



## **Constitutional Fidelity Throughout Time. A Comparative Survey**

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### **Introduction**

The pivot of this article is the theme of “constitutional fidelity”, a concept which requires the analysis of the Constitution as a written text granting stability and being subject to interpretations and revisions throughout time; to the judges and judicial instruments used in the dialogue between facts and norms. The article takes into account different viewpoints: that of society, that of the Constitution and finally that of judges. These elements should be in constant dialogue and within this dialogue time arises as a product of society, as a social conception and construction, because it depends both on those tools by which it is implemented for mere pragmatic purposes and on how it is perceived by the individual. The temporal dimension of the Constitution may clash with that of society and, consequently, with the temporal dimension of rules and institutions: this split occurs because people are always moving on, they progress and develop, adapting but preserving their historical identity. In this sense, individual and social time mutually interact in a present time which becomes the scenario in which the past lives again through memory and the future is put forward as a possibility. An important feature of the Constitution is the way it adapts in accordance with practical requirements. But how are “constitutional moments”, periods of transition, constitutional revisions constitutionally faithful throughout time? The ideal dialogue is between its unchanging elements and the structure which allows it to function, that is, its practical application according to the specific moment in time. In this way, the Constitution is both objective and subjective at the same time.

The article analyses the North American and the Italian contexts with the awareness that the topic of “constitutional fidelity” in the United States refers to a debate which cannot be easily set in its proper frame by a European point of view because of the particular characteristics of that philosophical-constitutional context. In fact, it is marked by research themes completely different from those of the continental scholarship, such as the Critical Legal Studies, the economic analysis of law, the race theories, and so on. In the Italian constitutional dictionary, the word “fidelity” is linked to the concepts of “duty” and “observance”, and it developed several hermeneutic solutions for constitutional rules or is

supported by ethical reflections on the (historically scanty) Italian public spirit. In the United States “constitutional fidelity” is something else, as J.M. Balkin and W.M. Treanor testify:

Fidelity is not simply a matter of correspondence between an idea and a text, or a set of correct procedures for interpretation. It is not simply a matter of proper translation or proper synthesis or even proper political philosophy. Fidelity is not a relationship between a thing and an interpretation of that thing. Fidelity is not about texts; it is about selves. Fidelity is an orientation of a self towards something else, a relationship which is mediated through and often disguised by talk of texts, translations, correspondences and political philosophy. Fidelity is an attitude that we have towards something we attempt to understand; it is a discipline of self that is related to the discipline of a larger set of selves in a society. Fidelity is ontological and existential; it shapes us, affects us, has power over us, ennobles us, enslaves us. As such, fidelity is an equivocal concept, full of both good and bad, mixed inextricably together. Fidelity is the home of commitment, sacrifice, self-identification and patriotism, as well as the home of legitimation, servitude, self-deception and idolatry.<sup>1</sup>

The Constitution that deserves our fidelity is the Constitution that reflects our hopes, our lives, our struggles, our commitments. And when we are faithful to that Constitution, what we are faithful to, ultimately, is ourselves.<sup>2</sup>

The concept of “constitutional fidelity” can be understood within a “psychological” relationship between “self” and “text” as demanded by Balkin. And in this sense it is possible to bring to mind the contributions of sociological theory of N. Elias, which focuses on the slow process of consolidation of the link (even a psychological one) between “subject, institutions and rules”.<sup>3</sup>

The reconstruction of the course of “constitutional fidelity” in a historical perspective allows an attempt at synthesis of constitutional periods according to a process of transformation determined by interpretative changes heedless of whether these have been assimilated in the constitutional text. In the quest for fidelity, what is the appropriate use of history and of political theory? Does fidelity to principles embodied in the Constitution require us to disregard or criticize certain aspects of our history? For example, on the one hand, we could talk about “constitutional infidelity” when there are no juridical checks on the political sphere (the sphere of Right), or when there are forms of constitutional “fraud” through political dynamics (e.g., the Italian referendum in 25-26 June 2007). On the other hand, considering the North-American debate on “constitutional fidelity”, we can emphasize the original understanding (this is the position taken by R. Bork): keeping faith with the Founders’ vision (e.g., J. Rakove). Finally, the Constitution as a historical subject belongs to a moment in history, because only in this moment of history can its characteristics be explained, allowing it to remain unchanged and guaranteeing stability; at the same time, the Constitution

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<sup>1</sup> Jack M. Balkin, *Agreements With Hell and Other Objects of Our Faith*, in 65 *Fordham L. Rev.* 1726 (1997).

<sup>2</sup> William M. Treanor, *Learning From Lincoln*, in 65 *Fordham L. Rev.* 1786 (1997).

<sup>3</sup> Norbert Elias, *Teoria dei simboli* (1991), *Italian transl.*, (il Mulino, 1998); *La società degli individui* (1987), *Italian transl.* (il Mulino, 1990); *Che cos'è la sociologia?* (1986), *Italian transl.* (Rosenberg & Sellier, 1990); *Saggio sul tempo* (1984), *Italian transl.* (il Mulino, 1986); *Coinvolgimento e distacco: saggi di sociologia della conoscenza* (1983), *Italian transl.* (il Mulino, 1988).

needs to be a dynamically evolving framework for its people both to remain faithful to it and correct errors coming from the past.

