emphasis on the democratic component – for example, by evoking an allegedly pure, unlimited “sovereignty of the people” on each and every issue that enters the public domain – may undermine that very commitment. It is precisely this long-term extension, stretching towards an undefined future, which lends a constitutional project its credibility and authority¹⁰ – yet, this is also one of the main sources of contradictions for constitutionalism. Given the added layer of complexity associated with constitutional time,¹¹ it is thus remarkable that contemporary political liberalism, epitomized by Rawlsian “justice as fairness” (Rawls 1971), has often been characterized by a degree of ambiguity in its consideration of the future. One of the main weaknesses of the most popular versions of liberalism – exposed by the recent economic and financial crisis – has been that, despite showing some degree of concern for the future, they have always relied on the overly optimistic assumption of continuous growth and the persistence of postwar consensus: in other words, liberalism has been too “presentist,” thus bracketing the “problem of

⁹ “Why would a democratic society tolerate what might appear to be a dictatorship of the past over the present?” (Elster 1988, 1).

¹⁰ See e.g., as regards the European Union, Articles 53 TEU and 356 TFEU, as well as Article 3 Final Provisions of the Treaty of Lisbon: “The Treaty is concluded for an unlimited period.” The notion of “unlimited duration” is also contained famously in ECJ Case 6/64 *Costa v. ENEL* ECLI:EU:C:1964:66 para 3. See also Article 240 Treaty on the European Economic Community, Article 312 Treaty on the European Community, Article 51 Treaty on the European Union (Maastricht). Clauses on unlimited duration are not uncommon under international law. However, voluntary and unilateral withdrawal is always possible: see Article 50 TEU. The same mind frame can be seen in ECJ C-184/99 *Grzelczyk* ECLI:EU:C:2001:458: “Union citizenship is destined to be the fundamental status of nationals of the Member States” (emphasis mine).

¹¹ As well known, Hart already observed that two key features of most legal systems are the continuity of the authority to make law possessed by a succession of different legislators and the persistence of laws long after the disappearance both of the law-maker and of those who are characterised by their “habit of obedience.” He even criticised Austin for neglecting the importance of this aspect of persistence over time. See Hart (1997, 51).

the future,” or circumscribing its value for the present (Forrester 2019, 172-203). In a sense, contemporary forms of populism and Euroscepticism may be seen as a response to the “lack of future” of the European project. By way of contrast, historically, as observed by Ernst Kantorowicz, “the most significant feature of the personified collective and corporate bodies was that they projected into past and future, that they preserved their identity despite changes, and that therefore they were legally immortal” (Kantorowicz 1957, 311). It follows that “the relegation of sovereignty to ancestors and offspring and the different representations of corporate perpetuity, such as [...] the constitution, open up the present to the horizons of the past and the future” (Barshack 2005, 562). In other words, one of the main flaws of contemporary liberalism, rather than openness to the horizons of time, has been that of flattening constitutional time, reducing it to a fragmented form of “linear time,” i.e. a sequence of present moments without any reconnection either to the past or to the future.¹² If liberalism has had an idea of self-government in mind, the “self” it has promoted has always been identified with the individual, rather than the people (Rubinfeld 2001, 69). If the individual conceived by liberalism is liberated in any meaningful sense, he/she is always liberated – at least allegedly – from the shackles of constitutional time. However, this does not tell us anything about the authorship of a collective commitment.

Hence the importance of complementing “linear time” with “cyclical time,” not only in terms of self-representation and self-interpretation, but also with a view to strengthening authority and credibility through a process of *collective* will-formation and deliberation. In other words, “cyclical time” is the image of a legal system as a set of normative values that are the object of interpretation over time by the actors of that system by looking

¹² The same can be said of modernity, which aims “to forbid the past to bear on the present [...] to abolish time in any other form but of a loose assembly, or an arbitrary sequence, of present moments; to flatten the flow of time into a *continuous present*” (Bauman 1997, 89). Linear time can also be seen in positivist theories, which trace back the authority of legal norms sequentially to an ever-higher norm, up until an originating source: see Walters (2016, 33).

retrospectively at past interpretations and selecting the best possible meanings for the future. Yet, “to understand the law in the present and thereby its guidance for future action requires more than projecting into an open and unscripted future a rule based on inferences from the past” – as noted by Postema – in the sense that “it is a matter of fitting the present proposition and its guidance for present action into a future that can and must be anticipated,” essentially because “law, and its mode of reasoning, is concurrently retrospective and prospective, a matter of appreciating the past and anticipating the future” (Postema 2018, 166). It is true that a certain degree of legal indeterminacy and openness suggest that normativity, especially as regards constitutional projects, always has a “weaker hold on the future” (Christodoulidis 2003, 416). However, this does not necessarily point towards irreconcilability between constitutionalism and democracy, because constitutional authorship is transtemporal. In other words, it is possible to conceive of the development of a common project in which all participants hold a strictly forward-looking perspective, capable of including also later generations (Kuo 2009, 706-707).

