ARTICLES

THE CONSTITUTION YESTERDAY AND TODAY

Valerio Onida *

TABLE OF CONTENTS:

1. Towards the "de-provincialisation" of the debate on the Constitution.

Sixty years after it came into force, the historical and legal debate on the roots, meaning and perspectives of the republican Constitution should be liberated once and for all from the limitations and sometimes stereotypes into which it has long been constrained. Examples are the affirmation of a genetic link between the Constitution and the Resistance, and the war of liberation from Nazi-Fascism, or the interpretation of the constituent process as the result of the coming together, or compromise between the major political forces making up the Constituent Assembly, and between the various and partially opposing ideologies they stood for. The studies and controversies on the continuity or discontinuity of the institutional order of the Italian State from pre-fascism to fascism, and from fascism to republicanism, and a consideration of the links between the powers established by the Constitution and the current configuration of the Italian political system, with the profound

* Professor emeritus, University of Milan, Italy.

changes that have befallen it over the last few decades are all certainly historically based keys to an understanding of the constitutional events of the Italian State, but they are nevertheless partial and insufficient.

Up to now, in other words, the Constitution has appeared, and has been treated above all, as the expression of a political pact between specific national forces, as an instrument of guaranty or an obstacle to determined political agendas, or else as a basis for negotiation or currency of exchange for future pacts (the "reforms" that make up much of the debate). In any case this has been done according to a wholly "Italian", i.e, an autarchic and somewhat homespun, even contingent, interpretation of the constitutional events.

Perhaps the time has come for a more detached vision, where the value and the scope of the Constitution can, and must, be appreciated beyond, and, in a sense, independently of the characteristics of our changing political system and the specific problems and agendas that it expresses.

Perhaps the clearest expression of this need to "deprovincialise" the debate on the Constitution can be found in the words of an illustrious member of the constituent assembly and protagonist of the constituent phase, one who would also be a key figure in the political, cultural, even spiritual life of our time, Giuseppe Dossetti. Reflecting on the "deeper root" of the Constitution, Dossetti observed:

"Some think that the Constitution is a spiny flower growing almost by chance in a barren land of post-war breakup and partisan resentment about the past. Others believe that it grew from an anti-fascist ideology to all intents and purposes cultivated by certain minorities who had largely lived in exile during the fascist years. Yet others - like a fair number of its current supporters - hark back to the resistance, through which Italy perhaps regained her honour and in some way found herself in tune with a certain kind of international culture."

All these opinions, in Dossetti's words, are "either wrong or insufficient", because in reality "the Italian Constitution was born from and inspired, more so than very few Constitutions, by a great global reality, i.e., the six years of the Second World War": this "enormous event that no man alive today or even simply born

today, can and will be able to set aside or diminish, whatever his opinion of it and from whatever perspective he looks at it".

And he concluded that: "… the Italian Constitution of 1948 can doubtlessly be said to have been forged from this burning and universal crucible, rather than from the events of Italian fascism and post-fascism. Rather than that of the brusque confrontation of three dated ideologies, it bears the hallmark of a universal and, in a certain sense, trans-temporal spirit" [1].

2. The "internationalisation" of constitutional law.

Contemporary constitutionalism is characterised, as is widely known, by "a universalistic" vocation, and in this also lies its root, which we could define as "religious" or "humanistic", i.e., tied in with the great spiritual visions, which we should not be afraid to define in fact as religious, worldly and human. Its fundamental statements are rooted in this terrain: all human beings, wherever they live, and however they are organized into societies, are equally endowed with dignity and "inalienable" rights, as well as being burdened with social duties. The basis and the justification of the exercise of authority in political society lie outside it and the interests of those who exercise it, i.e., in the protection and the promotion of this "order". The choices it can make respecting this order are based on collective consent.

It is true, however, that historically, the principles of constitutionalism developed over a long time in environments and legal systems of a largely national character (not untouched by the idea that every nation, every People, enjoys the right to self-determination and organisation, and therefore the right to have its own political order of State). In this context, the founding principles of international relationships and international law itself were particularly rooted in a number of specific considerations: the independence of all States from others (sovereignty-originality), the contractual character of mutual relations (pacta sunt servanda), and above all, the prevalence, in the case of conflict, of their respective use of force (war as the last resort in the solution of controversy). The principles of

[1] G. Dossetti, *Le radici della Costituzione* (conference held at the Abbazia di Monteveglio in the evening of 16th September 1994), in A. Gargano (ed.), *I valori della Costituzione* (1995).

constitutionalism thus developed largely from a prospective of national history, of which the various wars of independence and the respective military victories (or defeats) constituted determining stages. The first "world-wide" war can be said to have been the last war between Nations, or for Nations, and in fact its most significant result was the dissolution of two multinational empires which had existed until that time in Europe.