## 1. The Constitutional Text: Between Constitutional Practice and Principles

To rethink the Constitution not as a given fact, but rather as an act which continually renews itself certainly means that it is impossible to disregard temporality. No longer is the Constitution like a given reality in time but it is as if it coincides with time itself. In this sense, it is possible to speak of a “constitutional subject” within an automatic hermeneutic circle – “the time of the Constitution and the Constitution in time” – in which the judges, in giving meaning to cases which occur in the social context, are an active part.<sup>4</sup> The question of “constitutional fidelity” is clear if we consider the Constitution as text and context at the same time, a space within which gaps need to be filled by means of revision which responds to a recognized and common code. In fact, the Constitution as a written text and society determined by cultural pluralism are the main players in the problematic relationship wherein a judge feels the necessity to open up the constitutional text to the context in periods of crisis in the community. In opening itself to the social context, the Constitution is inevitably subject to time, and its written text guarantees stability and certainty on one hand, but exposes it to various interpretations on the other hand. In the temporal dimension, the Constitution is destined to change, at times leaving the text intact from which certain concepts can be interpreted in different ways; at other times, intervening and revising it with respect to formal procedure while the fundamental core remains unchanged in time. Sometimes its content is modified in order to satisfy the interests of a political class or a social group. In all these ways, political power is the determining force both in terms of strength and party strategy, and in terms of “*pouvoir constituant*” with regard to a Constitution which is fighting to assert and protect its identity.

Throughout time the idea of “constitutional fidelity” can refer to the original meaning of the constitutional text or to its fundamental core or, again, to the formal procedure to revise the constitutional document. Furthermore, the scenario is complicated by the relationship between the individual and society, which has never been static because it is built around and through two protagonists which are neither isolated nor immobile. In order to interact with society an individual has to look out on the world and open himself to it. The world welcomes him and shows itself to have a wealth of definitions, a whole system of attitudes, an ever active patrimony of ways of operating.<sup>5</sup> Consequently, the individual is conditioned by his being in the world, in his being a product of his own particular time which becomes entwined with the time of the society in which he is operating. The “arduous virtue of fidelity” comes from the search for harmony between the time of the Constitution and that of society in consideration of the fact that the judges, interpreting the Constitution, intervene as intermediaries in a dialogue which needs to be open in order to be democratic. The interpretation of the Constitution as a public process becomes the main vehicle of innovation of the constitution.<sup>6</sup> The aims which a society intends to pursue become an integral part of a “continuous flow of events” of which that *continuum* of deeds done by the individual becomes a part. This is the origin of social and juridical pluralism, by which ever new instances and events refer back to constitutionally safeguarded values which are waiting to be

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<sup>4</sup> See Michel Rosenfeld, *Just Interpretations: Law Between Ethics and Politics* (University of California Press, 1998); *The Identity of the Constitutional Subject. Selfhood, Citizenship, Culture, and Community* (Routledge, 2009).

<sup>5</sup> Giuseppe Capograssi, *Analisi dell'esperienza comune* (Giuffrè, 1975).

<sup>6</sup> Jörg Luther, *La Scienza häberliana delle costituzioni*, in *Analisi e diritto* 105 (2001).

realized, while the certainty of the law is continually undermined, never completely made concrete. Although the law is expected to guarantee juridical safety it cannot in the long run avoid, as it evolves, creating something “new” bringing a social harmony founded on a balance between stability and change. A continual evolution and controlled transformation can be envisaged where the function of the law is not decided exclusively by an analysis of the equilibrium of the system but instead takes into account upheavals, irregularities and states of transition which can undermine the idea of fidelity to the original meaning of the Constitution. In the perspective of being constitutionally faithful, it could be said that it is a time of “metamorphosis”,<sup>7</sup> founded on the gradual change of a system whose identity remains unaltered.

The Constitution observes society and perceives its pluralistic structure, its multiculturalism, and the pursuit of new ways for different cultures to live side by side. Social pluralism, characterized by the emergence of new groups and movements and by cooperation and dissent, is the symptom of a moment in history which is no longer that of a monadic, isolated society, but a time of historical importance, both nationally and internationally. On a legal basis, opening up the Constitution to the social context creates problems related to the interpretation of the Constitution, constitutional revision and “constitutional moments”,<sup>8</sup> which offer multiple elements such as conservation, innovation and cultural pluralism.

The relationship between interpretation and constitutional rules can only be considered *in fieri*, since it is part of a constant flow of events, such that one can only consider it a product of the temporal dimension of a particular society. Temporal dimensions co-exist in a present time with the prejudices and values that belong to the history of a people, and which have determined the identity of that people. These values and principles, taken from the past and interpreted in new ways, allow the creation of historical continuity aimed towards the future.

The values present in Constitutions and in Universal Declarations, represented by fundamental principles, need to be constantly opened up to the cultural context in which they are present. When seeking the most suitable rule to solve a case, a judge must consider both the social environment and the possibility that legislative reforms may take place, considering the possible reconstruction of the interpretation. These operations are evident in cases which are considered new compared to traditional cases, and which are confirmed as new through an analysis of the meaning and values they refer to. The study of a single case must be in the context of the time and society which has produced it, that is, the elements that can indicate a case as being “critical” or “hard”.<sup>9</sup> By observing the changing circumstances, judicial ruling becomes the subject of interpretation suitable for the transformation of the rules as a whole. The Constitution needs to be aware of social change, new conflicts, the continuing need for new solutions and interpretations, and institutional requirements for abstract and general rules in order to achieve certainty in the law and for the law. On the other hand, the Constitution needs to evaluate the real possibilities for resolving controversy and preserving its fundamental values.

The fundamental principles are the tool which the Constitution uses to resolve controversy, considering that these to be such, and therefore effective (as the base of social and legal order which remains faithful to its original matrix, while constantly renewing itself), must be witness to a present which does not repudiate its history, or rather, a history which extends seamlessly into the present: *being* and *becoming* a time .... For this reason, these principles carry out a function that is both conservative (being faithful to the original meaning

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<sup>7</sup> François Ost, *Le temps du droit*, (O. Jacob, 1999).

<sup>8</sup> Bruce Ackerman, *We The People. Transformation*, (Harvard University Press, 1998).

