# ESSAYS

## CONSTITUTIONAL LAWFULNESS IN THE HISTORY OF MODERN LAW

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*Abstract*

In a moment of transition and crisis when the socio-economic, political, legal foundations built by our founding fathers are undermined by growing instability a crisis hit the legal scholarship too. It is a crisis of sources of law, the starring source of modernity, which is undergoing a progressive decline in the post-modern era. Constitutional lawfulness appears instead to run uninterrupted between modern and post-modern.

TABLE OF CONTENTS



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### 1. The current crisis in juristic modernity as a crisis in law sources

It is easy and elementary to bear witness to the fact that we are undergoing a moment of transition – actually, extremely rapid transition. And we may verify this each time – and this occurs often – that we find ourselves drowned in a maddening fluidity, while heavy uncertainty dominates our daily lives. There is widespread talk of crisis, not incorrectly if through this abused term we refer to the serious cracks opening in the foundations – be they socio-economic, political, juristic – built in solid rock by our forefathers, now undermined by growing instability.

This is a crisis that hits head-on the jurist in particular, because it was the juristic construction fine-tuned in modern times[1] that was discussed in its deepest recesses during the last years of the 20th century. It is not a crisis of law – as is sometimes hastily and misleadingly stated – but one of that shape in which modern civilisation forced law to take form and manifest itself, those forms that in everyday juristic jargon are usually called *sources*. It is at any rate certain that the juristic fabric has been torn, and these tears led to a widespread sense of dismay, so much so that a number of young jurists – careful observers of changes in the environment – openly spoke of identity crisis[2].

The law historian, in the habit of not isolating individual points that form the timeline, in the habit of grasping the timeline in its long and eventful unrolling, is – possibly – among jurists the only one not feeling the discomfort. On the contrary, he is aware that we are on a path towards new uncharted territories, that we are leaving the still, solid and certain grounds of modernity to venture into the unstable, fluid and uncertain territory we conventionally label as post-modern (a historic indication that is quite approximate, and which we may only accept if through it we

[1] Modern civilisation is lucidly aware of the precious function of law – all law – as unifying cement for a state's compactness, it aims at controlling and manipulating it. The outcome is that very accurate juristic construction mentioned in the text.

[2] Reference is made to: G. Gitti (ed.), *L'Autonomia Privata e le Autorità Indipendenti* (2006), at 7. I noticed this attitude in a very recent paper: P. Grossi, *Il diritto civile tra le rigidità di ieri e le mobilità di oggi*, in M. Lobuono (ed.), *Scienza giuridica privatistica e fonti del diritto* (2009), at 43.

intend a temporal slot typified solely by a current movement, and therefore still undefined).

Undoubtedly, we are increasingly moving away from a specific shore, a well-known one that is stable in its certainties but is inadequate in terms of new historical requirements, and we find ourselves once again in the middle of a ford without having reached a gratifying landing place. It is understandable that the lover of positive law may suffer from such uncertainty, and it is equally understandable that the historian – who rests his knowledge on the dialectical vision of past, present and future – perceives the fertility of the moment, discovering it as an exploration towards *new*, the building site for *new*.

The 20th century, a century which – formally – appears to have just been closed behind us, provided fertile soil on which a law historian believes that the passage beyond modernity took place and matured, penetrating more and more in that undefined areas we have accepted to qualify as post-modern. This was a long century in the eyes of the historian/jurist, as it started in the turbulent last decades of the previous century[3], and now it is still moving towards an unreached landing place; a century during which that crisis in the sources of law, mentioned at the beginning, manifested itself in all its crudeness. A century in which law, the starring source of modernity, underwent a progressive decline.

Constitutional lawfulness appears instead to run uninterrupted between modern and post-modern, which as a matter of fact is the topic of our conversation; we are talking however of continuity within discontinuity, since it will be exactly constitutional lawfulness, in its birth in the arms of modernity, to provoke the first crack in the modern approach to law and in the modern solution to the problem of sources of law; and in its transformation during the course of the 20th century, it shall cause its final cancellation.

Up to now we have spoken with vitanda vagueness of the sources of law, legality, constitutional lawfulness, without offering to an audience formed mainly by non-jurists any instrument of

[3] Turbulent because marked by the suffering of the fourth "state", resulting in open and violent social conflict, even if minimised or even ignored by the strictly single-class pseudo-democracy.

comprehension. I shall therefore haste to provide contents to statements that are familiar to the juristic ideology and vocabulary, but are irksome and difficult to grasp for those not familiar in that field[4]. I would like, as a matter of fact, to respond to the great honour bestowed on me by the *Consiglio di Presidenza* with the assignment of the solemn speech at the closing of the academic year, in the presence of the Head of State and before the classes of the Academy, with an earnest attempt to escape the bounds of esotericism that – unfortunately – usually mark the speeches of jurists.

