

## THE ITALIAN CONSTITUTION FROM THE ORIGINS TO THE ECONOMIC CRISIS\*

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1.- I am honored to be in Bahrain, in a country with so ancient cultural traditions, a strong idea of future, a country well integrated and well accepted in the International community. I am honoured for giving a lecture on the Italian Constitution at the Royal University for Women too, at a young and dynamic Faculty of law, I am sure that our dialogue will be helpful for a mutual cultural understanding.

I would be proud to give you just some key concepts to let you approach to Italian and European public law. At the same time, I am concerned for the difficulty and the responsibility of such task, departing from the choice among a wide range of potential issues. I will give a quick overview on a particular Act called Constitution, on the Italian Constitution, written in 1947 by the people, as integrated in European contemporary constitutionalism. I will focus on some key words such as people sovereignty and the Constitution's role in the legal system.

However, a choice is needed, at least, among issues concerning, respectively, the First Part of the Constitution, providing general principles and citizens fundamental rights and duties, and the Second Part, regarding the Republic's organization, in spite of their being equally important for the polity and mutually connected. Nonetheless, the former is generally deemed as depicting the core of Italian constitutionalism, thus affording a better understanding of its features. A further criterion of choice might consist in the different challenges which the two Parts are recently meeting. Contrary to the Second, affected by endless political debates, reform bills or controversial reforms the First Part is not officially challenged. Constitutional reform is in fact considered necessary for enhancing the functioning of public powers, without subverting principles.

Beyond conventional political discourses, however, those principles might be affected from a more subtle, and more telling, crisis than that concerning organization. Hence derives another reason for focusing on the First Part, particularly for paying attention to its effectiveness on legal grounds and, on the other hand, to its perception from the people.

I would mix ancient and new issues, I will put on the table some open questions. At the end of this lecture I would say something about the relation between Italian and European constitutionalism and financial crisis in the last decade. I want to make clear too that I will be an Italian Constitution's advocate, but a constitutionalist has to underline lights and shadows, integrations potentially harmful.

2.- In 1945 the Italian people was confronted with the moral and institutional disaster following the Second World War and the fascist regime's demise. The need for a new Constitution was widespread, and supported by the political parties which had struggled against fascism.

On the 2 June 1946, the Italian people decided through a referendum whether to maintain the Monarchy or to establish a Republic, and elected the members of the Constituent Assembly. The choice for the Republic obtained only a slight majority, but an overwhelming majority of the seats in the Constituent Assembly went to antifascist parties.

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At the beginning, these parties appeared deeply divided on principles not less than on the institutional framework. The Communist and the Socialist Party, representing together roughly 40% of the Assembly, were driven by the Marxist ideal of equality, requiring strong State intervention and nationalizations, and on institutional issues followed Rousseau's view, vesting the core of public power in a single assembly representing the people. Christian Democrats, provided with an equivalent numerical strength, were instead attached to the ideals of freedom and dignity and supported a parliament based on two chambers, representing respectively the political will of the people and professional categories. Nonetheless, accommodations of these competing views were found at the Constituent Assembly even after the breach of the governmental coalition due to the impact of the Cold War. The very politicians searching in the morning for a common understanding on principles and general rules would engage bitter political struggles in the afternoon.

Within a year and a half, a text was adopted which figures among the mature products of European constitutionalism and Italian culture.

But why parties restrained themselves from muddling constitutional work with contingent politics? Does this prove an 'heroic' attitude? The political élite of the Constituent Assembly was composed of thoughtful and cultured men, but not of heroes devoted to the common good. Rather than their subjective qualities, historical circumstances need thus to be taken into account.

The Constitution was not only the product of hard times, a genuine reaction to a moral disaster. It was also written in a vacuum. Contrary to Japan's and West Germany's constitution-making process, Western Allies refrained from intervening in the Italian one. On the other hand, the pre-fascist tradition appeared inadequate to the newly established democracy's challenges. Conversely, the major parties' legal and political cultures had grown outside, if not against, the old Italian State, and, at the same time, corresponded to fairly opposite ideologies, which was particularly troublesome given the beginning of the Cold War.

The Assembly's workings, therefore, proceeded under a thick veil of ignorance about the major parties respective intentions. But this forced them to leave aside their own immediate objectives, and to play a co-operative game focused on the Republic's future. In these exceptional circumstances, the Constitution's drafting became a unique opportunity for merging political positions on the ground of common principles.