<sup>9</sup> Ronald Dworkin, *Taking Rights Seriously*, (Harvard University Press, 1977) 92.

of the constitutional text) and promotional (if “lawyers and judges will do better for society by trying to discover what really works in practice rather than by attempting to deduce concrete decisions from large, broad, abstract statements of principles of the kind that fidelity to the Constitution’s text would require. Judges, pragmatists claim, should concentrate on the actual and limited circumstances of particular cases, trying only to find accommodations of issues and interests that are successful in that limited frame”),<sup>10</sup> maintaining the original values, (of which they are an imperfect translation) and at the same time opening up to new developments.<sup>11</sup>

The core of the constitutional text is continuously expanded by “constitutional policy”, which redefines not only the meanings of constitutional precepts, but also the sense of the Constitution itself.<sup>12</sup> Through the use of language in a text, practices and subjects are created and interwoven and the experience of present time emerges from this. What is more, it does not finish in that moment, but links up to the historical conscience of existence with continuous reinterpretation according to the context. In this way, through the temporal experience, the content of the text takes on a meaning because its narration is the configuration of the temporal experience of the reader, that is the “temporalization” of the experience.

## **2. The Constitution from Past to Present: A North-American Survey**

The aim of the Constitution is not only to confirm the decisions of the past. It also aims to put the present in the condition of finding common ground with the inevitable influence that derives from such decisions, and then to encourage the present to assimilate possible future needs. History has a fundamental role in constitutional interpretation only if it serves the aims of justice. To regard the Constitution as a dynamic framework means to assign a central role to history that is not limited to a specific moment, i.e. the generation of the Framers.<sup>13</sup> The role of history is to discover legal values or to evaluate the function of other processes, where the problem lies in deciding how much authority to give to the “Dead Hand” of the preceding generations since if the government is based on the consensus of the people, what matters is the presence of this consensus, that is, the support of the sovereignty of the people. Only in this way will the government be legitimate and able to approve or disapprove certain constitutional clauses, giving more or less importance to the Framers’ generation. In doing this, history plays a vital role, if it is true that no generation writes on a clean slate and each is forced to confront the past.

The aim is not to recuperate specific decisions from the past which need to be assimilated but simply to take the best meaning of the Founding Fathers’ government in order to integrate and complete whatever comes from the past with the rest of history through the understanding of its evolution. Fidelity to history is essential to, rather than in tension with, the project of maintaining fidelity through history.<sup>14</sup> What modern day interpreters take from the Constitution takes on more importance and value than the Founders’ opinions.

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<sup>10</sup> Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, in 65 *Fordham L. Rev.* 1265 (1997).

<sup>11</sup> Antonio Ruggeri, *L’identità costituzionale alla prova: i principi fondamentali fra revisioni costituzionali polisemiche e interpretazioni-applicazioni <<ragionevoli>>*, in 1 *Ars Interpretandi* 113 (1996).

<sup>12</sup> Gustavo Zagrebelsky, *Il diritto mite*, (Einaudi, 1992) 191.

<sup>13</sup> Antonin Scalia, *Originalism: The Lesser Evil*, in 57 *Cinn. L. Rev.* 856-865 (1988); Robert Bork, *The Tempting of America: The Political Seduction of the Law*, (The Free Press, 1990) 157.

<sup>14</sup> Larry Kramer, *Fidelity To History – And Through It*, in 65 *Fordham L. Rev.* 1634 (1997); Jack Rakove, *Fidelity Through History (or to it)*, in 65 *Fordham L. Rev.* 1594 (1997).

In its search for democratic formulae, the American Constitution differs from ancient democracies which appealed to democratic theories rather than theories of construction of a Constitution with a strong populist appeal. The American Constitution (a short text of many authors, written in lapidary style) offers the American people (including those whose parents come from outside the United States) a *vocabulary and grammar of argumentation* by which every person can recognize themselves in this people. A.R. Amar proposes looking at the Constitution in its entirety and not at the separate clauses, aware of that problem of indeterminacy that has always created difficulties for the interpretation of the Originalists. Before we think about a *synthesis between generations*, it would be appropriate to face the problem of *synthesis* of the constitutional articles and amendments.<sup>15</sup>

History can sometimes help to identify certain aspects of constitutional clauses and although it is not the only useful source, it is the one which allows us to distinguish between a “genuine architecture of the thing” and “mere accidents of it”. In this sense we can support the historical approach and not believe that history is at the service of justice from the point of view of a justice seeking account.

Judge Johnson described the Constitution as an experimental project that evolved in a dynamic way, a power-enhancing model if made subject to political experience. American legislative history of 1793 regarding the *Fugitive Slave Clause* of article IV, section 2 of the Constitution and the *Fugitive Slave Acts* of 1793 and 1850 involved the Framers and the Ratifiers of the Constitution, as well as the governors of Pennsylvania and Virginia. In adopting the *Fugitive Slave Clause*, the Founding Fathers showed that they considered slaves property, as provided for in the past in *common law*, and they authorized owners of slaves to pursue their property (recognizing in this act a new constitutional right), even when this involved crossing the border with another state. The gravity of the *Fugitive Slave Clause* lies in the recognition (for exclusively personal reasons) of a new right of property protected by the Constitution, guaranteed by the authority of the national government and independently by the individual states, who were forbidden to interfere with the application of the right in question.<sup>16</sup> For the first half of the 19<sup>th</sup> century, state and federal judges took on a deferent stance towards Congress, recognizing their power to apply the *Fugitive Slave Clause*, refusing to pay attention to matters of justice, equality, or politics, and declaring that article IV/2 of the Constitution implied its automatic application. In 1843, with the support of decisions and theories proclaimed by the federal courts and the state courts of appeal, the Supreme Court formulated the idea of the Constitution as a *dynamically-evolving, power-enhancing framework of government* whose meaning was definite, and entrusted to political practice.