## 2. Modern lawfulness as an expression of juristic absolutism

As soon as we look backwards, to that juristic modernity that started to form from the 14th century onwards in continental Europe[5], and which found full consolidation in the 18th and 19th century, the juristic environment appears to us fully defined and having net and certain boundaries.

The protagonist in the history of law that was developing during that historical timeframe was the state; or rather, the several states into which the political and juristic unity of Europe was fragmenting itself. I shall clarify as of now that by *state* I do not mean all political powers equipped with effectiveness in a set territory, but a totalising, all-encompassing power aimed at controlling and dominating any social manifestation, a sort of huge puppet-master holding all the strings and refusing to let

[4] For a professionally juristic reader, several notes acompanying the text of the *lectio* shall appear unnecessary. They were added having in mind a highly cultivated reader lacking in juristic experience, in the attempt to enable an easier comprehension.

[5] It is worth advising that the European juristic history features, at least during modern times and until yesterday, two stories that ran independently and in parallel: the one of continental Europe and the one of the English kingdom. This is a situation, a juristic and not solely geographically insular one, where life continued for the whole modern age in accordance with a vision of law that was medieval, where the assignment of the development of the law fell on a class of experts – in the English case, to a complex and closed lawmaking class – rather than on political power. On the other side of the Channel therefore, the very close connection, almost a tie, between political power and the production of law, is missing, while it is more and more thriving on the continent.

them go. The state was thus more a psychology of power than a more or less significant quantity thereof; as such, it was the novelty that marked with incommensurable discontinuity the grounds of modernity, intensifying the boundary-setting between *modern* and *medieval*[6].

The Middle Ages encountered political subjects equipped with the utmost potestative scope, and the tyrannical exercise of power was not infrequent. In this civilisation however, the collective conscience held on to the notion – which was widespread and never denied – of the *incompleteness* of political power, meaning with this noun that its holder was not supported by a totalising psychology. On the contrary, he only took care of whatever was directly pertaining to the maintenance of public order, enabling plural and diverse forces to manifest themselves and take form in civil society.

The example offered by law is very enlightening: the medieval Prince – whether lay or from the church, or a free city – did not identify the involvement in law, its production, as the essence of his/its supreme function. His/its will, expressed in a law or in a city statute, only concerned limited objects, and always in close connection with the public order of the *civitas* or of the principality. The medieval Prince was only occasionally a lawmaker, while the ongoing production of law was reserved to the community[7]. The main source, as a matter of fact, was and remained for the entire Middle Ages custom, that is, habits germinating from the ground up, observed within the community and interpreted knowingly by theoretical and practical jurists.

It shall be the modern Prince, by force of the totalising psychology mentioned before, to focus more and more significantly on law, in a growing spiral from the 14th century to the 18th century. This Prince sought to produce law; he/it started identifying the sign of his/its sovereignty in this very peculiar activity. The Prince was and remained Prince especially because

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[6] This is the strong idea supporting my reconstruction of medieval law. See P. Grossi, *L'Ordine Giuridico Medievale* (2009).

[7] I clarified the attitude briefly described herein in a paper that duly integrates the extract of note 6: P. Grossi, *Un diritto senza Stato. La nozione di autonomia come fondamento della costituzione giuridica medievale* (1996), now in *Assolutismo Giuridico e Diritto Privato* (1998) (in German it is found in: *Staat, Politik, Verwaltung in Europa.Gedächtnisschrift für Roman Schnur* (1997).

he/it was a lawmaker. The age of political absolutism became for the law historian the age of *juristic absolutism*[8].

This did not occur immediately, also due to the fact that the long unwinding of the medieval millennium entrenched its values onto the very roots of western civilisation. The tendency was however marked, and consisted in the very close binding of political power and law, a tie that at the end of the consolidation process of modern law – that is, with the French Revolution and Napoleon – appeared as necessary and unavoidable. This was the moment of great codification, when the State seized back private law, which had until then been left in the maternal embrace of custom and had been reduced to object of the first Code demanded by the Revolution and implemented by Napoleon, the Civil Code.

The creator of modern law was therefore the political subject equipped with a wholly new psychology, that led him to seek full control of a glue that was precious in terms of the compactness of the political body. Consequently, the main source of lawmaking was that same authoritarian and authoritative voice of the Prince, the law, in a pregredient historical process that in the end made it exclusive.

Take due note: law is a word and notion flawed by polysemicity. Evan Thomas Aquinas spoke of *lex* in the midst of the medieval ages, reducing it to an *actus rationis ordinantis*, that is, to the reading of an objective order of social issues that the Prince was required to publicly manifest but also to comply with[9]. However, the law, in the hands of the uninhibited subject the modern Prince had become, was transformed into something very different.

Jean Bodin, a Parisian lawyer and careful watcher of the evolution of French statehood who (at the end of the 16th century) depicted its essential political/juristic features for us (that same

[8] This syntagm – *juristic absolutism* – I chose to mint a few years ago, and it obtained general acceptance in light of its effective clarification, but also some criticism. Looking at it with the benefit of hindsight, I continue to consider it as successfully expressing a significant turning point in the history of law. For further reference, you may read the essays collected in: *Assolutismo Giuridico e Diritto Privato*, cited above, and especially the introductory essay: *Ancora sull'assolutismo giuridico (ossia: della ricchezza e della libertà dello storico del diritto)*.