From this point of view, the Second World War represents a fundamental turning point in history. If World War I was the last and most tragic episode in the European conflict between powers represented by orders based on nationalities and their respective interests, World War II marks the ultimate conflict between democracies, i.e., between political regimes founded on the principles of constitutionalism emerging at the end of the eighteenth century, and authoritarian regimes which, beyond their specific national interests (which were placed on the same level, or at least with equal legitimacy, as the national interests of the democratic States), aimed to create a new order, and explicitly rejected the theoretical and practical foundations of constitutionalism.

These nations turned their backs on their own origins in liberal revolutions and the relative ideals of freedom, equality, and democracy, whereas the regime which came to power in the Soviet revolution did not, in theory, disown these principles, rather it claimed to carry out their perfection, even if in reality, it ended up distorting them.

The outcome of the conflict marks the global level of affirmation, even if only in ideal terms, of the principles of constitutionalism as not being the province of one People or another, or a specific geopolitical area, but as potentially universal. An affirmation that began to come to fruition with the institution, in 1945, of the United Nations Organisation, whose Charter refers to those principles, and especially with the approval by the UN Assembly, on 10 December 1948, of the Universal Declaration of Human Rights. What until then had appeared historically only as principles peculiar to the political culture of some western populations, some of which were, moreover, directly involved in colonial policies in other continents, was transformed and extended so far as to represent, at least in spe, a common human heritage. The slow, and even conflicting, pathway towards the

doctrine and practice of universal human rights has since then represented the true bedrock for the development of constitutionalism, and expresses its universal dimension in practical terms.

We cannot forget how this historical affirmation came into being. The aspiration of the Nazi-Fascist regimes to create a "new order of tyranny" was successfully opposed by what President Roosevelt, in his celebrated speech of the "four freedoms" [2], addressed to the US Congress on 6 January 1941 (before the United States joined the war), called the "the greater conception - the moral order". It expressed, in antithesis to "the so-called new order of tyranny", a vision - i.e. that of the four freedoms - meant to constitute "a definite basis for a kind of world attainable in our own time and generation".

It is interesting to recall how the speech, famous especially for the short passage on the "four freedoms", was principally devoted to sustaining the need for the United States to oppose "any attempt to lock us in behind a Chinese wall while the procession of civilisation went past", i.e. the temptation to adopt isolationist policies, the knowledge that "enduring peace cannot be bought at the cost of other peoples' freedom", so it was a need to strengthen the free world in the war against dictatorships. It was necessary, in such a context, to increase arms production to supply to the friendly countries, but also, since men "do not fight by armaments alone", to strengthen the "unshakable belief in the manner of life" that America was defending", because the action called for "cannot be based on a disregard of all the things worth fighting for"; without, moreover, ceasing to think of the "social and economic problems which are the root cause of the social revolution which is today a supreme factor in the world", and calling upon the citizens to put "patriotism ahead pocketbooks".

This historical document, which deserves to be known and remembered in its entirety as one of the founding documents of contemporary constitutionalism, expressed anything but appeasement or surrender in the face of the adversary of the day. Rather it expressed the full awareness that beyond the war to be won, it was necessary to assert faith in a safer world founded on

[2] F. D. Roosevelt, *The four freedoms* (speech delivered the 6 January 1941), in www.americanrethoric.com

the four freedoms - of expression, worship, freedom from want, and fear "everywhere in the world".

This is the birth certificate of the new "international" constitutionalism.

The Italian Constitution came into being in this historical climate, and totally expresses the spirit of the new international constitutionalism. Article 11, repudiating war and accepting the "limitations of sovereignty necessary to guarantee peace and justice among Nations", along with the internationalist clause of article 10, whereby the "Italian legal system complies with the generally recognized norms of international law", represented and represents the affirmation of this characteristic of the Constitution.

This was also the basis of Italy's long journey made with the creation and development of the institutions of the European community and the European Union. Today, we rightly observe the difficulties and uncertainties of the path towards integration, the frequent absence of shared attitudes and common initiatives by the Member States in the domain of international policy, as well as the fears and resistance which emerged upon the failure to ratify the treaty containing the European Constitution. We cannot however underrate the enormous progress made since the end of the Second World War, which once more saw our continent become a theatre of conflict, considering the immense historical significance of the physical disappearance of those frontiers that for centuries had been the locus and symbol of division and contrast, and the fulfilment of the prophetic intuition of the fathers of Europe, who wanted - as Robert Schuman wrote in the celebrated "Declaration" of 9th May 1950 - in setting up a process of integration, to make another war in the same region "not only unthinkable, but materially impossible".

In order to join in the several stages of the integration process, there was no need, unlike in other States, to insert a specific "European clause" into the Italian Constitution to justify constitutionally the acceptance of the internal effectiveness of the Community order, because our "European clause" (and not only that) was already in place in article 11, as the Constitutional Court has recognised since the nineteen-sixties (cf. sentences n. 14/1964, n. 98/1965, n. 183/1973), achieving in 1984 (with sentence n. 170) full acceptance not only of the supremacy of Community law, but also its immediate effectiveness at domestic level, substantially

supralegislative and constitutional, with the sole limit of the supreme principles of the constitutional order. This jurisprudence expresses far more than a simple accommodation of the relationships between the two orders. It substantially admits that European law operates at the same level as the Constitution, providing the opportunity to integrate it using community principles, which in turn incorporate the common principles of the constitutional laws of the Member States in a circular process whereby constitutional systems like ours "breathe" through connections with constitutional law produced at other national and supranational levels.