Going back over decisions such as *Prigg v. Pennsylvania*<sup>17</sup> or *Dred Scott v. Sandford*<sup>18</sup> reconsidering clauses like the *Fugitive Slave Clause*, it is difficult to conceive how a faithful constitutional stance is desirable. On the contrary, it could even be a *constitutional evil* that identifies in the Constitution the main culprit, direct or indirect, of a series of social injustices.<sup>19</sup> The American Constitution was the result of a revolution, with all the compromises that this involved. And it is exactly because of the imperfections present in every Constitution that the question of “constitutional fidelity” becomes inevitably a question

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<sup>15</sup> Akhil Reed Amar, *Few Thoughts on Constitutionalism, Textualism, and Populism*, in 65 *Fordham L. Rev.* 1657-1658 (1997).

<sup>16</sup> See on this point, Jonathan Elliott, *Debates of the Congress of the Confederation (June 2, 1783)*, in J. Elliott (ed.), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Taylor & Maury, 1845), 453

<sup>17</sup> 41 U.S. 1842, 539.

<sup>18</sup> 60 U.S. 1856, 404-412.

<sup>19</sup> Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, in 65 *Fordham L. Rev.* 1752 (1997).

of constitutional faith. In etymology, faithfulness requires one to “respect commitments made”, while faith means to believe in certain concepts based on others’ authority or personal conviction. To be faithful to someone or something means to have faith in someone or something.

Fidelity to the Constitution is fidelity to a political ideology of government, considering that the ideals of a constitutional moment always reflect present reality and even a constitutionally utopistic notion must always correspond to what is politically possible. In this discourse, the Constitution is not designed to be a model which can resolve every social injustice: its aim is to achieve and guarantee the basic structures of the democratic state, intervening only in the event of a threat to basic human rights and the democratic government. The level of fidelity to the Constitution must be evaluated considering exclusively a limited number of commitments that it offers: *establishing a democracy and protecting basic human rights*. The problem of “constitutional fidelity” puts text or tradition at the heart of the debate, underestimating the obligations which are exerted by the social and political context. A few examples are sufficient to underline the real problem for those aspiring to a constitutionally faithful stance: indeterminacy; the flexibility of the constitutional text on one side and the search for a pure form of fidelity on the other. In this hypothesis, fidelity would be nothing more than a disguised version of originalism which delegates the solution of constitutional problems to the *dead hand*.

To consider all the circumstances that over the course of history have undergone variations in terms of relevant variables, means to adapt the will of the Framers to current parameters, so that there is no gap between their point of view and the point of view of the interpreter today: the temporal diachrony is merely filled by retroactivity of the changes implemented. Vice versa, the hypothesis of distinguishing determining circumstances from a viewpoint of continuity of the Constitution and other circumstances that can be suppressed, is clearly arbitrary. What matters is not the changing of circumstances with the aim of translating the will of the founding fathers but the specific point in which those changes became sufficient to justify a translation. It is clear that it will always be difficult to find an agreement and that a unanimous consensus on the parameter of sufficiency will continuously be in discussion.

It is difficult to recognize the original aspects of the Constitution that the Framers would have wanted to adapt to changing circumstances and those that they would have wanted to be left unchanged; and supposing the interpreter is able to select the relevant circumstances, would regard the principles that the founding fathers would have carried out in the light of change. The hypothesis of treating all circumstances that have changed over time as relevant variables would mean to adapt the Framers’ thought to our own – it would be easier to question the tools for resolving problems rather than using forms of transposition; without underestimating the fact that it is an arbitrary, discretionary and dangerous line of reasoning to consider some circumstances variable and other constant. On the one hand the Constitution represents a document to aspire to for the optimal fulfilment of its clauses; on the other hand, on a more solid level, its continuous implementation is fundamental for the evaluation of its function in the social context, since the Constitution is above all a tool for justice and general welfare. If we wish to reconcile these two different ways of being constitutionally faithful and preserve the idea of the American people as a constituent power, fidelity and constitutional aspirations would require the analysis and balance of the imperfections and errors of American society (reflected in the constitutional text), as well as an interpretation of the provisions which over time have hindered the accomplishment of the ultimate aims of the Constitution. Constitutional failure is therefore a complex and often neglected hypothesis of constitutional theory, whose solution depends on how a theoretical

construction can satisfy the objectives stated: constitutional failure is the inadequacy of the constitutional tools.

The aspiration to be faithful to the Constitution is unrealistic if one acts in the hope of pursuing definite success, if one compares it with epochal tragedies; such an aspiration must compare itself with the condition of a Constitution which merits fidelity and which requires humility of the faithful interpreter. An aspiration that it is not of the entire American people, that it is not an unquestionable precondition, especially if we ask ourselves why African Americans should be faithful to a Constitution containing clauses which caused them to be treated as inferior human beings, reduced to slavery. Fidelity in this sense is not merely an act of devotion to the constitutional document but achieves its true realization in the moment in which the Constitution is interpreted in such a way as to include African Americans as citizens with the same rights and duties as the white population. An act of faith, therefore, determined by the faith in the power of self-determination of oppressed people to be free (according to the well-known formula of the civil rights movement “we shall overcome”).<sup>20</sup>

### **3. Constitutional Revision and the Fundamental Core of the Constitution**

Writing and reading the Constitution gives an awareness of the history of a state and its fundamental principles, (among which even political and legal conflicts represent an achievement), the structure and function of the text, and the institutions which apply the rules. The theme of revision of the Constitution is a central point in the analysis of the text and its relationship with time. It is linked to a question of legitimacy and effectiveness of the regulations, given that it represents the process of written rules; it is also linked to the recognition of the authority of “pouvoir constituant” on which the whole legitimacy of the Constitution is based.