[9] Tommaso D'Aquino, *Summa Theologica, Prima Secundae*, q. 90, articles 3 and 4.

Bodin on whom our illustrious member Cesare Vasoli wrote very insightful pages recently[10]), Bodin took care of setting its contents: the law for the new ages belonged to the will and not to the research activities of the Prince, it was therefore something self-referential, that justified itself within the psychology of the requesting subject, identifying itself purely and simply with what the subject liked[11].

Again at the end of the 16th century and again in that kingdom of France, which represents for us an extraordinary forerunner and laboratory of juristic modernity, another personality, also equipped with significant juristic education and sharp watcher of his times, Michel de Montaigne, made sure he advised, in his abundant chest of *Essais*, that whoever intended conditioning their obedience to the law of the Sovereign for its justice contents would be acting distortedly, since a law demands obedience by being a law, in its representation of the will (whatever it may be, good or bad) expressed by whoever is entitled to sovereignty[12].

### 3. Constitutionalism as a reaction to juristic absolutism: early constitutionalism and the 'rights charters"

"*Quiconque leur obeyt par ce qu'elles sont justes, ne leur obeyt justement par où comme il doibt*". Montaigne's statement is merciless in its harshness and registers the change undergone by law in approaching the territory of modernity. It is a reality devoid of content, or – even better – one that the Sovereign may fill as far as he pleases; and it is a law to be obeyed even if it repulses common conscience because it is riddled with arbitrary or unfair orders.

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[10] Reference is primarily to the subsequent, recent and very fruitful volume : C. Vasoli, *Armonia e giustizia. Studi sulle idee filosofiche di Jean Bodin* (2008).

[11] "*Commandement du souverain usant de sa puissance*" is his definition of *loy* (Bodin, *Les six livres de la Republique*, liv. I, c. VIII *De la souveraineté*). Bodin does not fail to note the style clause, with which – for the duration of the old regime – royal *ordonnances* were closed: "*car tel est nostre plaisir*", eloquently meaning that, in the absolutistic psychology of the modern political power, will and desire tend to be identified (*ibidem*,). The king of France however had a limitation for the whole old regime, that is, in the customary structure constructed by immemorable habits that almost formed the material constitution, unwritten, but providing the foundations of the Kingdom.

[12] Montaigne, *Essais*, liv. III, c. XIII.

The new statualistic vision demands as much, and degenerates into absolutism not only on a political level but on a juristic one as well.

It is in this historical environment and in reaction to the same that a widespread and rich current of thought and action took form, which we usually call *constitutionalism*[13]: as a first trademark, it strove to oppose itself to a lawfulness that could take form in substantial violence against the common citizen. That is because the Law – a vast and plural phenomenom mirroring a vast and plural society – was being reduced to a set of laws, since the Sovereign, in the new and rigidly statualistic vision, was the only one who could transform through his will a social and economic fact into Law. We may now, from the end of the ancient regime onwards, especially thanks to the revolutionary Jacobite clinch, speak of juristic monism, as opposed to the significant medieval pluralism, with a single producer of Law, a single source, laws, the new Law embodying absolute command. The dominating principle could only but be the one of lawfulness, that is, complete compliance with the laws of the Prince, removed from their contents.

Diffidence towards a positive state lawfulness – that is, one implemented by this or that Sovereign and that could turn loath in front of cases of abuse – was the first seedling of constitutionalism. To which an operational proposal immediately followed: the division of lawfulness. There wasn't as a matter of fact only the law produced by the *pro-tempore* holder of supreme power, beyond that and on top of that, there was a law of a different quality, since it was Divinity itself to demand it as a safe control of the original man[14]. Constitutionalism, a political/juristic

[13] I specifically chose to use constitutionalism and not modern constitutionalism in order to convey my non-participation in the unreasoned anticipationisms of those wishing to identify an ancient constitutionalism and a medieval one, with the negative result of putting two very different situations in the same basket, turning constitutionalism into a vague and undefined common ground, and most of all, removing the uniqueness of the movement developing in the 17th and 18th centuries.

[14] It may be advisable to warn that when we speak of Divinity, we do not refer to a purely metaphysical entity, as in the Jewish/Christian tradition, but to a pantheistical vision that tends towards the sacralisation of immanent nature itself.

phenomenon, entrenched itself in the great legal/naturalistic reflection, representing one of its consequential developments.

Here is the elementary plot: juristic absolutism is the fruit of human history, it represents one of the many betrayals human history has accumulated in its development. The rescue consists in looking beyond history, into that state of nature where primitive man retrieved the ideal environment for his development and where he found himself equipped by a benevolent Divinity with all the suitable rights, abilities and powers for his own protection.