From many quarters there has been talk of the Constitution being superseded by European law, in particular with regard to the so-called Economic Constitution. In reality it is not a question of superseding, but of the openness of the constitutional fabric to these supranational contributions, which do not contradict, but integrate the Constitution, using the logic that I have called a logic of the internationalisation of constitutionalism.

In the same way, the internationalisation clauses of the Constitution wholly contain the other, and in some way, even more significant, integration of the constitutional fabric consisting in the effects produced by the European Convention on Human Rights [3], which translates and guarantees, in the context of a wider Europe, the rights enunciated in the Universal Declaration, as well as in the international Covenants on civil and political rights and on economic and social rights [4], also originating from the Universal Declaration, and in the other great multilateral agreements, examples being the prevention and the repression of genocide [5], and torture [6].

---

[3] European Convention for the protection of Human Rights and Fundamental Freedoms, Rome, 4 November, 1950

[4] UN International Covenant on civil and political rights, New York, 16 December 1966, entered into force the 23 March 1976; UN International Covenant on social, economic and cultural rights, New York, 16 December 1966, entered into force the 3 January 1976.

[5] Convention on prevention and repression of the crime of genocide, adopted by the General Assembly of UN, 9 December 1948

[6] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, entered into force the 26 June 1987

The European Convention on Human Rights (ECHR) is especially significant for us, as it does not limit itself to imposing obligations on the signatory States, but institutes a new jurisdiction of a supranational type, the European Court of Human Rights in Strasbourg. Through this, we have witnessed the remarkable development of the case law of the European Court since additional Protocol n. 11 introduced individual applications concerning the violation of fundamental rights [7]. This was in 1998 (significantly, the same year that the Convention achieved legislative and, to some extent, supralegislative effectiveness in Great Britain with the Human Rights Act [8], so giving the first "Constitutional" State, despite its lack of a written constitution, an express catalogue of rights). Since then, the Convention has seen countless new practical applications thanks to a constantly growing Strasbourg case law (with such an increase in the number of appeals as to risk jeopardising its efficiency) and it is increasingly incisive not only in censuring individual concrete cases of rights violations, but also in indicating, when necessary, "the structural" causes, depending on those characteristics of the domestic order of the Member State which lead to recurrence, and by indicating in increasing detail the legislative or other measures which that State has to adopt to implement the terms of the pronouncement. In this way, Strasbourg case law not only influences domestic practice, but domestic legislation itself, which must change in order to meet the requirement to avoid violations and provide effective remedies able to correct them or repair them, and affects the associated domestic case law.

The ECHR became part of the Italian system in 1955, ratified and enacted with law n. 848, but for many years it seemed that its practical scope was relatively secondary. For questions of fundamental rights, the guarantees deriving from the Constitution, applied by the Constitutional Court seemed to have priority, through the judgment on laws promoted incidentally by the judges in the course of normal judgments. For a long time even the Constitutional Court denied to the norms of the Convention any "rank", and thus any effectiveness, different from that of the

[7] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force the 1st November 1998

[8] Human Rights Act, 1998

enactment [9] (one decision [10], hinting at a different formulation, remained isolated). And yet the Court did not fail to make frequent reference to the Convention, also in answer to the solicitations of a number of judges, in order to emphasise the validity of the conclusions that it drew from the constitutional norms on questions of rights in view of the convergence of the two orders of guarantees.

Recently however there have been some innovations on this front. Firstly, the constitutional reform of article 111, approved by constitutional law n. 2 of 1999, giving greater impact to an interpretation of the Constitution that offered more guarantees on the matter of criminal trials. This reform reproduced the dispositions of the Convention almost to the letter, thus giving them formal constitutional effectiveness. And even more so, later, the reform brought about by constitutional law n. 3 of 2001, inserting in the new article 117 of the Constitution the necessity for laws (not only at regional level, but also at State level) to respect international obligations, provided a new basis for making the norms of the Convention a real parameter in assessing the constitutionality of the laws.

For a long time, academics had been pointing out the wisdom of relating the norms of the Conventions to the sphere of objective constitutional law, in line with the aforementioned "internationalisation" of constitutional law. This would include European and other Conventions, which stand for universal values at supranational level on matters of fundamental rights. And in reality, it would be neither difficult neither illogical to treat them not merely on a par with every other international treaty, but as "generally recognized norms of international law", immediately effective, according to article 10 of the Constitution, at constitutional level. Despite their origin as treaties, in fact, it cannot be denied that while being meant to give formal legal value to the rights proclaimed in the Universal Declaration, they do not express the mere will of the signatory States, rather the endorsement of ineludible and shared requirements today

[9] See e.g. decision 22 December 1980, No. 188.

