UNIVERSITÀ DEGLI STUDI DI SALERNO
Dipartimento di Scienze Giuridiche

Dottorato in
Scienze Giuridiche
(Scuola di Giurisprudenza)

Curriculum
Storico-filosofico giuridico
(XXX CICLO)

LE REALTÀ DEL DIRITTO.
Istituzioni, spazi e forme della normatività

ABSTRACT

Coordinatore
Ch.mo Prof. Geminello Preterossi

Dottorando
Dr. Carmelo Nigro

Tutor
Ch.mo Prof. Antonio Tucci

Anno accademico 2017/2018

The present work aims at reweigh those juridical categories which have been the modern-day object of formative discourses in so far as it acknowledges the current metamorphoses in the realm of political, social and institutional constructions. As a matter of fact, the wide spreading perception of a leap of paradigms in the fixed order and the sequence of ongoing transformations have influenced the contemporary times in such a way as to label these the *«liquid modernity»*[1].

Moreover, far from becoming an exception of this *systematic liquidity,* today the law is one of the social phenomena with the widest fields of applicability. This is due to its very nature - the deep bond with the social life it should define- that shapes it in response to the social variations. Therefore, today more than ever the comprehension of the very nature of law would mean understanding its progressive shape-shifting features. Such premises ushers the modes of operation- movements rather than positions, the leaps rather than the continuity- on which this work is based.

After having briefly traced the main phases of the modern experience, the first chapter rejoins the current historical and political experience and emphasizes its *adaptations* on a more theoretical level.

Clearly, in regard of such study, one of the most interesting theory, among the many advanced in the recent years, is that of Saskia Sassen. Indeed, she applies the three-element-paradigm -territory, authority, rights- as the lamp of her analytical discourse.

She claims that as long as their capacity are completely developed in a-some-sort-of heterogeneity, the historical transformations would be but assembling and disassembling the three mentioned elements. Specifically, in reference to the advancement from the national to the global assemblage, the sovereignty itself would developed certain capacity that are the fundamental key in the process of *denationalization,* as well as in the consequent coexistence of new scales over that of the Modern State[2]. Thereafter the author emphasizes the extended role of the metropolises in mapping political, economic and social geographies.

---

[1] Cfr. Z. BAUMAN, *Modernità Liquida*, Laterza, Roma-Bari.

[2] S. SASSEN, *Territorio, autorità, diritti. Assemblaggi dal medioevo all'età globale*, tr. It. A cura di N. Malinverni e G. Barile, Mondadori 2008.

According to that, the political strategies -on a national basis- would be the major actors in shaping a system of -indeed- global cities, which ultimately are responsible in creating a network of infrastructures, economically and financially independent from the nations to which each city belongs[3].

Moreover, a different perspective takes into account the juridical language in its changing modes. Given to the fact that an increasing differentiated number of players, from the public to private spheres -*law firms, international courts, NGO, governmental organizations, etc.,* is today engaged in dialogue*,* the language of law is gradually moving away from enclosed forms and state hierarchies. Indeed, it is producing flexible tools which are directly employed in the resolution of specific problems, and in the fulfilment of the interests of those same players[4].

Due to the fact that on the contemporary scenery the forms of the law are subjected to a rising level of unsteadiness, it is evident how the state centralism is depicted as still necessary, even though surrounded now by *agencies* and *sources of heterogeneous normative power*. Assuming that the State is now unable to synthesize the plurality of the forms because of their overloading capacity, the sovereign power must flood into a wider scenery, which is that of the neoliberal *governance*. Consequently, in reference to Wendy Brown's assertions, one of the many consequences of this phenomenon would be to restore the exclusiveness of the Sovereign Power by new walls -the very mise-en-scène of the State's control over the national territory[5]. This perspective seems, indeed, to convey certain processes in progress today. On another hand, it defines the boarder as still too linear and, thus, endorsing an excessively reductive conception. Indeed, according to the Brown's assumption, the sovereign is depicted as a giant, surrounded by each sides and engrossed in his unsuccessful attempt to restore the criteria of his own sanctity.

On the contrary, other conjectures are far from portraying the sovereignty as entrenched and evanescent power. Indeed, they set it into a wider scenery as the fundamental tool in decoding developments in place. This is particularly true when

[3] S. SASSEN, *Le città nell'economia globale*, tr. It. a cura di N. Negro, Il Mulino, Bologna 2010.

[4] M. R. FERRARESE, *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale*, Laterza, Roma-Bari 2006.

[5] *W. BROWN, Stati murati, sovranità in declino, tr. It. A cura di S. Liberatore, Laterza, Roma-Bari 2013.*

considering geographies of unexplored nature rather than the Western ones. As a matter of fact, in depicting the *zoning* technologies in place on South-Eastern Asia, Aiwha Ong has observed a significant coexistence of *governance* and sovereignty, which ultimately is expressed by the idea of the *exception*. Precisely in these sceneries, the sovereignty lives in so far as it declares itself an *exception* of the neoliberalism[6], while working on by the same neoliberal logic. In an attempt to get rid of the sweeping and abstract trait of modernity, the sovereignty would be subjected to *graduations* -retreating or broadening towards governmental necessities-; in so doing, it ratifies itself in the realm of the neoliberalism.