The result is mirrored particularly in the First Part. Far from identifying rival ideologies, liberty and equality are mutually reconciled in light of Article 3's reference to the "human person's full development", requiring from the Republic "removal of economic and social obstacles", rather than a paternalistic role, towards such development. Civil, political, social and economic rights are accordingly recognized and granted. Particular attention is paid to the rights of the individual within communities such as families, schools, unions, parties, churches. Social, not less than political, pluralism becomes part of the constitutional landscape.

The question was fully debated of whether these matters, particularly social rights and pluralism, should be considered in a constitutional text. In spite of the option to recognize social rights in a Preamble given their non-justiciability, a huge majority of the Assembly was driven by the conviction that only a direct insertion of these rights within the text would bind the future legislature to enforce the respective provisions as well as those concerning civil and political rights. The choice for equating such rights was a crucial step for further developments of Italian law, and was also a premise for their consideration as indivisible rights, later recognized in the 1993 United Nations Declaration and in the 2000 Charter of European Citizens Fundamental Rights.

As for the Second Part, its main achievement consists in sharing public power both among diverse institutions at the central level - Parliament, Government, President of the Republic, Judiciary and Constitutional Court -, and among the State and local authorities. This articulation is more sophisticated than Montesquieu's separation of powers, reflecting not only the need for granting citizens liberties, but also a pluralistic view of democracy.

However, the Second Part's design is not without shadows. Contrary to those affecting the First, political arrangements tended here to safeguard the parties role and initiative, particularly with respect to the legislative-executive relationship. The Assembly rejected proposals to avoid governmental instability, putting some premises of the frequent recurring of cabinet crises in the Republic's experience. Mere political bargaining was also at the origins of Parliament's structuring into two Chambers elected by the people and entrusted with identical functions (legislation, giving confidence to Government, scrutiny of governmental activities), which appears an almost unique solution in comparative constitutional law.

3.- The Constitution's first years were hard and discouraging. Its legislative enforcement, whose terms were either fixed in the alleged Provisionary rules according to certain Titles, or otherwise to be intended as immediate, was unduly delayed by the centre-right coalition of the time with implausible pretexts. Against this attitude, called 'majority's obstructionism', the opposition attempted a difficult 'fight for the Constitution'.

On the other hand, ordinary judges denied the binding force of principles established in the First Part, which they deemed nothing more than a political document providing broadly framed objectives placed at Parliament's disposal. Accordingly, only Parliament, without being subjected to constitutional review, could change the legislation prior to the Constitution. The Constitution was not considered yet a 'rule of recognition' both because judges denied its rules of legally binding force and because of political resistance to constitutional enforcement.

In its first decision (no. 1/1956), the Constitutional Court affirmed that all constitutional provisions were endowed with legally binding force, and extended constitutional review to the laws enacted before 1948. Ordinary judges were thus implicitly invited to refer to the Court questions of constitutionality of the laws, irrespective of their date of approval. That decision, together with the subsequent case-law, succeeded in gradually changing the general attitude towards the Constitution. Since such process was driven from an independent institution as the Court, the 'fight for the Constitution' ended with the general acceptance from political parties of the Constitution as a rule of recognition for the whole legal order. In the following two decades, while the Court gradually struck down the legislation prior to the Constitution contrasting with constitutional principles granting civic liberties, Parliament enforced the Constitution on many respects, including provisions recognizing social rights.

The expansion of the constitutional dimension within public life was successful, to the point that fundamental rights enshrined in the Constitution marked a watershed in Italian history. But did these achievements result from the execution of a plan corresponding to the Framers will, as presupposed by the political culture prevailing in the Republic's first decades, or rather from largely unforeseeable processes?

4.- During the first period of the Republic, the Constitution was instead intended as standing at the top of a pyramid, dictating a plan of progressive social transformation which ordinary laws were expected to put into practice. The Constitution was intended as the engine of the legal system. It is worth reminding ourselves that an optimistic view of the future was then widely spread in liberal democracies, social progress being strictly connected with modernization of the economy, which, in turn, wasn't considered incompatible with an active role of the State.

These current ideas and practices coincided in Italy with the first enforcement of the Constitution, on the presumption that it could provide any changing in social and political life. The past and the future of the country seemed thus to be harmoniously connected.

This vision was shared from the centre-left coalition, leading government, with few interruptions, for thirty years (1963-1994). Meanwhile, these very parties concurred decisively in shaping the

memory of the country. In the public discourse, the wind had changed. During the Eighties, the mobilizing effects of the Constitution's enforcement ended with the approval of the laws deemed to put into practice the First Part's principles and with the passage of generations.