In fact, according to Rubinfeld, the legitimacy of a constitutional arrangement cannot be secured through the will of a single founding moment, because a commitment can only be *owned* by a people if the fundamental law is re-written and re-examined when necessary (Rubinfeld 2001, 14). At the same time, “the voice of the governed – the will of the governed, here and now – *cannot* be supreme. It must itself be governed by a text, whether written or unwritten, established in the past, providing rules for its own speaking” (*ibidem*, 79). A people can thus come into being independently from its own will, but can only become the author of its own foundational commitment over time.¹³

As a result, for a constitutional arrangement to be both initiated and upheld, several critical constitutional moments are necessary in order to put

¹³ *Ibidem*, 83. Moreover, “a constitution can never be founded in a sublime moment from a revolutionary past. It can find its foundations only – in its own future” (*ibidem*, 86).

the tenability of the original commitment as a collective act of self-binding to the test. Yet, what if this test can never exhaustively define the nature of a polity's commitment? In reality, approaches that deny the existence of demos-legitimizing factors respond to standard accounts of rational action, which, even when admitting the possibility that constitutionalizing features may emerge at some undefined point in the future, tie rationality to the agent's preferences at the time of action (Rubinfeld 2001, 119). In so doing, they overlook the relevance that an *ongoing* process of self-amending and self-interpreting constitutionalisation, characterized by an open-ended commitment, may have.¹⁴ Present-oriented rationality characterises also those approaches that claim that a proper democratic process of deliberation – for example in the European Union (EU) – can only take place by conferring decision-making power on national executive and legislative powers, which are supposed to better reflect the needs of the electorate.¹⁵ Although executive and legislative organs play a fundamental role in the performance of action in the present, the undeniably programmatic nature of their policies needs to be integrated by the activity of the judiciary precisely in order to verify to what extent a long-term commitment can be upheld and, if necessary, re-elaborated by a political community through self-interpretation. In fact, especially national courts can be very effective in counteracting the activity of the other organs, thus performing judicial review in order to contain and reformulate the public's immediate preferences in light of the polity's long-term commitment (Bassok and Dotan 2013). This confirms, first of all, that the nature of such commitment, unlike that of a *pre*-commitment, is never fixed once and for all, but always under negotiation, because “through a commitment, the self imposes on itself a normative obligation that provides a reason for, and not merely a cause of, its own future action” (Rubinfeld 2001, 125).¹⁶ Secondly, the

¹⁴ In this vein, I employ the concept of “discursive constituent power” in Fichera (2018, 39-63).

¹⁵ Mostly, this claim is put forward by political constitutionalists: see, e.g., Bellamy (2019).

¹⁶ On the nature of pre-commitment, see, e.g., Issacharoff (2003).

normative force of this commitment derives not merely from the fact that its object is worthwhile, but also from the circumstance that the author of the commitment views it as his/her own. It follows that this obligation can be discarded at any time, when it is no longer recognized as one's own. Because constitutional commitments are generated at times of "high political feeling," and not merely of "sober rationality," they cease to exist once the feeling vanishes (Rubinfeld 2001, 129). They can also be amended, if they no longer correspond to popular will.

3. Six Forms of Constitutionalism

In light of the analysis of the nature of a constitutional commitment over time provided in the previous section, in this section I will distinguish between six ideal-types of constitutionalism and illustrate how constitutional time is conceived differently in each of them. These ideal types are: legal constitutionalism, political constitutionalism, identitarian constitutionalism, societal constitutionalism, transformative constitutionalism and democratic constitutionalism. In a sense, as will be seen later, they may also be classified according to the different weight that is conferred upon the conceptual couple rule of law-democracy.

Legal constitutionalism may be considered as *par excellence* the conception that emphasizes the need to protect the rule of law. As a result, it advocates and relies upon some degree of neutrality of those institutions that are supposed to guarantee the "fair play" in a governmental architecture.¹⁷ When these institutions correspond to supreme or constitutional courts, they are endowed with particular strength, which is usually expressed by the exercise of rights-based judicial review. From this particular perspective, a constitution is thus viewed as a norm, which must be interpreted and applied by the courts. In order for courts to perform their tasks, some of the fundamental principles of a constitution are removed from the ordinary

¹⁷ These institutions can be typically courts – in particular constitutional or supreme courts- or other organs with analogous functions, such as the Head of State.

political process of deliberation and are object of a special form of entrenchment (e.g. through eternity clauses).