Hence the contents, endured in such readings, would lead to the emergence of a distinct ambivalence within the role of the state sovereignty; in fact, the State is certainly still fundamental, and rather than being applied to its conventional institutional domain, today it deals with sundry spheres of influence. Moreover, in the realm of the state sovereignty there are *governance* practices which suggest the presence of other forms of power. These are discipline governmentality and biopolitics. In other words, the forms of power that are profoundly engraved in bodies and social processes and developed from the very substance of the everyday relationships and the strategies of normalization. Ultimately, what Foucault would depict as «expanding whence, beyond, on the boarders and even against a system spoiled by the law»[7].

The bias innovative and subjective productivity puts together the basis for the pluralistic perspective which the current work take into account. Therefore, the second chapter briefly addresses the plausible meanings beyond the *pluralism* in order to manifest the demanding restrain of its resourceful potential. Plainly, the pluralism does not endure in a categorical behaving, it rather undertakes a series of particularly heterogeneous approaches which are bound together by a uniquely contentious object, which should be called -in reference to Griffiths's theories- the *juridical centralism*[8]. Henceforth, the work moves on to the definition and

[6] *A. ONG, Neoliberalismo come eccezione. Cittadinanza e sovranità in mutazione, tr. It. A cura di M. Spanò, Volo publisher, Firenze-Lucca 2013.*

[7] M. FOUCAULT, *Sicurezza, territorio, popolazione. Corso al Collège de France (1977-1978)*, tr. It. a cura di P. Napoli, Feltrinelli, Milano 2005.

[8] J. GRIFFITHS, *What is legal pluralism?*, in *«Journal of Legal Pluralism»* Vol. 18, N. 24, 1986, pp. 1-55.

applicability of the very conception of *institution*. In this regard it must be emphasized that the very institutional practices have been brought to life by the habitual interaction between forms and subjects and thus, both the consistent medieval tradition and the contemporary experience are reported to feature institution. In other words, the different juridical cultures/learnings that have been joined together, actually come from distinct historical backgrounds within the domain of modernity. It should be clear by now that the definition of *juridical* is ushering us the bond between the forms and the subjects who operate within the law, or rather who *lead it into action*[9].

The interaction between subjects, forms and spaces is basically the very core of the present work and the muscle by which it moves as silent as an inward question. The conception of institution that has been reassembled by Santi Romano stands now for a row tool able to define the *juridical* as a joint between the social applicability of its nature and the inevitably energetic and tense aspects. What is relevant in the studies carried out by Romano is essentially the social applicability of the institutional being in so far as its stationary trait would soon be replaced by the its very operative dynamism. As a matter of fact, the word *institution* seems to convey ambivalent meanings which also include the juridical dimension. Indeed, it depicts simultaneously a *simple* element such as one overlooked through its historical backgrounds and its factual completeness. And a complex object, still able to be disassembled into sections of the internal mechanisms, both normative and intentional. Institution, as we shall define it, bears together the -normalized-backwash and the -normalizer- process. Besides they both coexist of interdependent necessity.

In conclusion, the last chapter brings forward the conception of institution by scattering and re-intertwining it. Indeed, this passage unveils the very self-generative trait of the institution. Authors such as Gilles Deleuze and Arnold Gehlen have been of a great avail in emphasizing how the institution is the necessary structure of the mankind. This last, in truth, has been deprived of a suitable instinctive pattern by which its actions would been understood and guided. As a matter of fact, once a

[9] A. CATANIA, *Diritto effettivo e positività*, Editoriale Scientifica, Napoli 2009.

man is freed from the *natural* - or rather not socially and culturally fixed-environment, he has indefinite potential for liberty as well as an extremely vulnerable attitude. Clearly, its vulnerability comes as a result of a neglected guidance to lay explanation of the surrounding environment. In particular, Deleuze has effectively asserted that because of mankind does not control the *direct means* to fulfil its personal needs, then the institution is the most appropriate *environment,* the *indirect means* to come through them. And of course, such an entity -as it is the institution we are referring- requires human beings to be defined: they act in conformity with its purports and this is precisely what materializes and naturalizes it. The institution, indeed, is built upon the transformative power of those decisions and behaviors that take place within the same space this entity brought about previously. Beneath the light that such tense dichotomy has enlightened, it is time for the juridical movement to be analyzed: a reality which transcends individual lives and a fiction, which mystifies its very dependence to the decisions and behaviors of the individuals whom it rules. Therefore, the image of *fictio* -which Yan Thomas has developed throughout his analysis of the Roman law- seems of avail as a possible *hologram* of the juridical phenomenon[10]. Clearly, the metaphor of the *fictio* is here of any relevance in so far as it provides the a series of useful tools in acknowledging and comprehending same contemporary juridical dynamics. As a matter of fact, this metaphor offers a potential overall look of the very ambivalent trait of the juridical experience, by means of combining the formal and artificial dimension with its fixed reality. Thus it seems a *willing – institutionalized – truth,* potentially modifiable by whoever is fluent in its language.

This complex image includes all the active elements that any juridical experience cannot ignore: which are decision, order and law. Here comes the final section of this work, whose purpose is to unveil and acknowledge the entangled relation between these three elements. In so doing, a large part would be destined to the

[10] M. SPANÒ-M. VALLERANI*, Come se. Le politiche della finzione giuridica*, in Y. THOMAS, *Fictio Legis. La finzione romana e i suoi limii medievali*, tr. It. a cura di G. Lucchesini, Quodlibet, Macerata 2016. p, 95.

conception of *power conferring* -invented by Herbert Hart- by recovering it through the specific understanding of *law-power* concept suggested by Alfonso Catania[11].

[11] A. CATANIA, *Metamorfosi del diritto. Decisione e norma nell'età globale*, Laterza, Roma-Bari 2008.