[10] Decision 19 January 1993, No. 10 (par. 2). The Court stated that the norms of the Convention derived from "a source which can be referred to an atypical competence and therefore they cannot be abrogated or modified by an ordinary law".

perceived internationally. These are the norms which make up the new "general" international law, at constitutional level [11].

In two recent judgments (n. 348 and n. 349 of 2007 [12]) the Constitutional Court endorsed a similar, if not in fact identical, result, taking the simplest path, (opening the door to further problems, because of the reference to all international obligations) i.e., applying the new article 117 of the Constitution. In any case, what counts more is the result. Today therefore the fundamental rights and their minimum content are aligned expressly and univocally, alongside the protection of constitutional norms, with that of the European Convention and the case law of the European Court. Thus, the Constitution of 1948, with its internationalist openness, not only is not contradicted, but is strengthened and enriched, considering that it is always possible to add, when necessary, even higher standards to the guarantee of minimum European standards, if they are not in conflict, inferred from the Constitution itself and applied through domestic case law.

Jurists question and discuss the perspectives and the risks of conflict between different sets of case law in this system for protecting rights, described as multilevel. But, beyond the possible individual problems or divergences, the fundamental point that emerges is precisely the internationalisation of the standard of protection of the rights, and therefore the integration of the national and international constitutional fabric, at least as far as rights are concerned, in line with their original universalistic vocation, but where the voice of the Constitutions and the national case laws do not disappear, because they too are part of the choir.

In today's globalised world, this is an important step ahead. Those called upon to interpret cannot remain bound to sterile "originalist" criteria for the interpretation of the national Constitutions. The language of rights is increasingly becoming a common language. The most detailed and best structured Bill of Rights is perhaps that of the 1996 South African Constitution. It is

[11] For some mention in the sense that even conventional norms on fundamental rights can be considered as generally recognized norms of international law, see, in the jurisprudence of the Constitutional Court,, decision 30 July 2008, No. 306 (par. 10) and decision 26 November 2009, No. 311 (par. 6).

[12] Decision 24 October 2007, No. 348 and decision 24 October 2007, No. 349.

no accident that it requires judges, in interpreting it, also to make reference to international law and that of other States.

There is a position strongly supported by some jurists in America which would not meet with approval in Italy or Europe. These jurists hold that in interpreting the American Constitution, it would not be legitimate to refer to the laws and jurisprudence of other countries, forgetting that, if the rights guaranteed are those common to all human beings, which the very Founding Fathers (in the famous incipit to the Declaration of Independence of 1776) asserted as incontestable and "self-evident" truth, as all human beings are considered to be created equal and endowed by their Creator with inalienable rights, one cannot imagine nor justify any legal nationalism from the point of view of the fundamental rights.

The Courts too, when they are called upon to defend human rights, are generally induced to have less care for the contingent requirements of international politics, which even they are not and cannot be insensitive towards. To cite but two examples, thinking of the Italian Constitutional Court, one recalls the firmness with which it fully applied article 27 of the Constitution abolishing the death penalty, declaring the constitutional illegitimacy of norms, even those applying internationally accepted obligations, which allowed extradition towards countries that still allowed the death penalty for the crime ascribed to the person being extradited (first in judgment n. 54 of 1979 [13], and more recently in judgment n. 223 of 1996 [14], in which the United States government claimed that there were no grounds); or where it clarified that in the event that criminals are transferred to Italy to serve prison sentences, they will enjoy the same rights as Italian prisoners as far as execution of sentence is concerned (sentence n. 73/2001, Baraldini).

3. The Constitution and twentieth-century ideologies.

What is the relationship between the Italian Constitution and the great ideologies of the twentieth century? The question is all the more apposite in a time like the present, when the

[13] Decision 21 June 1979, No. 54.
[14] Decision 27 June 1996, No. 223.

ideologies that characterised the last century are widely being given up for dead.

Constitutions too are largely the products of "ideology", in the sense that they correspond to general views of the world and especially political and social organisation. In this sense, it is certainly possible to identify the ideologies that fuelled the history of constitutionalism. On the other hand, the twentieth century saw the temporary assertion in certain political realities of "unconstitutional" ideologies, insofar as the authoritarian regimes were based on theoretical premises and not only practical considerations of rejecting the essential postulates of constitutionalism (in fact they generally rejected even the use of a "Constitution", preferring to entrust their development to the free desire to pursue their declared ends without legal obstacles). The ultimate defeat of these regimes at the end of World War II marked, as recalled above, the affirmation of constitutionalism at international level. More recently, in Europe and elsewhere, some "openly unconstitutional" regimes which survived the war have come to an end, and after the dissolution of the Soviet bloc and the transition of the former European communist states towards liberal-democratic systems, the so-called popular democracy experiment has also seen its day.