On the other hand, the increasing importance of the European Community and of a market-based economy, together with the emancipation of social groups from party ideologies, appeared the main factors of modernization. And, since these changes required well-functioning institutions, political discourses on the Constitution shifted from the great ends characterizing its First Part to the need for reforming the Republic's organization as provided in the Second.

In terms of constitutional history, these elements appear even more important than events occurring between 1992 and 1994, namely the discovery through judicial investigations of a huge political corruption, the following resignation of the majority's party leaders. Destruction of old parties was due to corruption in a wide range of meanings. Their cultural not less than political resistance in adjourning the democratic tradition to the new challenges occurring in society and at the institutional level was fatal to the survival of consolidated beliefs and assessments.

It is not a casualty that, when the media depicted the rise of the political system resulting from the 1994 elections as the advent of a 'Second Republic', as if it corresponded to the establishment of a new constitutional order, the formula obtained immediate success in the political and social system.

The question of why sons should maintain a Constitution written by their fathers goes back to the XVIII century's debates in the United States of America and France, receiving diverse answers according to various epochs and countries. At any rate, the term "fathers and sons" is referred in those debates to the people, rather than to its representatives, whereas in the Italian Republic parties entrenched themselves for decades behind the Constitution, with the effect that people got used to look at it through the parties intermediation. Nor the impressive Constitution's impact on the legal system, and on citizens rights particularly, was sufficiently considered in the public discourse.

Generally, people's attitude towards the Constitution was thus directly at stake. Parties reforming attitude was differentiated, they spoke different languages but the final result was – and is- common because Constitution is now considered like an ordinary law, far from "sacred" law.

Sacred is mixed with profane.

The first example is given from constitutional Act n. 3/2001, reorganizing the centre-periphery relationships, which obtained only the absolute majority of votes in each Chamber, and was then submitted to a referendum. After twelve years entry into force we can say that the reform didn't the work, messed up the sources of law and changed Constitutional Court from a Judge on the rights in a Judge of conflicts between State and Regions.

Another far reaching attempt to change the Constitution was made in 2006. It consisted in amending 53 Articles of the Constitution out of 139, which corresponded to almost the entire Second Part. Passed in Parliament with the absolute majority of votes, the Act was submitted to a referendum and rejected; it revealed striking contradictions about 'federal' Senate and about the relation between Parliament and Prime Minister.

The story of the constitutional reforms didn't produce formal results, but created a dangerous "Constitution" outstanding between reality and unreality. On this hand, I don't trust another big reform project, now under Parliament's examination, with "unusual" procedures and old contents.

Constitutional violations are unfortunately abundant in recent years.

I can just point to another general violation in the state level: a trend of confusion of powers, an enlargement of functions by Government and Republic's President not addressed or directed by Constitution. The most part of the legislation doesn't derive from parliamentary discussion and approval of governmental bills, but rather from Parliament's confirmation, within sixty days, of legislative decrees, in spite of the fact that Article 77 of the Constitution enables the Cabinet to enact such decrees only "in extraordinary cases of necessity and urgency". The Cabinet's encroaching of this constitutional entitlement is not a novelty in the Republic's experience, being supported by the

claim that parliamentary rules appear inadequate in ensuring the legislation's approval within reasonable terms.

However, the practice of legislative decrees has recently reached an alarming level. In the last five years decrees are the main source of law, Constitutional Courts – and Government too – is not completely able to limit this uses.

These violations of constitutional rules and principles, being seldom brought, for technical reasons, before the Constitutional Court, are likely to be questioned to the extent that they provoke popular dissent. Apart from judges and scholars, however, sensibility to such issues and, more generally, respect for the rule of law, appear affecting only slight sections of the electorate. In further cases, campaigns in the media exacerbating, if not creating, popular feelings are organized from above, with shifty ways.

Popular legitimacy is a necessary, although not exclusive, condition of a democratic constitution's maintenance. At the same time, however, a practice of democracy exhausted in electing for five years the 'ruler of the country', appears at odds with the premises on which constitutional democracies are grounded, affecting rather the now widely diffused 'illiberal democracies', where fundamental rights and the rule of law are neglected notwithstanding free elections. The risk of Italy's half-conscious shifting from the former into the latter category is not entirely implausible.

Hence derives the following dilemma. On the one hand, the 1948 Constitution has demonstrated an enduring capacity of shaping the legal system, thus orienting political, economic and social developments of the country. At this respect, we might end this lecture by testifying the Constitution's effectiveness, which corresponded to the main objective of the Framers.