It is on that model of an early man that we must focus, before contamination by social and political history. Constitutionalism took from the doctrine of natural law the effort to base the new civilisation on pre-historic grounds, assigning this ruse with a purely *civil rights* attribute. It was the natural law fable of the state of nature, of a golden age that never actually existed; this took on the aspect of an extremely able strategy to reinforce a range of subjective situations borne in an original time of which no human could deprive the subject.

It is clear that all of this led to a sublime artifice, since the evoked and invoked environment never existed and may only be considered virtual; but it is also equally clear there was a need for meta-historical grounds able to remove the individual and his liberties from the suffocating embrace of the State: before history there was a world populated by single individuals who were all the same, each of whom equipped with a precious set of rights. Before history, which inevitably appears to be dotted with communities and various forms of power, there was a time in which the subject could freely exercise his rights consistently with his nature.

Basically, before the State there was the law, or better, a higher-placed, intangible, unconquerable law.

Even if the stated subjects were not historically living creatures and this was a mere case of museum models, the result was significant for western juristic society: the subject was being truly liberated from all of the timescale deposits layered onto him by historical events, and thus an individual was produced armed with favourable subjective situations, autonomous in his individuality, unwilling to get caught up in the network of social classes, communities, corporations that had conditioned him in

medieval times and had continued harassing him until the end of the old regime.

The so-called 'Rights Charters', faithful expressions of the first 17th-18th century constitutionalism, specifically indicated with their rights-catalogue format, the *civil rights* nature of the purposely-sought after natural law foundations. The aim was a result: to overlay onto the layer of positive Sovereign laws a superior layer immediately based on the nature of things, and therefore an intangible one; to break down lawfulness imposing a superior lawfulness interwoven not with commands, but with un-forfeitable and irrepressible rights.

Constitutionalism was already in action, and a profile of constitutional lawfulness was coming through, albeit floating on the concreteness of real-life law – more like a grouping of philosophical/political principles than of regulations ordering an economic/social experience. It shall be necessary to look into and specify these undoubted limitations in a moment.

### 4. 'Rights charters': an expression of modern juristic individualism

I spoke earlier of strategy, of precious strategy: an initial step to strengthen the citizen in front of the abuse of political power. I feel like I need to add something: a double strategy.

As a matter of fact, the supposed state of nature was a relevant contribution towards the provision of undisputable foundations for an individualistic-type civilisation. Only a foolish apologetic attitude could prevent us from grasping the sense of a penetrating politics-of-law operation: once the much-coveted political power was conquered at the end of the 18th century, a rigidly single-class State was designed with an attempt however to equip it with winning features, able to cover the fact that the unfair dominance by privileged classes of the old regime had been simply replaced by dominance by that intelligent and entrepreneurial bourgeoisie who had encouraged and made the Revolution.

The suitable juristic make-up was, as a matter of fact, provided by the natural law foundations of the earlier constitutionalism. Everything was measured – I have already said it – not on flesh and blood people, but on disembodied models, on

virtual subjects that were more like museum statues than living creatures. The flaw rested mainly in the abstractedness of the designed environment, a flaw that was the basic mainstay of a watchful strategy, which became a precious quality in order to painlessly achieve a specific aim. Working on abstract models enabled, as a matter of fact, providing each person with the scent of hope, without affecting the economic and social inequalities of the present world.

The examples on equality and private property are of effective eloquence.

In the state of nature men are all individuals and all equal, and *égalité* was written on the flyers of the Revolution, in all programmes and in all 'charters' dotting the revolutionary six years. But we are speaking of formal, purely juristic equality, with a more negative than positive function leading to an absence of juristic bonds to the reaching of de facto equality. For the gutter-dwelling Parisian who owned nothing, it was no more than a flashy but useless decoration[15].

Worse even concerning private property: in the state of nature Divinity desires each man to be the owner of himself, to be equipped with a proprietorial charge projecting itself into the exterior world. Here too this function should be evaluated in a negative sense: class bonds that prevented access to property were removed, each man was a potential owner. With this aggravating circumstance: in the absence of social/legal preventive bonds, the missed securing of factual ownership could only be ascribed to the laziness and ineptitude of the subject[16].

There was a cost to this, and a heavy one: the unfulfilled distance between the very convincing political/juristic rhetoric of the 'rights charters', in the form of those manuals and catalogues that set them out, and civil society in its unrefined and shapeless historical authenticity. The 'charters' appeared to be floating on top of society without any possibility of making an etching, and a sort of Chinese wall separated the miseries of social/economic

[15] And *fraternité*, which could add substance to equality, always turned out – sadly! – as an ineffective and mocking rhetorical expression.

[16] And as a matter of fact the poor, who though provided unfairly as poor, had had *privilegia* in ancient regime societies (the *privilegia pauperum*), were now condemned to open scorn as they were identified (as mentioned in the text) as one with the lazy and the inept.

facts from the natural law designs that took form in mockery for the large majority of citizens (most of whom not even equipped with the instrument of political vote).

