

Europe

Development of constitutional jurisdictions in Continental Europe and the advancement of liberal democracy

by Alessandro Pizzorusso



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When examining the causes underlying the development of constitutional law in Europe in the second half of the twentieth century the discussion should begin by focusing on the fact that, until the post-Second World War period, it was extremely unusual, if not unheard of, for the European juridical and political authorities to conceive of imposing any limits on sovereign authority, all the more so where this power was exercised by organs with a democratic structure.

Prior to the French Revolution, the possibility of limiting monarchic authority had in fact been widely debated. According to some, it was absolutely to be excluded given the divine nature of the investiture which the latter represented, while according to a second body of opinion a set of 'supreme principles' should be introduced which also the monarch would be obliged to respect.

The shift which subsequently took place from a power structure founded on divine investiture to one founded on democratic investiture formed part of a process of transformation which occurred during the nineteenth and the first half of the twentieth centuries, and which gave rise to the constitutional norms underpinning the legal systems of most European countries – albeit with different modalities in individual cases. This change reinforced the view that excludes the placing of any limits on

sovereign power. An important contribution to this development was also made by the assertion of legal positivism; intrinsic to this was the view that the law – and above all the 'Code' – was a product of human rationality comparable to the machines which had enabled so much extraordinary progress to be made in the area of scientific discovery.

The clearest symbol of this tendency is probably the doctrine of parliamentary sovereignty which was established in the UK and which had as its consequence the progressive reorganisation of the monarch's powers to the benefit of the elected chamber and the government expressed by it. On the Continent, there was a parallel development, even if the individual constitutional stories vary on many points. In France, for example, the monarchic cause was finally defeated only after 1870, with the advent of the Third Republic; in Germany and the countries of the Austro-Hungarian Empire, the same process took place only after 1918, although in reality the transformation triggered by the Revolution, and spread by the movements of the French Army, continued to develop practically everywhere during the Restoration period, albeit gradually. In Italy, the ambiguous formula 'by the grace of God and the will of the Nation', adopted in 1861 to define the powers of the 'constitutional monarchy', covered a series of compromises between the 'Court faction' and the representatives of an electorate that was extremely limited as a result of the census, but still constituted an important step towards parliamentary sovereignty, even if it was not until 1946 that a truly 'universal' suffrage was introduced, including the complete abolition of the royal prerogative.

It was with reference to these codes that the doctrines inspired by the principles of legal positivism developed the nineteenth-century notion of the law as the expression of the *volonté générale*,

and it was on the basis of this that lawyers and legislators rejected any proposal for the introduction of a jurisdictional check on the constitutionality of laws and reduced the range of the constitution – predominantly if not exclusively – to that of a political document. It should be remembered that not all the constitutions of this period had in fact been conceived as flexible, but even where constitutional flexibility was absolutely excluded, the possibility of a constitutional check was consistently rejected in the name of the respect due to popular sovereignty – of which the law was the highest expression – even in the very frequent cases in which they were the work of non-elected bodies or, where they had been elected, there were serious doubts as to the representativeness of the electoral procedure.

LIMITS ON SOVEREIGN AUTHORITY

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A first breach in this view can be discerned with the introduction of the principle of legality (to which the notions of 'rule of law' and '*Rechtsstaat*' respectively in the UK and Germany, both of which were developed to meet similar needs, correspond); this imposed jurisdictional checks on the proceedings of public authorities, although it should be said that for many years the application of this principle encountered various and insurmountable obstacles, given the 'political' nature of some of the categories of proceedings. Clearly, the law constituted the type of proceeding whose political nature was not open to discussion.

This line of reasoning did however allow judicial review of administrative activity to develop, and this in turn allowed important opportunities to open up for the legal protection of private individuals against the proceedings of legal authorities in many European countries. It was, for example, only a small step for the legal scholars of the 'Viennese School' to invent the principle of constitutional legality and a checking procedure for the constitutionality of laws, both of which were based to a great extent on the techniques used in administrative law.