Because the constitution as a norm entails a more or less rigid framework, in the sense that it assumes the existence of a core that is difficult to amend, normally a substantive configuration of constitutionalism is advocated: contemporary societies express a commitment to certain fundamental values and, correspondingly, constitutions enumerate the basic rights that are placed at the heart of a polity.¹⁸ Judicial review is supposed to protect fundamental rights against the tyranny of the majority; at least some of these fundamental rights are coterminous with democracy; in hard cases, judges can deduce from these rights the principles that enable them to decide in line with the core values of the society (Dworkin 1996).

The image of law reflected by legal constitutionalism is thus closely associated with the sphere of morality. In other words, the significance of a constitution lies in its ability to define the political morality of a community, thus drawing on the principle of equal respect of all citizens. Given a strong emphasis on the rationality and entrenched nature of a legal system, politics is subject to law. The main function of a constitution is thus to limit government by law.

In many respects, political constitutionalism is the antagonist of legal constitutionalism, because it is characterized by a shift towards the democracy component rather than the rule of law component of a polity. Rather than looking at the constitution as a norm, political constitutionalism focuses on the process that enables both the fulfilment of the ideal of self-government and the representation of collective interests (Griffith 1979, Bellamy 1996, 2019). In order to ensure large participation and inclusion of people, this conception thus supports parliamentarism (in particular,

¹⁸ The relationship of legal constitutionalism with Hans Kelsen is ambiguous: see for a general treatment Vinx (2007). Kelsen was sceptical about the use of open-ended concepts and human rights provisions in the constitution, because they would inevitably acquire a supra-positive status. He was also against increasing the role of constitutional courts, because this would undermine their legitimacy and their claim to relative political neutrality.

unicameral parliamentary systems). As a result, from a political constitutionalist perspective there are no questions or issues – including those having moral, ethical or religious implications – which can be legitimately excluded from the political debate. In addition, because the articulation of the common good is always the outcome of deliberation, courts are not the most appropriate organs acting as guardians of the constitution. Citizens, instead, ought to be viewed as the suitable guardians: in fact, the principle of parliamentary sovereignty protects their freedom from domination. In particular, the relationship between citizens and the government is very much based on a direct relationship of trust.

Because the constitution is viewed here in more dynamic terms, political constitutionalism is normally proceduralist, in the sense that it considers procedural democracy as the true source of legitimacy for political action.¹⁹ A constitution is thus supposed to incorporate a detailed description of the legal and political system, especially of the powers and functions of the levels of government.

The image of law that can be extrapolated from this mind frame is intertwined with political action. As the constitution is never able to settle the fundamental disagreements that lie at the heart of a society, the democratic process tends to be preferred over the judicial process. For example, US-style strong judicial review and the use of a written constitution are regarded with suspicion, because they constrain democracy. Given a strong emphasis on political equality, party competition and majority rule, the law is subject to politics. The main function of a constitution is to enable government (Griffith 1979) or make it accountable (Tomkins 2002) and secure the stability of the polity.

While legal and political constitutionalism, at least in their ideal-typical configurations, appear as classic contenders – with the result of spurring endless debates about the quality and suitability of one or the other model –

¹⁹ However, some versions of political constitutionalism may be considered more substantivist. See, e.g., Khaitan (2019).

there exist two other forms of constitutionalism, which are even more controversial as regards both their configurability and implications. They are societal constitutionalism and identitarian constitutionalism.

The former conception pledges to deprive the notion of constitutionalism of its statist bias. A broader constellation is thus suggested, in order to encompass non-State actors, including not only corporations, but also social movements, professional bodies and other autonomous sectors of society, e.g. within health and sport (Teubner 2004, 5). Traditional versions of constitutionalism beyond the State are blamed for limiting their analysis to the WTO, the EU and other supranational bodies with a public institutional character. Yet, the version offered as a more comprehensive alternative – predicated on the need to ensure social differentiation as a strategy of resistance to top-down institutional pressures – is by no means univocal. While some accounts clearly turn their eye on market-oriented sectors, which are supposed to emerge and self-regulate spontaneously (*ibidem*, 27-28), others focus on and overtly advocate forms of equally spontaneous popular resistance and “constitutionalism from below” – for example through social movements (Anderson 2013) – which may sometimes antagonize not only the statist institutional apparatus, but also other more established public entities beyond the State.

Societal constitutionalism paints a more complex image of law, as encompassing both external intervention – in the form of both social pressure and political-legal regulation – and self-restriction.²⁰ As a result, societal constitutionalism’s relationship with the political is ambiguous, in the sense that the latter is either ignored or downplayed,²¹ or reasserted in a different shape (Anderson 2013, 898). In other words, constituent power is

²⁰ This is often defined as “hybrid constitutionalization.” Constitutions emerge as a result of a double reflexivity: the reflexivity of the self-constituting social system (economy, science etc.) and the reflexivity of the associated legal system. Constitutionalization (i.e. the juridification of social spheres) is achieved when a meta-code (constitutional/unconstitutional) is developed, thus subjecting decisions that have already been verified through the code legal/illegal to a further independent code.