If the diligent regime propaganda successfully concealed the real conditions of the country, continually extolling the supposed, final and insuperable conquests[17] of the Revolution and of 19th century pseudo-democracies, there was no lack, in the second half of the 19th century and within that same dominating class, of those who though not cultivating revolutionary overthrows, and backed by a strong ethical conscience and a sharp and merciless diagnosis, highlighted the classist nature of the State and the ensuing fracture between declarations of intent and daily reality.

I shall note here, among the various examples that could be made, only the energetic commitment of two Tuscan intellectuals, Leopoldo Franchetti and Sidney Sonnino, who were to become protagonists in the Italian political life and who chose to corroborate their individual voices and give them increased scope through the creation of a Magazine having a manifestly programmatic nature, the "*Rassegna Settimanale*"[18] ("Weekly Review"); these were significant voices as they originated from politically conservative individuals, and they were very eloquent because – without beating around the bush and with the nailing authority of veritable field investigations – did not hesitate to twist the knife in the wound insisting in the provocative yet exemplary truth that freedom and equality as theorised for all, and formally ascribed to all, remained theoretical statements, while formal civil rights institutions in fact protected the interests of an oligarchy. Sonnino spoke of "liberal formalism"[19], identifying the convincing

[17] These latter conquests, insuperable and therefore unfailing, were the object of an undisputed belief and necessarily corroborated by a very knowledgeable and nailing mythology. I offered a few clarifications on these modern *mythologies* in a number of essays collected in the following volume: P. Grossi, *Mitologie giuridiche della modernità* (2007).

[18] It was the "Weekly political, science, literature and arts review" that started appearing in 1878 at the Florentine publisher Barbera, and which "Remains the best magazine of post-unity Italy" (in Eugenio Ripepe's words, who dedicated intelligent attention to Franchetti and Sonnino in his forerunning book (E. Ripepe, *Le origini della teoria della classe politica* (1971), at 177).

[19] S. Sonnino, *I contadini in Sicilia* (Vallecchi 1925, at 339) (1877).

announcements of the 'right charters' as the "phantasmagoria of juristic (*doctrine*) freedom".

### 5. The juristic 20th century and the multi-class state: towards a new constitutionalism

Modern political/juristic reductionism, which bore in its very bones the elitist vocation entrenched in natural law and in juristic enlightenment, necessarily felt a deep diffidence towards social magma, and had thus wised up to control it. The social mass now appeared, after the revolutionary squeeze, as a compact and inert platform that should remain inert, since the reins of the government of the *polis* were delivered in the hands of what Franchetti and Sonnino had courageously – for some, shockingly – qualified as 'oligarchy'.

When – during the decades that chronologically closed the 19th century but, according to law historians, opened the long century we still find ourselves in – social magma seeped out of the dungeons where it had for long been locked up, it did not limit itself as in the years of the Revolution to crowds spilling in the streets, destined to end up soon to be swallowed once again in the gutters. One hundred years – and what years! – did not pass in vain, and this is proven by the events that followed each other, interwove, but most of all moved over several levels and with different strategies: unrest turned to social conflict, social conflict took the shape of strikes, less crowd-gathering yet extremely corrosive for the stability of the economic environment. Associative forms became more and more wide and widespread.

If Franchetti's and Sonnino's observation is true that, "Lower classes, which are the majority of the nation […] do not participate in the game of political forces […] these classes and their interests do not take part at all in the country's life, they are excluded from it"[20], the new and decisive feature of the social/juristic environment in Italy and Europe at the end of the century was that the mass of have-nots was no longer the occasional gathering of individual physical forces without any link except for widespread desperation; the two dimensions that

[20] See the quote in E. Ripepe, *Le origini della teoria della classe politica* (1971), at 186.

the bourgeois civilisation had drastically tried to remove, the social and – worst yet – the collective one, were now growing in presence.

The novelty of the last decades of the 19th century was a social/juristic environment that was now articulated and enriched by various and growing social gatherings, the foremost being the unions. The novelty, in the eyes of the law historian, lays in an environment that had lost its forced and artificial *simplicity* and had become more *complex*. Now, the time had come to face up to that mass psychology, which had become more aware and mature, and which had recognised in collective identification the sole strength of the socially and economically weak subject. An attitude accompanied by the actual and effective presence of that strength, with consolidation of precious social forms, among which – as we said – the unions.

The forced and artificial stage of yesteryear had been *reduced* to a rarefied game of individuality, the macro-individual State and the micro-individual physical subject, and was the fruit of a very crafty strategy that had thus – substantially but disguisedly – enhanced the purely census-related foundation of society. The stage, which was more and more coming to the forefront between the 19th and 20th centuries, was way more complex, exactly because the bourgeois regime was slowly losing grasp of watchful social control. And the State laboriously shifted from single-class to multi-class.