In this context, constitutionalism can today be considered as a kind of "good remnant" of the ideologies from which it has developed, cleansed of the contradictions, deviations and excesses which history has produced, so becoming a "remnant" which has been in some sense "de-ideologised".

The contradictions between theory and practice, and the deviation of political regimes resulting from ideological movements towards outcomes contrary to their very premises, or at any rate unacceptable, are not rare in history, where the facts often turn out to be very different from the ideas. The Constitution of the United States cohabited for a hundred years with slavery in some States. After the liberal revolution and the proclamation of the rights of man in France in 1789, the terror followed only a few years later (the revolution that devoured itself). Even the more advanced instances of European constitutionalism in the nineteenth century and between the two Wars cohabited with nationalistic policies and the expansion of colonial domination in Africa and Asia. Under the communist regimes, the demand to

achieve social and economic equality - this too being part of the ideological heritage of constitutionalism - at the price of civil liberties and political pluralism, led to the affirmation of illiberal and not democratic regimes.

It is well known that the Italian Constituent Assembly was a forum for the comparison and dialogue of positions anxious to affirm the theoretical bases for pluralistic democratic constitutionalism on the one hand, and positions more preoccupied with asserting practical requirements on the other, leaving ideological considerations in the background. One recalls first and foremost the speech of Giorgio La Pira, with his criticism both of statist control of a Hegelian stamp, which the authoritarian regimes (all within the State, nothing outside the State) had pursued, and what he called the Constitution of 1789, inspired by proto-liberal individualism, which he judged to be the fulfilment of Rousseau's theory of the social contract. Consequently he affirmed a personalistic and pluralistic conception (with the acknowledgement not only of individual rights, but also of the intermediate communities and their rights) as a theoretical basis for the new constitutional order [15]. The second position is represented by the speech of La Pira's contemporary, Palmiro Togliatti, denouncing the limits and responsibilities of the pre-Fascist political class, affirming that his group aspired to "a Constitution that set aside ideologies", and therefore would not be an "ideological formulation" but a "concrete political formulation". He also stated that the Assembly had also seen the confluence of the "human and social solidarism" of the left and the "solidarism of a different kind of ideological inspiration, but which arrived nonetheless, through the formulation and concrete solution of different aspects of the constitutional problem, at similar results to those to which his party [arrived]". It was a convergence to which, Togliatti added, the conception, sustained by La Pira, "of the dignity of the human person as the foundation for the rights of man and the citizen" could not be considered an obstacle, but actually constituted "another point of convergence" between the left and the "Christian solidaristic current" [16].

[15] *La Costituzione della Repubblica nei lavori preparatori dell'Assemblea Costituente*, seduta pomeridiana dell'11 marzo 1947.

[16] *La Costituzione della Repubblica nei lavori preparatori dell'Assemblea Costituente,* cit. at 15

In reality, the meeting point, the common ground for the agreement that brought the Constitution into being, in total contrast to the previous authoritarian experience, was nothing more than the acceptance of an ideal formulation that, embracing the premises and the essential postulates of the liberal democratic and social ideologies, avoided some of the consequences of extreme and more "ideological" developments. Consequently, republican Italy found its place within the greater current of contemporary constitutionalism. The prevailing positions were therefore "non-totalising". Alcide De Gasperi, in setting out the Christian Democratic programme in early 1944, argued with the "total fundamentalism of the Marxist parties – upon which, however, they did not base their work in the Constituent Assembly – but also rejected the suggestion of a "Christian State", asserting that "our political movement is, however, aware of its limits", that "the State is the political organisation of society, but not all of society", and that his party did not present itself "as the integralist promoter of a universal palingenesis, but as the bearer of a specific political responsibility, certainly inspired by our ideal agenda, conditioned rather by the shared environment in which it must be put into effect" [17]. As for the organisation of powers, what prevailed was no "Jacobin" conception of democracy, wholly focused on the power of the people exercised in Parliament, but a more balanced vision that reflected the historical experience of European constitutionalism, and that grasped, among other things, the importance of guarantees connected with the creation of institutions of constitutional justice. This is perhaps, along with openness to internationalism, the greatest and most incisive development in constitutionalism after the second world war. Its ample dissemination today makes a sharp contrast with the diffidence in which it was held even by some members of the Constituent Assembly, for the sake of attachment to the extreme myth of the sovereignty of the people with no legal limits.

It may be an interesting aside to note that Togliatti's formulation, while being rich in historical awareness, turned out to be less forward looking or less "farsighted" than that of the Christian Democrats such as La Pira, who went so far as to

[17] See VV. AA., *Il programma della Democrazia Cristiana. Atti e Documenti della Democrazia Cristiana* 1943-1967 (1968).

appraise aspects of constitutional organisation such as, tellingly, the role of the Constitutional Court, the organisation of the judiciary, or the new rules on the fiduciary relationship between Parliament and Government.