²¹ See the *critique* in Christodoulidis (2013).

not denied, but reconfigured beyond formal politics, i.e. dispersed in the various sectors and sub-sectors of society (e.g. economics, health) and transcending institutional power structures. In this existential and decisionist mind frame, constitutional moments are not limited to politics, but are characterized by the mobilization of societal forces pushing for radical change in circumstances of near catastrophe.²² This is because, in what is considered a functionally differentiated environment, mechanisms of self-correction are normally ignored and only operate in extreme situations, when the will to change and the awareness of the imminent collapse are sharp enough and the self-destructive tendencies of a system can be potentially remedied by the last-minute decision of self-limitation. Hence, “inner constitutionalization” is a more valuable alternative to State intervention, which is viewed with suspicion after the episodes of political totalitarianism in the XX century. Unsurprisingly, whereas legal constitutionalism focuses on constitutional courts and political constitutionalism emphasizes the role of parliaments and the electorate, societal constitutionalism (especially in its market-oriented version) regards both constitutional courts and central banks as “guardians of the (economic) constitution.”²³

At the other end of the spectrum lies a very familiar form of constitutionalism – one which encompasses a number of variously nuanced versions, including “authoritarian constitutionalism,” “competitive authoritarianism” or “abusive constitutionalism” (Tushnet 2015; Landau 2013; Levitsky and Way 2010) or, alternatively, “populist constitutionalism” (Blokker 2019). These formulae convey a number of

²² Teubner (2011, 11-12): “This is not the moment when the self-destructive dynamic causes the abstract danger of a collapse to appear: that is the normal state of things. Instead, it is the moment when the collapse is directly imminent” and “the constitutional moment is the direct experience of the crisis.”

²³ Teubner (2011, 40-41). As the author notes, “the politicisation of the economy is high in the agenda of societal constitutionalism (...). And just as constitutional assemblies and constitutional courts are the guardians of the political constitution, so the central banks and the constitutional courts are the guardian of the economic constitution. And their constitutional politics requires a high degree of autonomy.”

features, which do not necessarily coexist simultaneously, such as: the use of constitutional forms to achieve un- or anti-constitutional objectives (more specifically, the use by some political leaders of large majorities and constitutional procedures to progressively amend the constitution and increase or consolidate their power: the so-called unconstitutional constitutional amendments); limited pluralism and a higher than average control of the media and other *super partes* organs by the dominant party; a degree of responsiveness to public opinion and resulting flexibility of the party's political choices, coupled with a diminished degree of accountability; weak-form review and strong connection between courts and the dominant party; the use of elections as the only or predominant test to detect and crystallise popular will once and for all. However, two observations are necessary. First, as already mentioned, not all these features are present at the same time and some of them are not compatible with each other. For example, at least according to Tushnet, authoritarian constitutionalism displays a higher degree of commitment to legally restraining arbitrary power than abusive constitutionalism (Tushnet 2015, 438). Second, I believe the same features, in different shades of intensity, may characterize many constitutions, which are not commonly labelled as authoritarian or abusive. As a result, in my view a different, broader notion, which I call identitarian constitutionalism, expresses more usefully a certain way of organizing power, which does not necessarily go – either explicitly or implicitly – against the fundamental principles of a modern constitution.

Identitarian constitutionalism does not place emphasis either on the nominal, procedural elements of a constitution (as political constitutionalism does), or on the social forces that shape legal and constitutional frameworks (as societal constitutionalism does). Similarly to legal constitutionalism, there emerges a substantive commitment to an entrenched set of principles or values. Yet, unlike legal constitutionalism, the privileged site where such commitment is made explicit is not the supreme/constitutional courts, but a reified notion of the people, who, if “genuine,” adhere to these values,

especially when they are anchored to an ethno-nationalist narrative. Values are not posited by the legislator, but reflect the historical and cultural basis of a constitutional order, which ought to be respected across the years. Consequently, key concepts for this form of constitutionalism are constitutional and national identity – often undistinguishable from each other.

The image of law that is associated with identitarian constitutionalism is one that goes against the traditional, rationalistic liberal account of a legal order. The rule of law is conceived as self-government and the general will facilitates the tendential identification between the governor and the governed.²⁴ Identitarian constitutionalism, with its voluntarist undertones, thus relies upon one empty container, which can be filled variously, depending on how popular will is manufactured: trust, as the relationship of immediacy between people and the government. Similarly to legal constitutionalism, some questions are placed outside the ordinary political debate – although they are decided in identitarian terms; analogously to political constitutionalism, less judicial oversight over the activities of government is advocated. Finally, in contrast to societal constitutionalism, the vocabulary associated with the constitutionalization of non-state entities, including civil society or corporations, is regarded with suspicion, unless it is brought under the aegis of the executive.