The deforming vision we continually receive of jurists as servile subjects who acquiesced to power, and who were therefore deaf to changes, may lead us to envisage their total astonished silence, but it was in fact one of them who blew the whistle most loudly on the transformations that were under way. Our man was a connoisseur of public law, I would not hesitate in placing him among the top voices on 20th century juristic science, Santi Romano.

Romano, who on the one hand, from a strictly juristic point of view, had not failed to severely criticise the latest and definitive conquests of modern civilisation, denouncing the abstractedness of those sorts of 'catechisms' represented by 'rights charters'[21], on

[21] 'Catechisms', like 'panegyric' and 'political romanticism', are harsh and figurative expressions used by Romano himself, almost to highlight a group of

the other hand was a careful observer of social changes, and without ripping his clothes off and without conservative inhibitions, he noted the features of the new environment and the ensuing crisis of the state structure built to perpetuate – maybe indefinitely – the social/juristic order minted by the Revolution, which at the beginning of the 20th century appeared in its true light: a forcing, a compression of the plural forces in society.

My reference, as any legal jurist may well expect, is to the inauguration speech at the beginning of the academic year, which Romano was asked to make in 1909 at the University of Pisa, titled – with a very brave face-on approach – "The modern State and its crisis" [22]. The crisis was identified by the great Palermo-born jurist/publicist specifically as the rise and growth of social formations that, by indenting the compactness of the State (that compactness demanded by the Jacobite project, albeit very congenial for the liberal *stato di diritto* [limited government]), were eroding it deeply.

Just a few years later, in 1913, Italy was to achieve universal voting for men, which had been obstructed for a long time and fiercely, and this was to resolutely transform the old single-class structure. Again a few years later, the storm of the World War, from many points of view unnecessary and an enormous tragedy, was to represent the furthest boundary stone of a society that was controlled and directed from the top down[23].

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statements not subject to verification in day-to-day reality, in a strict reproach held in his inauguration speech at the University of Modena in 1907: Santi Romano, *Le prime carte costituzionali*, now in *Lo Stato moderno e la sua crisi - Saggi di diritto costituzionale* (1969), especially pages 165 and 168. Please refer also to the very significant essays, always by Romano: *Saggio di una teoria delle leggi di approvazione* (1897), now in *Scritti minori* (1950) (reprinted in 1990); *L'interpretazione delle leggi di diritto pubblico* (1899), now in *Scritti minori*, vol. I, cit.; *Osservazioni preliminari per una teoria sui limiti della funzione legislativa nel diritto italiano* (1902), now in *Lo Stato moderno e la sua crisi*, cit.

[22] Now in *Lo Stato moderno e la sua crisi*, cit.

[23] It is not a mere coincidence that exactly in the final year of the great War, in 1918, Santi Romano published a small book "*L'Ordinamento giuridico*" that was the first theoretical construction aimed at removing the law from the overbearing shadow of the State, replacing it in the wide and complex embrace of society. Those wishing to know more may refer to my post-grad lesson in Bologna dedicated to the design of the scientific message of Santi Romano (see P. Grossi, *Santi Romano: un messaggio da ripensare nella odierna crisi delle fonti*

**6. Features of the new constitutionalism**

It was in this intensely renovated climate that constitutionalism took a decisive turn, and experienced a second and intense moment with the entrenchment of a constitutional lawfulness that was intrinsically new.

The first relevant step taken by 17th-18th century constitutionalism with the 'rights charters' was no longer sufficient. There was now a need for much more than 'catechisms' (as poignantly qualified by Romano). If the 'charters' – aimed at a desired meta-historical state of nature, shaped on a purely abstract subject leading a meta-history that was in fact never actually experienced by humankind – could not fail to be seriously flawed by abstractedness, the new and successful attempts occurring all along the 20th century came through as an interpretation of society in its historical concreteness, and therefore, in its actual complexity, without design strategies forcing or artificially changing the true social/juristic environment.

Values, interests, needs that were actually circulating in that historically concrete reality represented by a population living at a certain time and space, took form in a text, which was no longer a static catalogue of abstract subjective situations, but a supreme juristic rule regulating human cohabitation.

We must repeat – and therefore stress – that this was an attempt to design a juristic framework of a historical fabric, of living history, without submitting it to artificial contractions, to simplifications that would mortify its concreteness. The complexity of society, now fully recovered in the multi-classism of the social structure of the 20th century, was loyally reflected in the 20th century Constitutions, where the term 'Constitution' marked a substantial difference from the old 'Charters'[24].

The first accomplished example occurred right after the conflict, in 1919, in a Germany that was seeking to venture down new roads after the breakdown of the Wilhelm Empire, with the Federal Republic of Weimar: the Weimar Constitution as a matter of fact strove to interpret the juristic attitude of German society, transforming it into an organic grouping of principles and rules.

(2005), now in *Società, diritto, Stato. Un recupero per il diritto* (2006), and in *Nobiltà del diritto. Profili di giuristi* (2008).

[24] With the due specification that the term 'constitution' was formally used also to denote some 18th century French and American charters.