To speak of the revision of the Constitution means to wonder about the existence of a set of rules and principles which make up a “genetic code”, unrelated to time, and representative of a structural limit for amending the constitutional text. The core is made up of “eternity clauses”, designed to protect the integrity of the constitutional system, the need for stability, certainty and constancy, and also a series of variables destined to change over time, adapting to the requirements of the cultural context. In other words, the foundation of the Constitution, its framework, is shown to be not only necessary, essential and indivisible, a determining force for the safeguard of fundamental rights and for the recognition of the identity of the Constitution, but also dynamic.

Although it guarantees its integrity and its persistence in the evolution of time, it does not deny the Constitution the need for possible changes, the expression of “pouvoir constituant”. On the contrary, it reduces the risk of the breakdown of the whole structure. Therefore, by stabilizing the route through which the Constitution is modified, the process of constitutional revision would be able to guarantee relative stability of constitutional rules and avoid the political fragility of the text (as long as political power does not violate the rules for amending). In respect of the identity of the Constitution – a symbol of the history, culture and conflicts of a country, a people and a system of reference, not least the judicial procedures on

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<sup>20</sup> «Human rights are something you were born with. Human rights are your God-given rights. Human rights are the rights that are recognized by all nations of this earth»: *The Ballot or the Bullet*, Speech at Cory Methodist Church, in *Malcolm X Speaks*, (Grove Weidenfeld, 1965), 23, 35. Derrick Bell, *Racial Realism*, in 24 *Conn. L. Rev.* 363 (1992). Catharine MacKinnon, “Freedom From Unreal Loyalties”: On Fidelity in Constitutional Interpretation, in 65 *Fordham L. Rev.* 1775 (1997).

which all that is based – the values and principles contained in it represent the “fundamental core”, a “limit” to revisionary zeal.

“This debate in substantial measure concerns the limits on the authority of constitutional interpreters, whether judges or others. It was Marshall, of course, who in *Marbury v. Madison* had defined the importance of a written constitution ... as consisting in the specification of powers (and limits) of the government. The problem, of course, is how we decide disputes about what the ‘writing’ actually means.”<sup>21</sup>

The revision of the constitutional text intervenes on the socio-political scene to upset the harmony and the stability of a set of rules recognized up to that moment as constitutional dictate. On the one hand, the amended constitutional text breaks away from the passing of time (legal, social and political changes), and is subject exclusively to the sovereign power of the original Constitution. These Fundamental Rules are inflexible and difficult to change, and must run the life of the state with their unconditional force. They cannot be changed by the elected powers, they can only be modified in particular circumstances.<sup>22</sup>

On the other hand, the revision can be seen as politically legitimized by the dominant power in a particular moment in history in which there may be a sense of threat to the stability of the system. Therefore, the meaning given to the Constitution and the values which emerge from it will not be those of the dominant political parties in that moment of history. Considering constitutional revision, procedures are needed to integrate future generations into the Constitution, adapting it to cultural change or organizing these changes over a reasonable period of time. Failures of revision must also be analysed by taking into account their cultural principles, of particular importance in Italy today. Innovation predominates but it must not sacrifice the conservation of the identity of a Constitution, identifiable through its “*pro aeternitate*” clauses and through reference to the elements of a democratic constitutional state.<sup>23</sup>

Constitutional revision is at risk of being reduced to “mere fiction”, without any political legitimacy and breaking away from the social processes that allow the Constitution to be more than written rules. In the second case, “*pouvoir constituant*” – limited by time and space – legitimates the revision and thus gains historical continuity. In this way, a certain stability is guaranteed for the democratic legitimacy of the constitutional system without diminishing the idea of continuity that was present until that moment.

When historical events occur that mark important passages, fundamental constitutional moments, an indicator of the transformation in course and a break with the past, there is a need to intervene in the constitutional text to repair any possible break with its context in order to consolidate the democracy. Since the organization of society can change over time, it is essential that the constitutional provision is suited to the new social order for it to be effective. The procedure of constitutional revision allows the formal Constitution to be integrated into the moment in history of the material Constitution and to give continuity to “*pouvoir constituant*”.

This process of adaptation, put into motion by the socio-political powers, should create balance among different individuals with different means of integration, and harmony between text and context. The fundamental core of the Constitution grants harmony through its text and context, so that even if problems are connected to the former they end up spilling over into the latter. We can find a clear and recent example of the reciprocity of the

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<sup>21</sup> Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) < 26; (C) < 27; (D) < 27: Accounting for Constitutional Change in Responding To Imperfection. The Theory and Practice of Constitutional Amendment*, (Princeton University Press, 1995).

<sup>22</sup> Georg Jellinek, *Mutamento e riforma costituzionale, Italian transl.*, (Pensa, 2004).

<sup>23</sup> Jörg Luther, *La Scienza häberliana delle costituzioni, supra* note 8, at 108.

relationship in the Italian referendum of 2006 which proposed a revision of the Constitution in contrast not only with the formal aspect of the Constitution (text/language) but also and above all with the substantial aspect of the context, expressed in terms of concepts, objectives and the effects produced (by them). In the same way, the rethinking of the past can be understood as an opening or as a retrenchment in the social and constitutional sense.

In such a well-defined framework, the key role is played by the political sphere, which must work in respect of the explicit and implicit limits of constitutional revision. In the relationship between the sovereignty of the people and the law, the key role is played again by the political sphere, in the role of “responsible management” of the common good and protection of formal guarantees and shared values; it should encourage a greater involvement of citizens in participating in the running of the state and in decision making processes.

Recently, the Italian Constitution is revealed in all its fragility as it bends to the contingent power of politics, of strategies and party advantage and emerges from the process weakened on the level of recognition and implementation of fundamental principles and constitutional rights. We are witnessing a time which we could define as “diachronic”<sup>24</sup> in which the individual’s time to construct the future according to expectations (which also depend on the past,<sup>25</sup> that is from the rights acquired and from the principles and recognized fundamental values which represent its “fundamental core”), seems obstructed by politics, where short-lived constitutional norms are being affirmed, with no qualities of universality or abstraction.