If this is so, perhaps the cliché (while not being so far from the truth) of the Constitution as an encounter between the three ideologies, Liberal, Catholic-Democratic and Marxist, that relies on the dominant political forces in the Assembly and their ideal ancestries, might well be replaced by a consideration of the correspondence between the "strong core" of the ideas forming the basis of the Constitution and that "good remnant" of the afore-mentioned great eighteenth-to-twentieth-century ideologies.

Also from this point of view, the Constitution of the Republic has a "non-provincial" "spirit", and is part of a context that goes far beyond the experience of our country. It is not difficult to summarise the contents of the "strong nucleus" of ideas that constitute the common "heritage" of constitutionalism, i.e., the dignity to be recognised and safeguarded in every human being; the idea that the political organisation (the State) is for the person, and not vice-versa, and in Anglo-Saxon terms, respect for the rule of law; the existence of an intangible nucleus (inalienable not only by the State but also by the market) of individual freedoms, and of collective rights (of the social formations) that supplement them; the principle of equality understood as the prohibition of discrimination and as a fundamental canon for the adequacy of the legal treatment to the situation; the not only passive, but active task of the public powers to promote freedom and equality, and so a guaranteed nucleus of social rights; political power based on the consent and the participation of the citizens in the formation of the collective will, within constitutional limits; a "widespread" organisation of the powers to ensure balance and mutual control; a system of guarantees ensuring the rights of all and the effective respect of legal rules; the international and supranational projection of these principles in order to guarantee an international order not based on force but on the respect of rights.

It is very true that the formulation of these statements does not yet imply agreement on their practical scope, as there is obviously much to discuss concerning what human dignity is or which rights are inviolable, or again what relationships need to

exist among the various rights. And yet these are not empty statements, especially considering that they have been the basis for the potentially convergent jurisprudential tendencies of national and supranational Courts, which give historical tangibility to their content.

Jurists and philosophers will continue to discuss, and even argue, about the nature and basis of these principles, namely, whether they are to be considered the expression of a kind of new "natural law", or whether they are valid only as positive law, and on what basis. But what counts is to recognise the existence of this "common constitutional law", of this constitutional "common law". This is where the Constitution comes in, and it is in this light that is necessary to debate how to safeguard, extend and strengthen the effectiveness of this heritage, to make it ever more effective, to overcome its limits and contradictions, to fulfil it in the complex, incoherent and often dramatic context of national and world-wide events.

In a sense, the birth of the Constitution is similar to that, shortly after, of the Universal Declaration of Human Rights approved by the UN General Assembly of 10 December 1948 with the vote of 50 States out of the 58 then members of the organisation, and the 8 abstentions of the States of the Soviet bloc (which unlike our communist left did not approve the text, despite working on its production). The Declaration too was the fruit of an act of confidence in the existence of a common ground - that of the universal human rights - for the various cultures and traditions and the various regimes: that common ground that President Roosevelt had invoked almost eight years before when he proclaimed his intention to construct a world in which the "four freedoms" would be asserted for all, everywhere in the world [18]. And it could be said that, like the Italian Constitution, the seed sown then, with the search for, and the acceptance of, a common ground, even in a climate of strong political opposition (the Cold War, that in Italy meant a confrontation between the forces of Government and the opposition of the left) has borne fruit over time. As our Constitution has proved to be an anchor shared by the national community, although its more ambitious aims are still far from being fully realised (i.e. the "programme" of article 3,

[18] F. D. Roosevelt, *The four freedoms*, cit. at 2.

second paragraph [19]), in the same way, the Universal Declaration has represented, and can represent, for the world a common reference for the growth of the culture and the practice of human rights, in spite of the continued and widespread conflicts and practice in sharp contrast with the proclamations. It has been used in the texts of Conventions - regional ones such as the European Convention of 1950 and general ones such as the New York Covenants of 1966 - thus constituting the basis for the construction of the rich case law of Courts of Human Rights, especially Strasbourg, that today regards and involves the 47 States of the Council of Europe, including all the former Soviet bloc.

4. Risks facing the constitutional heritage: the equal enjoyment of rights.

What are the greatest risks threatening the survival and the development of constitutionalism in Italy and the world today? I do not refer to threats coming from organisations and actions attacking the material security of our societies, but the risk of tarnishing, in our societies, and Italy in particular, confidence in the permanent validity of the patrimony of principles and values of which constitutionalism is the expression, together with the loss of conviction of the need to safeguard it and promote its fulfilment.

The first danger, albeit for now more in intellectual debate than in practice and case law, is the spread of theoretical and political positions that explicitly question the fundamental elements of the essential patrimony of constitutionalism.