On the other hand, we are forced to admit the intimate fragility of such conclusion even in 2013. To the extent that the above mentioned achievements are well known only within the circle of lawyers, the Constitution appears to the greatest part of the population too remote from its needs and feelings,. The distance between 'the Constitution of lawyers' and 'the Constitution of the people', although partly inevitable, and, to a different extent, not unknown elsewhere, appears thus particularly deep and troublesome for the Italian 1948 Constitution's future.

The dilemma is much more hard to resolve when, like today, there is an intersection between economic and political crisis. The first one could be a cause or increase the second one, could move the constitutional system from its traditional elasticity to a dangerous breaking point, from typicality to a-typicality ruled by chance, emergency or strength's relations too.

5.-At the moment, the last challenge of Italian Constitution, and we can say, of European constitutionalism too, is the last decade's financial end economic crisis. It threatened and is still threatening the credibility and the economic and financial structure of the second most important monetary system in the world. Crisis disclosed European union's fragility starting from the choice of keeping separate monetary and economic policy – divided between Union and member States -, from the unsafe Euro's system of guaranties, from the real coordination of economic policies stressed by un appropriate multilateral surveillance mechanisms too.

First of all, crisis had a deep impact on the people's right to happiness and social security, in particular on youngest generations. It had a deep impact on entire Europe economic model, on the welfare State, so on constitutional perspective: Constitution like the legal system centre's, human rights and duties, forms of Government, sources of law, the centre-periphery relationships.

The Italian legislative answer to crisis was coordinated with others European constitution's reform and structurally with – or officially directed by ?- a new European Union's law. A single State's economic or public financial crisis – for example Spain, Portugal, Italy or France – became an ordinary European Union's affair. European Union became during the crisis a rescuer, then a stronger economic stability Union's, a stability budget Union's guaranteed by soft and hard law,

however binding law. States in financial difficulties have been or run the risk of becoming, officially or unofficially, states under European Union's protectorate.

It means much less economic, financial and monetary sovereignty, handed over to an international organization without a strong and appropriate democratic's legitimation. It means European Union mainly decides targets, times and instruments to achieve those goals in short, medium and long terms too. It means European Union cares just goals and doesn't care which formal state measures has to be taken to stem recessions – constitutional and legislative measures - too. States decide fastest and not shared instruments of decision and I think it is a problem for a constitutionalist and for an advocate of parliamentary's democracy.

At the moment, after Italian big illusions of never ending private welfare age's against public state finance's, after cultural and political hesitations age's, there is a new binding multilevel law inspired and governed by European Union, really integrated, made off a constitutional act n. 1/2012 and an international Treaty in 2012, so called Fiscal compact Treaty. Italian Constitution has a new principle voted from Parliament with a large majority, the balanced budget rule, expressly and deeply solicited by European institutions in 2011's summer. Numbers, mathematical and economic concepts has suddenly came into our Constitution without political or cultural debate about the general economic model, without an appropriate debate during parliament's sessions. There is no evidence of the reform in the previous twenty years constitutional reform history's.

European pressure on Italy condition and will condition economic and public budgetary sovereignty; I think are clear the implications on our constitutional system.

"However", there is a new fundamental principle, a "super principle", an irresistible one that I think redefines, turns upside down the entire legal system. There is an ordinary Act that put into effect and develop the mentioned constitutional Act. A literal approach to new 81 Constitution's Article allows to say that could be inelasticity in public budget policy and the new principle could be a prerequisite or precondition for the other ones. Definitely, costs before rights; and it has many tricky constitutional implications.

Another interpretation underlines that public accounts in an orderly manner, will legitimate a more flexible interpretation, so more money to spend in public and social policies allowed by European Union.

The new independent parliamentary budgetary office and, particularly, constitutional Court's decisions will make clearer the most appropriate interpretation and will design a correct balance between traditional principles – social rights and equality – and balanced budget rule. It is not easy insert a new principle in a table of classical ones.

Briefly, there are new answers to important and several questions that are involving constitutional principles:

main economic and financial decisions – economy does the work without constitutional law ?-;

attitude of legislations to let live the Constitution in the legal system;

balance between law, policy ed economy; - one more time, economy does the work without constitutional law ?-;

emergency's dictatorship;

relation between democratic constitutionalism's core – as rule and limit of public and private power - and "tecnocracy";

decision making and representativeness;

role of Government, strong but not elected by the people.

An important issue is a new centralization governed by European Union in a vertical perspective, that is far from the previous decentralization or devolution.