As opposed to legal, political and identitarian, as well as, in some sense, societal constitutionalism, which have been analysed thoroughly in recent years, transformative constitutionalism is a relative under-theorised phenomenon. It has been developed essentially by judicial bodies in the Global South, especially in India, in Latin American and African Countries and stands in stark contrast with classic counter-majoritarian arguments and related diffidence towards juristocracy and the “*gouvernement des juges*,”

²⁴ Rousseau (1968, 81): “When the people as a whole makes rules for the people as a whole, it is dealing only with itself; and if any relationship emerges, it is between the entire body seen from one perspective and the same entire body seen from another, without any division whatever.”

which are rather popular not only in the United States, but also in many European countries, starting from France. The main project behind transformative constitutionalism is to promote social and economic rights and, more in general, State action towards a more just society (Klare 1998; Vilhena Vieira, Baxi and Viljoen 2013; von Bogdandy *et al.* 2017). Interestingly, this form of constitutionalism has given birth to many strands, sometimes quite different from each other, depending on whether they are inspired by Dworkinian or vaguely deliberative conceptions, or critical legal studies (Cornell and Friedman 2010). Despite its geographically delimited origin, it has spread across the Northern hemisphere too, and has been embraced, for example, by a section of German scholarship (von Bogdandy, Ferrer Mac-Gregor, Morales Antoniazzi, Piovesan, and Soley, 2017). Although transformative constitutionalism shares with classic legal constitutionalism an emphasis on the role of courts in the preservation and promotion of society's core values, it pursues a more explicitly social and political agenda, supporting positive rights, State interventionism and accountability of private actors with respect to constitutional rights (Hailbronner 2017, 540). Change must not simply be promoted, but also preserved in the future: in other words, as explicitly made clear in countries which have only recently adopted a democratic constitution, the intention is "to heal the wounds of the past" and provide guidance for a better future, while envisioning a society that is constantly open to contestation and change (Langa 2006).

One additional form of constitutionalism is represented by what I would like to call democratic constitutionalism. This latter form includes two strands: one, relatively old, which has been coined "participatory constitutionalism" (Valastro, 2016; Polletta, 2014; Pateman, 2012), and another, fairly recent, which has developed out of general theories on deliberative democracy and is known as "deliberative constitutionalism" (Levi, Kong, Orr, and King 2018; Worley 2009). Both aim to enhance direct participation of citizens in the democratic process, thus emphasizing the

values of transparency, participation and accountability. From their perspective, the constitutional and democratic components of a contemporary liberal democracy ought to be conceived on an equal basis. While they support various degrees of popular sovereignty, protection and promotion of social and political rights and the related autonomy of parliaments, they distinguish themselves from political constitutionalism, because majority rule is not seen as the main legitimating factor in the liberal-democratic game. In other words, the foundational nature of modern constitutions is not dismissed completely: however, the idea of a “final act of closure” – which, in the eyes of legal constitutionalists, would be typically performed by a court – is alien to these conceptions. Rather, their background assumption is that a liberal democratic society is neither fully accomplished, nor triumphally progressing towards an enlightened form of government. Because institutional arrangements are always historically situated, they are necessarily characterized by openness and flexibility, hence subject to constant criticism and renewal (Gerstenberg 2019). This happens, because popular sovereignty is proceduralised in such a way that the weight conferred upon the public sphere is higher than any temptation to appeal to the people as such – thus avoiding to confer upon the elections a decisive significance (Chambers 2019).

Relatedly, there is a clear distinction between deliberative constitutionalism and populist constitutionalism, on the one hand, and participatory constitutionalism, on the other. On the one hand, differently from populist constitutionalism, deliberative constitutionalism prioritizes the public sphere over the elections as a mechanism of democracy and legitimacy (*ibidem*; see also Levy, Kong, Orr, and King 2018). On the other hand, although emphasis is placed, in both the deliberative and participatory form, on citizens’ participation in the political decision-making, especially at the micro level – for example citizens’ juries or assemblies, deliberative polls or participatory budgeting – it has been observed that deliberation has an added value compared to participation, as it focuses on the quality of the

deliberation and on the active involvement of citizens in the framing and discussion of the relevant issues on the agenda (Suteu and Tierney 2018, 282).