Among the many that were to be realised in Europe during the course of the 20th century, the Italian Constitution of 1948 was also a conspicuous example: it marked the birth of a new life – after the ruins of the war, the oppression of the Fascist dictatorship, the betrayals of the Savoy dynasty – and was a faithful reflection of the juristic attitude of the Italian population, as grasped over two years of intense work by an extraordinary 'constituent assembly'.

**7. New constitutional lawfulness**

I insisted on historicity as a new attitude with respect to the previous abstractedness, and proof of it comes from the special focus shown by constitutionalism on the conception and construction of the *subject*. The subject appears as protagonist both at the beginning and subsequently, but from an irreparably different viewpoint.

First it was the unitary subject of natural law, an a-historical and therefore merely virtual subject, a model of man and no more; abstract subject, devised and resolved as an insular entity protected by several rights and burdened only by the duty of self-preservation. Here on the other hand, we speak of an intrinsically *relational* entity, well-entrenched in a cultural, social and economical context, found alongside another, all others, and having a very close and necessary relationship with them.

First an *individual*, now a *person*, undoubtedly equipped with numerous subjective situations that the Constitution is asked to protect, and which develop in concrete environments of freedom, but also committed to an equally wide range of duties. This is highly relevant, because it is duty that socialises the subject, weaving him into a relational fabric; in other words, it historicises him.

Let me add a further specification: it is a subject who often operates within one of the many social formations produced by civil society. The new pluralistic vision rejects the Jacobite compactness of the State, that compactness that had found during the 19th century its crowning achievement in the State/person, a juristic invention that also reached the aim of separating State and society, of avoiding contaminating the State with the disorderly social magma. The crisis denounced by Romano in 1909 approached a lucid awakening: the State was starting to be a

community. In fact, a community of communities, setting off a process whose development was witnessed in Italy in the last years, especially in terms of relevant constitutional amendments[25].

It is clear that the newly-minted Constitution could not resolve itself in a catalogue of rights; or better yet, it could not exhaust itself in this, but it desired and was required to speak of religion, culture, education, economy, work, environment, health, as well as of the "organisation of the Republic", as stated in the second part of the Italian Constitution of 1948. It is clear that it should be so, since it is consequential for the purpose that 20th century constituents set themselves: to express the juristic attitude of a population in its historical concreteness, translating it into principles and rules.

The citizen was not faced here with philosophical/political sermons on a 'happiness' that was too often unattainable (as in American and French 'charters'), or of an equality that was as abstract as it was unfulfilling; he received, on the other hand, his fundamental juristic compendium as life compendium.

It is obvious that constituents tended to look beyond the State, taking as reference the entire civil society in all its complexity. The 20th century Constitution appears to us therefore more as a great act of knowledge than of potestative will. Last summer, when I was asked to celebrate – at a Convention – the sixtieth anniversary of our fundamental rule at its vigorous sixtieth birthday, I did not hesitate to qualify it as an act of reason. I did not wish in 2008 to rekindle the far-away Thomist definition of law, nor did I wish to entertain a vacuous rhetorical expedient; I wanted, on the contrary, to highlight a significant and typifying feature of these experiments of mature constitutionalism, bearing witness to their effort to make an unbiased, objective interpretation of the fabric of a society, extracting those principles and rules that – on their own – were to realise a non-fictitious but most of all lasting unity; they were to design precisely in terms of scope and contents, the fundamental law of a population, offering it not philosophical/political propositions but a concrete and supreme juristic law, intrinsically juristic and concretely applicable.

[25] Reference is to the notorious – and questionable – reform (implemented recently) of title V of the second part of the Constitution.

### 8. The Constituent Assembly of 1946-48 and the construction of new constitutional lawfulness in Italy

A probatory example of what we were saying just now may be eminently pointed out by the toil of our constituent fathers in the 1946-1948 period; it also appears clearly to us in the very fruitful preparatory works, which I have always read with intellectual edification and which I have always recommended reading to my students for as long as I was asked to hold university 'courses'.

I deliberately used the term 'edification', which belongs to the usual vocabulary of moralists, and I did so to kindle attention. The Italian Constituent Assembly was not a chorus of angels. It was formed by party men who were often divided by strong ideological fractures; there was no lack of clashes and even hot disputes. There was, however, a basic attitude that deserves, from the mouth of the historian and constitutionalist, use of the adjective edifying: because there was an attempt to construct a solid political unity, in full awareness that it may be reached by getting rid of contingencies that brought separation and distance, and focusing strictly on common values. There was an endeavour, in other words, to construct not transiently but for the long run, for that *longue durée* that, well beyond the transient, is the real time of history.