Another important issue is governing with much less financial resources, the debtor State's sovereignty and Parliament's role in this new picture. Definitely, the future of constitutional democracy.

We often say: “We gotta do “homework” because Europe asks it, Europe wants it”. And it means that a part of Italian people and political parties hold European Union responsible for austerity and no chance to spend public money during a strong social crisis. It means holding dangerously European Union responsible of rising Italian poverty. I Don’t agree because Italian parliament ratified all European treaties and acts in the last two decades with a large majority, almost unanimously.

New emerging actors in the mentioned picture are new regulators – or traditional regulator with new instruments and logics claiming legislative’s power -, public and private regulators, multinational companies with uncertain origin and legitimation under the perspective of sovereignty and political democracy. From private law are coming strong challenges.

Last October, at yearly Italian constitutionalist meeting, Teubner, a german private law’s professor, sayed that constitutions are too serious matter so constitutionalist should not have the copyright about this. I think he wasn’t giving an offence to Italian man and women seated in the conference hall, but he underlined the importance of a perspective’s change, the importance of find and use new categories and new approaches to such important challenges.

Definitely, cultural and political lobbies, social groups well organized and equipped, a wide part of people has preferred, event after 1993 Maastricht’s Treaty entry in to force, to use public budget as an instrument to defend their particular interests rather than be conscious that the world was changing because of new competitors in a globalized world.

On the other hand, European Union surely solved a lot of Italian economic problems, but didn’t change gear or speed, or has hesitated to take the initiative, didn’t add new founding principles to the original ones – the creation of a common, free economic and monetary market - , first of all a convincing and new meaning of shared democratic and solidarity principles - that is the core of every political community’s -, standing by functionalist paradigm, centred on people rather than political élites, bureaucracy or Courts. The first decade of this century is full of hesitations, about a wide range of key issues, about European economic governance.

In a word, cultural, political and economic hesitations, no courage. In a word, Italian people distrusts in Italian governors and European Union too, considered like a guardian and the cause of Italian parliamentary form of government under protectorate; European rich people’s distrusts in debtors States too. At the same time, Italian and European economies, so people’s life, are under a strong pressure of international financial markets. They could decide – decided?- governments in Italy and Greece in 2011. Habermas, a german philosopher, spoke of “soft coupe d’etat”.

A constitutionalist should highlights constitutional deviations, so I must underline the Italian situation during the crisis. I have to admit that economic situations stressed the previous strong constitutional difficulties or bad practices. Unconventional or “unconstitutional” policies are so rooted that it’s quite difficult to distinguish between what is allowed and what should not be allowed, it is quite difficult to distinguish which is the real Constitution, the 1948’s one or an unconventional one based on customary law.

The main disappointment is that the Constitution as interpreted in the last five years, or in the last decade, is often unfit to rule and address the legal system of a democratic and parliamentary Republic, is not the main factor of safety and stability.

The Constitution looks so suspended that it is hard to find the starting point or what legal system should be or should do. And actually I can’t see an exit strategy.

6.- I Don’t want end my conference with word such as illusions, distrust, weakness, I Don’t want appear like a “loser constitutionalist”. Even if in Italy we are living a period based on confusion or atypicalness, I would end with words such as hope and appropriate change governed not by emergency, but by shared reason and reasonableness.

Our attention should be driven, both on legal and on historical grounds, to frequent misunderstandings of the Constitution's content, with the aim of clarifying its enduring value as well as its transformative virtues. Why are misunderstandings so frequent? No other solution is better than strengthen – and come back to the deepest spirit of - the key words of modern constitutionalism: human dignity, democracy, rights and duties, separation of powers. The future of the constitutionalism, in Europe and much more in Italy, has an ancient origin, an ancient heart. Even in a multilevel system, contemporary constitutions are still a box full of instruments to give an address to the present and the future of the social, political and legal system.

After all, the connection, and therefore the compatibility, between tradition and change is exactly what we miss more in Italy. And this is far from depending on a single document called Constitution. In this way, I think it would be helpful consider it like a “process” in the multilevel constitutionalism of an open and integrated society, more than a mere document, like a goal – still - to reach more than a reached goal.

**Abstract.-** La relazione si sofferma su alcuni concetti fondamentali della Costituzione italiana come democrazia, diritti e doveri, separazione dei poteri, dalle origini alla recente crisi finanziaria, in prospettiva comparata ed europea.

The lecture focuses some key-concepts of the Italian Constitution such as human dignity, democracy, rights and duties, separation of powers, from the beginning to the financial crisis, in european and comparative perspective.