Each of the forms of constitutionalism sketched very briefly above deals with the notion of constitutional time in a different way. As the premise of legal constitutionalism is that a number of fundamental principles must be preserved from political contestation, although they are still subject to interpretation, the predominant conception of time is cyclical. Prevalence of the features of rationality and entrenchment point towards placing emphasis on the role of the judiciary as the emblem of cyclicity and as a guardian of the rule of law. However, this does not imply a removal of linear time, which is mainly expressed by executive decision-making and legislative activity.

Linear time is instead strongly present in the case of political constitutionalism, because democracy emerges as a daily business, constructed through a direct relationship between social and political actors. Although participation and involvement of local levels of decision-making are encouraged, the main focus of political constitutionalism are the central Parliament and government. As political activity is viewed as an expression of the contemporary will of the citizens, this approach is essentially presentist.²⁵ Cyclical time is not excluded, but – whether in the form of regular elections, or in the form of judicial review – it is subordinated to linear time and viewed instrumentally for the purposes of the achievement of governmental goals.

By way of contrast, identitarian constitutionalism, by reconfiguring a return to the nation State – or at least to a reinvigoration of national sovereignty through which transnationalisation of law is not denied radically, but refashioned and adapted to sovereigntist eyes – evokes in fact a return to a legitimating past. This source of both authority and legal pedigree is a fixed moment or period, which, while supposedly situated far

²⁵ See the reflections on the implications of presentism in section 2 above.

back in time, is constantly present in the narrative proposed. As a result, while some features, like entrenchment and attachment to some more or less traditional values might recall elements traceable in legal constitutionalism, the presentist vision of identitarian constitutionalism locates this conception somehow nearer to political constitutionalism. However, its representation of time is circular, because it lacks the ability to allow ongoing negotiation and reinterpretation of the founding values that are identified as binding for the polity. In addition, this is a strong version of presentism, because the identified leader possesses a relatively high discretionary power to alter the binding commitment of the polity or replace the previous interpretation of the alleged traditional values with another interpretation.

Yet, perhaps the most radical version of presentism is provided by societal constitutionalism, which offers a much more complex representation of constitutional time. As noted by Prandini, globalization and high-speed society threaten law as a source of legitimacy and stability, as well as the very nature of constitutions as basic law: “law is law (and nothing else), and it must change” (Prandini 2013, 748). In other words, according to Prandini globalization disconnects the rule of law, as a system of general, stable and predictable norms, from societal processes, as new forms of law, much more flexible, dynamic – such as in the case of soft law – emerge: as a result, judicial activity becomes more creative and less focused on legal precedents (*ibidem*, 750-752). New self-constituting entities thus do not find legitimacy in their past, but project themselves into the future, thus replacing the identification of a clear origin with the establishment of a field of networked actors that decide at one point to regulate their activity – in compliance with already existing rules – with constitutive meta-rules (*ibidem*, 766). Examples can be made in the context of the so-called transnational law, such as in the case of *lex sportiva*, *lex digitalis* or *lex mercatoria* (Fichera 2016a). As contingency is seen as the prevailing factor in the technology of law-making, societal constitutionalism

configures time as fragmented into “now-times,”²⁶ which can be regulated by some piece of legislation only in the short term, only to be replaced by another piece of legislation.

Differently from societal constitutionalism, the notion of constitutional time proposed by transformative constitutionalism is not a rupture between past and future, but some degree of continuity. Although the future holds a promise to remedy the mistakes of the past, the latter must not be removed completely. Moreover, not only the core values of a society, but any change in those values is supposed to be preserved in the long term, at least to some extent. The representation of time that is put forward by transformative constitutionalism is thus something in between the arrow of linear time and the undulation of cyclical time.

For analogous reasons, democratic constitutionalism considers pre-commitment not as a set of substantive limitations on the choices of a majority, but rather as a collection of procedural and structural values that ensure the protection of those rights of participation that allow a democracy to survive (Issacharoff 2003, 1994-1995). Conceived in this fashion, pre-commitment is not understood as a negative constraint to change, but rather as an enabler or facilitator of democratic governance. Constitutional time can be imagined therefore as a spiral moving upwards, from bottom-level to top-level decision-making.

Obviously, these ideal-types do not correspond exactly to real-life models and often many of their features are overlapping. However, they provide a useful overview of how different degrees of the combination between constitutionalism and democracy can operate, with legal constitutionalism located more towards the rule of law side, and the others, progressively from political to transformative, identitarian, societal and democratic towards the democratic side.

²⁶ I borrow the notion of “now-time” from Heidegger (although with a different meaning): see Heidegger (1962, 474-475).