As for civil liberties, tensions connected to increasing mass migration, the problems arising from today's multicultural and multiethnic societies, the spectre of "culture clash", all create reactions of fear and closure. As an answer to the disappearance or relaxing of "external" borders between States, through the breathtaking increase, thanks to the new technology, in mobility and communications, and the various phenomena of globalisation, there almost seems to be a common construction or reconstruction

[19] "… It is the duty of the Republic to remove the obstacles of economic and social nature which, by limiting in fact the freedom and equality of citizen, prevent full development of human persons and the participation of all the workers in the political, economic and social organization of the Country …".

of "internal" borders, assertions of identity and particularity, fear and diffidence towards the "different", along with anxieties about "security" that tend to lead to exceptions to the universal protection of fundamental civil rights, such as the prohibition of torture or the right to due process, and therefore attitudes and measures contrasting with constitutional principles, in the name of the requirement to fight new dangers facing society.

Even religions, which, having found peace after the painful conquest of secularity at least in our western world, seemed to have become stable factors of understanding rather than division and conflict, are again showing their teeth and are being used as arms in a confrontation between cultures. And so much so as to induce some (e.g., France with its law on the veil) to ban religious symbols from public spaces, not out of respect for diversity, but for fear that they might heighten conflict, while inducing others (i.e., Italy with its crucifixes in schools and courts of justice) to use them as new "civil" symbols. And at times, all this leads, also here, to the reassessment of points that we believed solid, such as freedom of worship and equality without religious distinction.

As for the economic and social orders, the controversy over the ideologies of the twentieth century, and in Italy over the political forces that led the country to embrace western and European constitutionalism, also threatens to give rise to regressive interpretations of the premises of its wealth of ideas.

The new global economy does not seem to have any other objective than competitive growth in consumption and personal wealth. Economic inequalities are increasing rather than disappearing. Criticism of the "State as entrepreneur" and the inefficiencies of the public sector becomes criticism of the State per se. In the name of market freedom and economic competition for wealth, words such as "solidarity" or "justice" seem to disappear from the political dictionary (but not from the constitutional lexicon, which puts the "imperative duties" of political, economic and social solidarity together with the inviolable rights [20]).

We seem to be witnessing the emergence of an originalist and fundamentalist interpretation of liberal principles, that fails to

[20] Article 2 of the Italian Constitution: "The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed, and requires the fulfillment of the imperative duties of political, economic and social solidarity".

recognise the constitutional rank of social rights and seeks a "minimum" State, which leaves the way open to the spontaneous forces, essentially of the economy, i.e. the market, and predicates for politics a role of merely defending the minimum material conditions for cohabitation (the classical functions of "order"), and not the promotion of freedom, equality and justice.

All this touches essential aspects of the constitutionalist heritage. Certain charges that our Constitution is too "social" and not liberal enough are, in reality, vitiated by "a domestic" point of view, and fail to take into consideration that the constitutional principles of the Welfare State or the "social market economy" are clearly not a peculiar characteristic of the Italian Constitution, but are intrinsic and equally essential to contemporary constitutionalism everywhere.

By placing the "liberal freedoms" of expression and worship and "freedom from want" on the same level in the aforementioned speech on the "four freedoms" of 1941, Roosevelt not only lists this third freedom, translated into world terms, as being the need for "economic understandings which will secure to every nation a healthy peacetime life for its inhabitants - everywhere in the world", but sets among the foundations of a "healthy and strong democracy" objectives such as the "equality of opportunity for youth and for others", "jobs for those who can work", "security for those who need it", "the ending of special privilege for the few", "the preservation of civil liberties for all", "the enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living" - drawing the relevant consequences in terms of social and employment policy [21].

On this side of the Atlantic, just to cite one example, the current German and French Constitutions expressly classify their respective Republics as "social" [22] (and our definition of a Republic "founded on work" [23] is no different in meaning). The right to work and rights at work and to social security are expressly and amply recalled in the preamble to the French Constitution of 1946 which "confirms and supplements" the

[21] F. D. Roosevelt, *The four freedoms*, cit. at 2

[22] See article 20, par. 1, of the German Fundamental Law, 1949 and article 1, par. 1, of the French Constitution, 1958

[23] See article 1, par. 1, of the Italian Constitution: "Italy is a Democratic Republic, founded on work"

declaration of 1789, and to which, according to the preamble of the Constitution of 1958, the "French people solemnly proclaim their fidelity" [24] (it would be no objection the fact that this is only a preamble, considering that it has long been recognised and used in the case law of the Conseil Constitutionnel as part of the "bloc de constitutionnalité" used as a yardstick for the constitutional legitimacy of laws [25]). Clauses stating that "property imposes obligations", "its use must at the same time serve the common good", and that indemnification in the event of expropriation "must be established by means of a fair balancing of the interests of society as a whole and the interests of the parties" are not found in our Constitution and the case law that applies it, but in the Grundgesetz of the Federal Republic of Germany [26] .