### 3.1 The Italian Perspective

In the Italian context, when the Constitution of the Republic came into force, the principal aim of the jurists was to avoid all forms of subjectivism that might compromise the certainty and objectivity of the juridical system, in order to guarantee the “impersonal” character of the law.

Aiming to recoup the time “lost” by formalism, C. Mortati develops the idea of a material Constitution which represents that essential nucleus of purposes and forces which maintain all positive regulations.<sup>26</sup> It is identified in the politically organised forces of the social group which in a determined historical moment manage to actively interpret the overall interest of the political community. The material constitution is, for C. Mortati, juridical *par excellence*, because it is from the material constitution that we take the criterion to be able to imprint the character of legalness on the whole system of successive rules through which the constitution is developed. At the same time the formal constitution is a guarantor of the material constitution, giving it certainty and stability when it takes on concrete form in a close tie between state and community.

Italy moved from a dogmatic kind of fidelity to regulations, which is seen to be a founding principle, to fidelity to constitutional principles, but following a normative plan which retains fidelity to be juridically relevant, managing to re-enter it into the web of constitutional principles. In this way, the constitutional rule is pulled by the material “fact”, and is bound to the fact within a structure which is normative and therefore binding. In this sense, it would be like maintaining fidelity both to the written and secret Constitution (determined by practice, for example) in as much as the latter is both valid and effective.

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<sup>24</sup> François Ost, *Le temps du droit*, *supra* note 9, at 36.

<sup>25</sup> Raúl Zamorano Farias, *Civilizzazione delle aspettative e democrazia nelle periferie della società moderna*, *Italian transl.*, (Pensa, 2003); *El debate actual en torno a la concepciones del tiempo en la sociología*, in 31 *Cinta Moebio - Revista de Epistemología de Ciencias Sociales* (2008), available on <http://www.moebio.uchile.cl/31/zamorano.html>.

<sup>26</sup> Costantino Mortati, *La costituzione materiale*, (Milano, 1940), 87.

On the one hand, rights need to be protected and applied effectively, which only the principle of the separation of powers, the fulcrum of the entire constitutional structure, can guarantee. On the other hand, the organisation of the state is determined by objectives which are proposed by political activity. Granting political actors operational control on the level of material fact without recognising it as the source of legality still grants political activity control over legality.

The duty of fidelity to and of observance of the Constitution and its laws is explicitly addressed to citizens and, in particular, to those who have been entrusted with public functions. In particular article 54 paragraph 2 hypothesizes the existence of a “constitutionally faithful way of exercising public duties”, according to a general principle of fairness which is positivized in the principle of loyal cooperation.<sup>27</sup> The integrative function that is attributed to these principles is determined above all by ethical values which describe these principles but which, when considered in the perspective of balance of interests, assume the coercibility of an objective parameter of evaluation.

Unlike the American context, the Italian one does not search for a specific content of fidelity to the Republic. In fact, article 54 is used by the constitutional judges in a limited way, as a kind of hendiadys without any direct normative force and that needs new detailed notes and specifications on the constitutional or legislative normative level (e.g. the Country’s defence, article 52).<sup>28</sup>

Fidelity follows this pattern and in the evaluation of regulations activated by political behaviour, it has a double role to play: either within the political system and a judge of correctness which is also political; or regarding the constitutional system (also connected to the political system) in which it is directed towards pointing out political solutions which conform to the regulatory system as a whole. Both “constitutional fidelity” and rules of fairness represent limits to the political and ideological action of social forces, where the aim is not to rule out that contrasts of opinion or of interest or even conflicts of fidelity will take place. However, it cannot be denied that today a contrast remains between political activity which often tends to legitimise itself through “unshared regulations” and the rule of law which fights to avoid being deconstitutionalised, to avoid being reduced to a mere symbolic function or to a normativist fiction of a closed system of legality. The risk is of consecrating the “juridical institutions” which are to be found in the text of the constitution and recognising them as mere references which are symbolic of the discourse of power; the same process of concretisation of the rights and the principle of equality before the law must also include the principle of constitutional provisions in order to avoid exclusions between the process of applying the law and the generalised and inclusive normativity proclaimed by the text of the Constitution.

Moving on from these conclusions, we are aware of the need to draw a line not only at the textual positivisation of the written word, but also at those rights which are not written (but still faithful to the constitution), where the element of omission (where it has not been written down) is not translated into either a negation of validity or a declaration of unconstitutionality. The assumption necessary to carry out this entrenchment is that of negating validity to phenomena which belong to unwritten rights (including political activity)

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<sup>27</sup> Giorgio Lombardi, *Contributo allo studio dei doveri qualificati*, (Milano, 1967), 179; Luigi Ventura, *La fedeltà alla Repubblica*, (Giuffrè, 1984), 130; *Art. 54*, in (ed. G. Branca), *Commentario della Costituzione*, II Vol., (1994); Alessandro Morelli, *Il dovere di fedeltà alla Repubblica*, in R. Balduzzi, M. Cavino, E. Grosso, J. Luther (eds.), *I doveri costituzionali: la prospettiva del giudice delle leggi*, (Giappichelli, 2007), 175.