4. Communal Constitutionalism

The argument in this work is that none of the ideal-types illustrated in the previous section contemplates an alternative scenario, one in which at least an attempt could be made to re-imagine constituent power – i.e. the power to establish a constitution, which is normally exercised by the people – in a new setting. Such a form of constituent power is no longer configured simply within the comfortable borders of the nation-State. Yet, one should avoid depicting idealistic representations or reifications of some sort of transnational people, possessing a collective identity and a transnational consciousness. Nor should one cling to the old, perhaps in some sense reassuring, framework of nation-States as the only relevant actors in the field. Especially when the focus is on complex processes of integration beyond the State, such as in the case of the EU, but also in other similar processes across the globe, especially in Latin America, the role played by the local dimension should be emphasized and promoted much more than it currently is. Inevitably, however, one of the main shortcomings of participatory and deliberative practices is that they operate only on the surface, without turning into *actual* involvement of the citizens.

I would like to use for these purposes the notion of communal constitutionalism. Communal constitutionalism implies the co-existence of a plurality of normative orders, sites of decision-making, social practices and mechanisms of allocation of resources, which are not necessarily associated with State actors, but may also include non-State actors (including private actors acting in the public interest), especially at the sub-national, local level. As argued elsewhere, this means that, while a constructive relationship with national and transnational levels of decision-making is maintained, grass-root movements, transnational party formation and citizen participation should be encouraged in both institutionalized and non-institutionalized settings (Fichera 2016b). This notion is thus an enriched form of legal pluralism “from below,” capable of embracing not only, for

example, the idea of “Europe of regions,” which was developed in the European context in the early 2000s, but also forms of participatory budgeting that have become particularly popular in Latin America and have been spreading across the globe, including Asia and Europe. It is not by chance that the notion of communal constitutionalism has had some resonance among Latin American political scientists (Rivera Lugo 2019, 162). However, in this frame of mind national courts, too, have an important role to play. They may not only check compliance with standards of accountability of local governors, but also ensure that the interpretation and application of EU or transnational law is in conformity with fundamental constitutional provisions. Communal constitutionalism thus does not accord excessive leeway to the executive, contrary to what may happen in the case of participatory budgeting (de Sousa Santos 2005, 310). It may be considered a derivation of deliberative constitutionalism, but, while emphasizing the democratic component of contemporary constitutional arrangements, it confers an equal importance to the rule of law component, primarily through the activity of the judiciary. The protection of the rule of law and other fundamental values of the multi-level polity by each of its members is considered of the utmost importance.

To some extent, there is an overlap between communal constitutionalism and sub-national constitutionalism (Ginsburg and Posner 2010; Marshfield 2011; Delledonne and Martinico 2011). First, just like subnational units’ constitutional frameworks, communal constitutions define and preserve a certain degree of independence and self-determination for their local authorities, and at the same time limit and reorganize their power. Second, both versions admit the establishment of minimum standards of protection of fundamental rights, while allowing the local level to set up higher standards. However, subnational constitutionalism, while institutionally distinct from federalism – as the latter is concerned with the distribution of power between different levels of government – is a second-level form of constitutionalism, because it still depends on and is constrained by the

allocation of powers decided by a federal set of rules. By way of contrast, communal constitutionalism can operate in non-federal contexts, where there exists a complex multi-level structure of government, as in the case of the EU. While subnational constitutionalism may prohibit subnational units from setting up their own judiciary, no limitation of this sort exists for communal constitutionalism, neither as regards the judiciary nor for any other institution.

Ultimately, communal constitutionalism is a form of practical arrangement that seeks to remedy the flaws and combine the virtues of the models illustrated earlier. For example, it admits that and certain values in a legal system should be preserved according to a political morality, but at the same time negotiation and re-discussion of these values should be permitted. Importantly, communal constitutionalism relies upon a two-level system of constitutional change. Generally speaking, the overarching legal framework in federal systems tends to resist to change much more than its sub-national units (Dinan 2008). The same cannot necessarily be said as far as communal constitutionalism is concerned. Looking at the most emblematic example where it can operate – the EU – it is worth noting that several significant changes in the structure of its legal and political order have taken place during its history, in different ways, much more than in the structure of the domestic constitutional systems that compose it. This has occurred first through classic treaty amendment and ratification. Second, change has been shaped by atypical activity, such as the practice of adopting Treaties outside the EU legal framework, as with the adoption of the European Stability Mechanism.²⁷ Third, constitutional changes have traditionally occurred by way of interpretation by the EU judiciary, in particular in the form of

²⁷ On that occasion, while agreeing on the amendment of Article 136 of the Treaty on the Functioning of the European Union – authorising the establishment of the European Stability Mechanism (ESM) under EU law – a separate Treaty, i.e. the Treaty Establishing the European Stability Mechanism (ESM), Brussels, 1 February 2012, was concluded only by the Member States belonging to the Eurozone. It replaced two earlier funding programmes, the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM). Interestingly, the ESM acts as an intergovernmental organisation, whose seat is in Luxembourg and follows rules of public international law.