The recent celebrations of the sixtieth anniversary proved that the target was hit, at least concerning 'fundamental principles' and the 'first part'. Our 'Charter' perfectly corresponded with the feature of being not only a fundamental rule for the Italian population, but also being solidly cemented, and therefore lasting in time; belonging to those Constitutions that a proactive constituent, Piero Calamandrei, chose to call *long-sighted*[26] with a clarification that hit the mark. This evaluation,

[26] "The Constitution should be long-sighted, it must see far away, it cannot be short-sighted," (as stated in the very well-known speech at the Constituent Assembly, in the session of the 4th of March 1947, during the general discussion on the project designed by the Commission of Seventy-five; the text – *Chiarezza nella Costituzione* – may now be easily consulted in P. Calamandrei, *Opere giuridiche* (M. Cappelletti ed., vol. X, Morano 1985, at 496). The Calamandrei intervention was however still veined with criticism and reservations, a legacy he still had in connection with the illuministic dogma that nailed his earlier self. We should duly note that 1947 was a year of gret re-thinking for the great Tuscan proceduralist, and his messages – during the course of that year – show

after due consideration, looking back on the sixty long years that have elapsed, was duly picked up by Giorgio Napolitano in a conference held in Turin a few weeks ago[27].

This responsible working method was fully implemented, within the Commission of Seventy-five, by the First Sub-Commission, which had been assigned with the undoubtedly higher yet very delicate issue of the 'Rights and duties of the citizen'. This comprised individuals of the highest stature, among which I like to recall jurists Dossetti and La Pira, Christian Democrats, Socialist Lelio Basso, Communists Concetto Marchesi and Palmiro Togliatti. Aware of the delicacy of the problems they were asked to solve, they were all of the advice that the best road to take was that of being led by reasons that would not be detached from the fields of rational and reasonable.

There was a *synergy* (a beloved term of Dossetti), but this could only happen because the dimension chosen in which to move was the most objective, the least polluted by veins of low-key politics.

Here is the high voice of Dossetti, "Above these fundamental principles, which should offer in brief the features of the new State and of relations between citizen and State, it is necessary to get consensus"[28]. Which was given, by grace of the rationality of the approach. The issue was red-hot: the person, society, the State, in their complex relational intertwining. Dossetti's proposal was to make their moves based on a shared principle: "precedence of the person with respect to the State"[29], a

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some contradictions, marking the start of a new path. In October of 1947 we may find a speech, proving the actual detachment and marking a boundary in the constant – yet no longer continuous – thought by Calamandrei on the great issues/problems of the sources of law, on constitutional lawfulness, ordinary lawfulness, interpretation of the law, on the role of the jurist and specifically that of the judge. I recently focused on this significant turning point in the cultural life of Calamandrei during a Florentine commemoration organised by the *Consiglio Nazionale Forense* in order to duly remember those unforgettable events of 1947 (see P. Grossi, *Lungo l'itinerario di Piero Calamandrei* (in print in the 'Rivista trimestrale di diritto e procedura civile' and on the 'Rassegna forense').

[27] G. Napolitano, *Costituzione e democrazia* – Speech held at the 'Biennale Democrazia', Turin, 22nd of April 2009, Rome, Press Office of the President of the Republic, 2009, at 10.

[28] G. Dossetti, *La ricerca costituente 1945.1952* (A. Melloni ed., 1994), at. 103.

[29] See id., at 102.

suggestion fully aimed at valuing the person, protecting it. Dossetti convincingly added, "This fundamental concept of precedence of the person, of its full vision and of the interpretation it receives from social pluralism, may be asserted with everyone's consent"[30]. And there was open dialogue between Dossetti, a believer, and Togliatti, an agnostic. Consensus was achieved.

All of the discussion on 'fundamental principles' and on the 'first part' was based on this calm observation. Giorgio La Pira, one of the Speakers, him too enveloped in fecund synergy, stated, "This first part […] with its progressive determination of the essential rights of the person and of the community, would represent a true reflection of the structure of society"[31]. The link was with the 'real' – they were convinced they should and could do it. A '*real*' to be read in its objectivity, to be *recognised* (another beloved term of our constituents) beyond the State, on a more decanted field than the one of daily politics; certainly not in a rejectable, purely virtual state of nature, but in the concreteness of society, in its history, its tradition, its customs.

The 20th century Constitution – this renewed and more aware constitutional lawfulness, our current complex lawfulness that across the 20th century, the century of post-modernity, led us stoutly toward the uncharted territories of the future – has the gift of not expressing museum-like geometries, nor unsatisfactory mythologies, but rather a full historicity of law, finally enabling the harmonisation between society and the juristic order, that harmonisation that modernity was not successful in achieving, and which it probably did not seek.

Allow me, in conclusion, to add that a precious glue of the growing (yet not easy) coherence between constitutional values and legal commands was offered, is offered and shall be offered by an institution that is central to the heart of the State and of the Constitution of 1948, and to which I am proud to belong, the Constitutional Court, a veritable breathing organ of the Italian juristic body, a body devoted to civil rights on account of the citizen who finds therein protection of his fundamental freedom.

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[30] *Id.*

[31] G. La Pira, *La casa comune - Una costituzione per l'uomo* (U. De Siervo ed., Cultura 1979), at 152.