<sup>28</sup> Alessandro Morelli, *Il dovere di fedeltà alla Repubblica*, *supra* note 29, at 167; Decisions n. 16/1973, point 2 and n. 31/1982, point 3.

which are placed *extra constitutionem*.<sup>29</sup> In this picture we include both attempts at constitutional reform which are unfaithful and political tendencies, institutional conceptions and constitutional interpretations which are characterised by the phrase *condoned obscurities* or actual conditions which are formally unexpressed. The written constitution takes as its source customary behaviour or, rather, a series of behaviours which are faithful to the criteria of conduct to be found in the constitution. Because of this, constant respect over time of such criteria permits the assimilation of customs into a living constitution (as the ensemble of constitutionally oriented customs). On the other hand, we must observe how the dishomogeneity of the political-social structure is marked out by a complex of juridical, legislative and political activities which redefine the meaning of the text of the constitution and the “unity of sense” of the Constitution, following an homogenous vision and systematic criteria. Therefore, in the possible diachrony that is set up between the activities of “constitutional policy” and conformity to the fundamental of the Constitution, the objective parameter of fidelity to the Constitution could be saved exactly where the text of the Constitution may be recognised as a document to which we can trace back the solution of every legal problem through its “complex unitary meaning” which its interpreters grant to it and safeguard. In this sense, the relationship between the rigidity of the written text (the Constitution) and the prohibition of sources *extra ordinem* (customs) is played out on different levels and involves problematics which find their meeting point in the declaration of illegitimacy of those norms that oppose the Constitution.<sup>30</sup> The judge needs to remain *intra-Constitutionem* through fidelity to a provision which is not imposed in order to be mechanically carried out, but to oppose the emerging empiricism of factual contingency and to identify an idea of the Constitution which is assumed to be the juridical statute of the political.

Generally, the observation of constitutional gaps is the legislator’s duty, because constitutional reform is the safest way of filling these gaps; and constitutional gaps must be managed by the legislator, because the Constitution is changed according to how state power is exercised. However, this kind of positivism is not insensitive to the insufficiencies of written law, which is incapable of explaining those rules (or regularities) which, although they operate outside the constitutional text, are not “passing phenomena” but behaviours repeated over time, or the fruit of constitutional reforms or, indeed, of constitutional change. But if “political” means “belonging to the state”, then in the concept of the “political” the “State” has already been thought of: in this sense, the activities that develop according to unwritten precepts and which form in their entirety an “ethical policy” belong to the legal sphere, in as much as they contain recognised and guaranteed provisions for the exercise of the state’s power, even if, in the majority of cases, they are not binding in character, but flexible, in that they are always adapting to the political situation which itself is in constant change.

The past is full of examples of constitutional dynamics, of attempts to delegitimize the Constitution and reveals how the circuit of revisionism (like referenda or constitutional laws) is the easiest way of pursuing certain political aims. And paradoxically, it is easier because its physiological relation to the Constitution allows political forces to pursue a legitimate (because legal) purpose of defrauding the Constitution of its content. Thus it was in 1993 with the proposal for institutional reforms, with the referendum of the same year, with the revision

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<sup>29</sup> Michele Carducci, *Doveri costituzionali infedeli per Nichtausübung. Spunti tedeschi per le tentazioni italiane* in R. Balduzzi, M. Cavino, E. Grosso, J. Luther (eds.), *I doveri costituzionali: la prospettiva del giudice delle leggi*, (Giappichelli, 2007), 360.

<sup>30</sup> Michele Carducci, *Doveri costituzionali infedeli per Nichtausübung. Spunti tedeschi per le tentazioni italiane*, *supra* note 31, at 353; François Ost, *Le temps du droit*, *supra* note 9, at 37.

of 1997 and with the referendum of 25 and 26 June, 2006.<sup>31</sup> In all these cases the explicit limit set by the Republic against any attempt to “sterilise” the rights confirmed in Part I of the Constitution (considered the fundamental nucleus) was stepped over. The argument was that the change would only affect Part II of the Constitution.

By fidelity we do not mean only a general respect for legal forms, but also and above all, a harmony and conformity with the content of constitutional provisions. And it is exactly in this sense that we can speak of “defrauding” the Constitution, that is: by designing an “innominate crime” in which we can recognise a teleological assignment, the autonomy of the subjects and the demarcation between principles and rules; by indicating an evaluative property which has been freed from the formalism of literal textuality and of its deductive application, and is, rather, projected onto the question of ends and of the value of an order of rules which is not only coherent, but, above all, does not conceal its constitutive force by abandoning it to the controlled and uncontainable caprices of those for whom it is intended. When the legal and political systems interweave and overlap and begin to use the same language, or if they reverse roles causing a profound underlying pathology, and discussions take place and decisions are made within the bounds of “political correctness” but outside the correct constitutional structure, the risk of defrauding the Constitution becomes an ever present, even natural element. It outlines new rules of a game in which politics substitute juridical provisions through the circuit of fraud which travels through the finality of the “liberty of forms” in the methodological rigour of the politically correct.

Fidelity follows phases of transition like a parameter which perceives and reflects the theoretical formulations concerning the Constitution as a duty and, in its manifestations, fidelity is a function of history, of the context in which it is practised. It would be ingenuous to imagine that some kind of fidelity exists which can be isolated from contingent factors. Certainly it is desirable to have a state system which is organised for functions, relations and competencies which are faithful to the Constitution. However, history teaches us otherwise: fidelity is both for a decision and for the person who takes it; there is fidelity to legal forms and to ordinary legality, and when we consider “constitutional fidelity” these arguments are even more important because, in fact, fidelity is always in the hands of those who should be faithful and these possible fractures can spill over onto constitutional legality. In clear and authoritative words: legal changes do not provoke social transformations, but transformations that take place in the real world have always caused the most important changes in the law. The Constitution situated in time is an historic event in order to present itself as a process which is realised in time, as an “open” Constitution which is in need of “an adequate theory of interpretation”. In this regard it is opportune to democratically define the areas in which power – the state organisation itself – operates. At the level of fidelity, the placing of the Constitution in space allows us to grant it the respect that is reserved to it, that is, it allows us to complete the picture so that the constitutional provisions are not lost in “existential ontology, whose unfruitful end is the same as for all a-historical conceptions of subjectivity, well expressed in the pitiful human *Dasein* of Heidegger, in the confused historical conscience of Jaspers or in the labyrinthine hermeneutic historicity of Gadamer”.<sup>32</sup>

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<sup>31</sup> Gianni Ferrara, *Premessa*, in A. Pichierrri (ed.), *Quale revisione costituzionale dopo il referendum del 25-26 giugno 2006*, (Mandese, 2007), at 9-10.