important – sometimes even landmark – rulings by the Court of Justice of the EU and the interaction between courts belonging to different levels (Arnulf, 2012). As will be further illustrated below, the configuration of a different type of change in the relationship between the EU and the national level, as opposed to the relationship between the federal and sub-national level, is a factor that is seriously taken into account by communal constitutionalism. Moreover, one fundamental premise of communal constitutionalism is that, when it comes to complex mechanisms of transnational integration, the economic dimension cannot be separated from the social dimension.²⁸

Ultimately, the representation of time associated with this form of constitutionalism is, perhaps counterintuitively, that of a fractal, given that one of the properties of these geometric figures is that of exhibiting similar patterns at increasingly small scales. Structures, techniques and symbols that normally operate on a large scale, such as, for example, a council of representatives, an expert committee, a social movement, an executive board, can function effectively also at the micro-level of regions or cities, especially those having a bigger size (Hirschl 2020).

Having said that, communal constitutionalism addresses a daunting dilemma. Its objective is to ensure, through deliberative practices, self-government at the micro-level, while at the same time relying upon a core set of shared values, which ought to be promoted within contemporary, stratified legal orders, despite the fact that societal demands are increasingly complex and tensions rising. It is a project that attempts to answer some of the problems identified by populist movements, without losing sight of the bigger picture. After all, the contradictions between constitutionalism and democracy are reproduced at the micro-level, too. In this regard, once again the EU represents a significant example. As noted briefly above, constitutional change in the history of the EU has often occurred at a rather

²⁸ See, e.g., Young (2012, 354), who emphasizes the role of social movements in channelling demands for social and economic rights, and Hervey and Kenner (2003).

fast pace and in formal and informal, as well as typical and atypical, ways. This means that the democratic underpinnings of such changes may not be solid enough or may be at least questionable. From this perspective, communal constitutionalism presents several points of contact with deliberative constitutionalism. It believes that the possibility to revise both the substantive principles that found a political community and the deliberative criteria themselves should be preserved (Worley 2009, 469). Constitutionalism and democracy are thus reconciled by allowing amendment even of entrenched institutions and fundamental rights, as long as modification takes place through particularly strict, exceptional procedures²⁹ that are able to involve as many stakeholders as possible.

However, especially as far as decisions affecting the allocation of budgetary resources are concerned, appropriate decision-making at the local (both national and sub-national) level should be ensured and taken into account in a more structured way, for example through institutionalised and non-institutionalised channels of communication with social and political movements that are not associated with traditional parties. First, in order for deliberation to proceed as an ongoing practice – which is not confined to constitutional moments and exceptional situations, but operates as a constant process of self-learning and self-correction – it is necessary that concern for local sensibilities is not only brought to the fore, but also addressed explicitly. Second, national and sub-national courts are supposed to give voice to those local sensibilities, including not only the respect of constitutional principles and values that are deemed essential for their societies, but also cultural and social demands that otherwise risk to be neglected or superseded. In the case of the EU, this set of practices and discourses takes the name of *discursive constituent power*, through which a

²⁹ Worley (2009, 473-474). As the author notes, “Constitutionalism insulates individual rights from ‘the vicissitudes of political controversy,’ but it does not require their being entirely immune to revision. Conversely, deliberative democracy treats individual rights as morally and politically provisional, but it does not require that every principle of rights or justice be subjected to endless reconsideration and alteration.”

peculiar idea of people has been constructed in the process of European integration (Fichera 2018, 39-63). A pre-condition for this, however, is that a minimum degree of shared values is not only agreed upon, but also complied with and enforced within the transnational polity.

5. Conclusions

These are hard times for constitutionalism. The Enlightenment spirit that was still strong at the end of the 20th century seemed to herald a new era, characterised by the expansion of rights, the consolidation of new methods of governance, the rise of free movement. None of this has occurred, or, if occurred, it has had a negative impact on standards of democracy and rule of law that were believed to be unquestionable. Not only has the development of constitutionalism beyond the State both as an idea and as a technique of government reached a standstill. It has also raised concerns about its viability and effectiveness. In this article, six ideal-types of constitutionalism have been analysed: legal constitutionalism, political constitutionalism, identitarian constitutionalism, societal constitutionalism, deliberative constitutionalism, transformative constitutionalism. The question is whether these models, developed within the State, may at least in part apply beyond the State. It has been suggested that it may be useful to adopt a reflexive approach that examines them through the notion of constitutional time. The prism of time allows considering the nature of commitment in a polity. From this perspective, with a view to reconciling constitutionalism and democracy or at least preventing their demise, communal constitutionalism aims to focus on the needs of the local, both national and sub-national level of decision-making. For this to happen, not only institutionalized, but also non-institutionalized mechanisms of cooperation and articulation of social and cultural interests should be encouraged.

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