In more general terms, it is worth remembering that the right of every individual to social security, the attainment of "economic, social and cultural rights indispensable for his dignity and the free development of his personality", the right to work, the free choice of employment and to "satisfactory working conditions and protection against unemployment", "to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented if necessary by other means of social protection", to "a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services", to education, as well as the right "to participate in scientific advancement and its benefits", are proclaimed not in some charter of the so-called real socialism, but in the Universal Declaration of Human Rights (articles 22, 23, 25, 26, 27), and are referred to specifically in the New York International Covenant on Economic, Social and Cultural Rights [27] signed in 1966 (articles 6-15).

Neither do the European Convention, as yet without an explicit catalogue of social rights, and the relevant jurisprudence of the Strasbourg Court, ignore requests for protection of these rights. "Democratic Society" - to which the European Convention refers in few words as a parameter for commensuration of the sole

[24] See Preamble of the French Constitution, 1958.
[25] See e.g. Conseil Constitutionnel,, 27 December 1973; 16 January 1982.
[26] See Article 14 of the German Fundamental Law 1949.
[27] See *supra*, note 12

permissible "state interference" in the sphere of the individual rights [28] - is not only a political order characterised by elective mechanisms for the formation of the collective will, but a society that guarantees civil and social rights and the fundamental equality of individuals in the enjoyment of the same.

The historical communist regimes of Soviet origin sacrificed respect for freedom and pluralism, and thus the fundamental human rights, on the altar of an idea of equality (in any case not achieved). But equality is rightfully a full part of the historical patrimony of constitutionalism, and, naturally, not only formal equality before the law, understood as the prohibition of legally unjustifiable discrimination, but also equality in the effective enjoyment of the fundamental rights. To remove it from among the basic principles of the constitutional order would mean betraying the entire history of constitutionalism.

5. The depreciation of democracy.

A second risk now concerns the mechanisms of political consent and the exercise of power. We can observe the increasing complexity of the problems that modern societies have to face, the interweaving and playing off of individual and group interests, decision-making issues and difficulties in governing. In face of these, are emerging again on a large scale, particularly in Italy, distrust of the mechanisms of participatory and deliberative democracy, suspicion of, or aversion to, politics in se, the split or contrast between the "real country" and the "legal country", which the collective movements and the mass parties of the twentieth century tended or aspired to overcome, presenting themselves as tools for the mediation and transmission of the social demand vis-à-vis the political institutions. In order to "decide", and to "govern", it seems there is a willingness to "oversimplify" the mechanisms for making and transmitting consensus and forging the political will.

This, perhaps, is the strongest and most common temptation facing the many who think of constitutional reforms of the order of the State as a remedy to the ills and the problems of

[28] See Articles 8, par. 2, 9, par. 2, 10, par. 2, 11, par. 2, European Convention on Human Rights (supra, note 3)

the country. The danger is that this would not limit us to adopting corrective measures to the form of government and the regulation of electoral representation (beyond those already envisaged, as it is not true that the Constitution completely disregards the need to prevent the "degeneration of parliamentarism", according to the celebrated Perassi agendum to the Costituent Assembly [29]), and improvements in the rules governing the operation of the institutions. There is the risk of compromising respect for the balance of powers, in a context where democratic participation be strengthened and not asphyxiated, as the Republican Constitution postulates, laying it foundations. Also in this, the very principles underlying constitutionalism are at risk.

In a country like Italy, summing the historical defects of a social fabric largely lacking in instruments able to maintain a high level of independence from partisan conditioning (for example the world of communication, or the traditional "hold" of political parties on the administration) and those of a widespread "anti-political" culture as a rejection of all that pertains to the preservation and the promotion of the requirements of society as a whole (from the administration of the public goods to the fiscal loyalty of the contributors), the watchword "governability" risks becoming the passe-partout for solutions not leading to institutional efficiency, but to the extreme personalisation of power and impoverishment of democracy.

Access to political power becomes, for those who pursue it, an objective reached above all by satisfying the more egoistic individual and group expectations, taking on board uncritically and irresponsibly feeding the humour and the fears that emerge in social environments bereft of idealistic stimuli and even mere rational awareness (the growing "spreading populism"). It becomes an exercise split between proclamations "for show" - which the voter-spectators attend, noisily manifesting more or less "support" for their team, like a "claque" invariably accompanying the performance - and efficacious ability to work the legal and

[29] See the Agendum (*ordine del giorno*) presented by the Member of the Constituent Assembly Tommaso Perassi the 4 September 1946. In the agendum Perassi advocated the adoption of the parliamentary system, but "with constitutional arrangements being adequate to safeguard the stability requirements of the Government and to avoid the distortions of parliamentarism".

institutional maze where the ultimate purpose of the "general wellbeing" may well be lost.

It is not all like this nor only this. But the danger to contend with today is the depreciation of constitutional culture - which means not only acquaintance with and respect of the Constitution and its principles, but above all an idea of politics that can translate into a rule for political action, by electors and elected alike, by private citizens and those in public office, to be put into practice "with discipline and honour", as well as observing "the Constitution and the laws" (article 54 of the Constitution). Safeguarding society from these dangers is an essential part of the "constitutional patriotism" that is required of us.