<sup>32</sup> Pedro De Vega Garcia, *Mondializzazione e diritto costituzionale: la crisi del principio democratico el costituzionalismo attuale*, in 3 *Diritto pubblico* 1087 (2001).

## Conclusion

“Constitutional fidelity” does not mean a mere protection of tradition or a hierarchical supremacy of the Constitution, and from this viewpoint the American meaning is completely different from the European expressions of *Defensa de la Constitución*, *Sentimiento constitucional* (or *Verfassungsgefühl*), *Anerkennung*. “Constitutional fidelity” does not mean a mere search for a behavioural standard; it realizes that relationship within a specific context of institutional (political and judicial) behaviours and the fundamental goals of a community. In Italy this relationship has as yet not been created.<sup>33</sup> In the United States, “constitutional fidelity” is not a search for a “duty of observance” by someone to something. The American spirit does not accept this kind of synthesis. Facts are produced by subjects; so those facts allow to re-build the feeling between the American people and the constitutional document.

Fidelity is not a tie with the past but, paradoxically, with the future; it is a way to understand a legal system as a social system, where the social elements cannot be reduced to the single conscience and where history has to be combined with the experience and the activity of observing, without any a priori approach to the concept of Constitution. The Constitution legitimizes itself in the course of history; and fidelity to history involves any kind of relationship, as it were a double-lane way, where fidelity to the Constitution is fidelity in ourselves. Talking about fidelity implies dealing with an unknown future and discussing the past as if it were a theme of social communication which strengthens the legitimate constitutional belonging to a people.

The necessity for the constitutional text to open up to the “evolution” of society is useful to identify a new cultural equilibrium through “indicators of predictability” provided by dialogue and negotiation between individuals and groups who participate in the decision making process. In this way, the text is adapted to its context, constructing the basis of what has been defined as a “time in history” and what is therefore a “time of the Constitution” since it determines “content and objectives”. Time “in the Constitution” on the other hand can be abstract or tangible. Abstract time is eternal time, in which the abstract nature includes numerous matters without identifying itself necessarily with any of these. Tangible time is measurable, like the time available to the constitutional institutions to carry out their functions.

In judicial activity, when a judge decides which law to apply to a specific case, a meaning is inevitably given to that fact. Giving a meaning, characterizing the framework of that fact, inevitably produces a degree of certainty (within the dimension of meaning). In the temporal dimension, the giving of meaning is possible because of the constant elements (objects and situations) and variables (events), and it refers back to other possibilities which present themselves as real (actual) and possible (potential) at the same time: from the moment in which a decision is taken by a judge that decision is automatically linked to future possible decisions and social needs.

In the context in which an individual finds himself imparted by experience, by acts and by processes, deeds can be perceived as “merely practical experience” (*Erfahrung*) or, if representative of an ideal *quid*, as an “essence”,<sup>34</sup> as “experience aware of life” (*Erlebnis*).<sup>35</sup>

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<sup>33</sup> Michele Carducci, L’ «accordo di coalizione», (Cedam, 1989), 104.

<sup>34</sup> Edmund G.A. Husserl, *Idee per una fenomenologia pura e per una filosofia fenomenologica*, I, Italian transl., (Einaudi, 1965).

<sup>35</sup> Hans G. Gadamer, *Verità e metodo*, Italian transl., (Bompiani, 2004).

The Constitution as a historical subject belongs to a moment in history, because only in this moment of history can its characteristics be explained, allowing it to remain unchanged and guaranteeing stability. It is placed in history, and is itself history – it is not “temporal” because it is “in history”, but it exists and it can exist in history only because it is temporal in the foundation of its being.<sup>36</sup> It is a historical time that endures by imposing itself as a narrative identity capable of change without breaking. Under the aspect of innovation, the Constitution is therefore also “the expression of a situation of cultural development” (*kultureller Entwicklungszustand*). Culture gives life and form to a Constitution in which the people “are” their material Constitution or the context that determines the effectiveness and the development of the formal Constitution (the text). The *Häberlian* image of the “Constitution as a cultural process” develops the *Smendian* idea of the Constitution as a dynamic process of integration whose strength lies in communicative and symbolic ways of negotiation and reciprocal tolerance rather than in arms. This cultural process is renewed from one generation to the next, through knowledge and emotion, through procedures of clarification of the past and hopes for the future. Not only does the culture of the Constitution depend on the progress of political academics and jurists, but it is determined by the general culture of the citizens who accept it and by its principles in civil ethics.<sup>37</sup>

Each constitutional written document is the conceptual and historical result of the contingency. For this reason, scholars talk about “constitutional fidelity” as a way to identify themselves on the historical path (*Path Dependence*) opened by that written document and without considering “constitutional fidelity” as a normative, fixed datum.

Finally, the concept of “constitutional fidelity” seems to be a communicative, ethical and linguistic code which enables the idealization of certain values independently from the interests involved in the judicial decisions and to work in a bi-conceptual dimension: on the one hand, for defining the contents of practical judicial decisions in the perspective of continuity, and, on the other hand, for identifying those fundamental reasons which are mutually recognized and accepted.<sup>38</sup>

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<sup>36</sup> Martin Heidegger, *Essere e tempo*, *Italian transl.*, (Longanesi, 2000).

<sup>37</sup> Jörg Luther, *La Scienza häberliana delle costituzioni*, *supra* note 8.

<sup>38</sup> George Lakoff, *Sette idee per un discorso*, *Italian transl.*, in 789 *Internazionale* 36-37 (2009).