This approach can of course be placed firmly within the positivistic concept of the law, as has been amply shown by the famous Kelsenian paradox. According to this, the flaws in the living constitutionality of the law were reducible to flaws of formal constitutionality, given that any error committed by passing a law which was incompatible with the precepts of the constitution could always be corrected by recourse to a revision of the constitution itself. This approach was, of course, based on theoretical assumptions differing sharply from those which had allowed, from the beginning of this particular historical phase, the realisation of forms of constitutional justice typical in the US.

THE ITALIAN PATH

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Checks on the constitutionality of laws in the US initially came into existence in an environment influenced by a natural law conception of rights, in a model that rejected any absolute power and instead recognised the existence of human rights as inviolable and inalienable. And despite

the fact that, in the period following this, positive law doctrines had a wide influence in this area, the initial approach continued – despite some areas of revision – to constitute the basis of the notion of constitution and of constitutional law.

Indeed a new and substantial continuity began to be established between the emergent concept of democracy and the structuring of mandatory constitutional limits for the defence of fundamental human rights. In the development of European legal reasoning, on the other hand, it is not possible to find this kind of continuity; the shifts of opinion that were discernible during the French Revolution, and which gradually took root, were principally concerned with the transformation of monarchic authority to a representative assembly, rather than with the affirmation of a higher level of inviolable rights.

Those limits which the political thinking of the previous era had propounded as efficacious for so-called absolute sovereigns were, in reality, when compared to democratic power, no longer felt to be acceptable. And to little avail was the observation that it was difficult to realise forms of political representation capable of allowing the *volonté générale* effectively to correspond to that of the citizens, or at any rate to that of the large majority.

Nevertheless, for many years, needs of a practical nature necessitated the limitation of the suffrage to information based on the census, the maintenance of unelected second chambers, the royal prerogative and other constitutional rules which set aside either completely, or at any rate in part, any balanced form of representation, so as to render even more unrealistic the qualification 'democratic' to those regimes which operated in many European states during the nineteenth and twentieth centuries. And, obviously, among these, were those cases where the *ancien régime* was 'restored', or – even more insidiously – which were presented as plebiscite democracies (also known as 'Bonapartism'), where the citizens' will was interpreted by the unchallengeable decisions of a monarch or dictator. Even when the development of political parties had opened up the prospect of new opportunities for democratic life, dissatisfaction with institutions was never

entirely eliminated, despite some changes in the approach to representation which the followers of the Enlightenment had proposed.

US MODEL

Checks on the constitutionality of laws in the US initially came into existence in an environment influenced by a natural law conception of rights, in a model that rejected any absolute power and instead recognised the existence of human rights as inviolable and inalienable.

During the twentieth century, however, the increasingly obvious inadequacy of these approaches – based as they were on a combination of democratic absolutism with techniques derived from legal positivism – began to give rise to serious alarm and, above all, to demands for a more clearly perceptible protection of the fundamental rights of freedom, particularly after the horrifying violations of the latter in many European countries during the two World Wars and the installation of many violent dictatorships in Italy, Germany, Spain, the Soviet Union and elsewhere.

Given these tragic events, which sometimes took place within (or almost within) the legislative and constitutional norms in force at the time, the need to achieve more rigorous protection of fundamental human rights and the fundamental rights of democracy came to the fore, and the introduction of a constitutional check on the laws, based not only on the ideas of Kelsen but also on the American understanding of constitution, began to spread in Europe too. Over the last fifty years this view has become established not only in countries which have undergone the experience of authoritarian regimes, but also in many others, including countries such as France (whose political culture had always remained inflexible in the face of influences of this nature).

Finally, in recent times, the phenomenon of the spread of these kinds of solutions into the constitutions of East European countries as well as those of non-European countries emerging from periods of close restrictions on democracy and liberty, is really very striking. It should also be noted that this

kind of development has frequently led to the setting up of instruments guaranteeing the independence of the judiciary (for example, in France, Italy and some other countries a Council of the Judiciary has been established), together with the transfer of important functions generally reserved for the executive bodies to independent authorities. A clearer need for rationality on the part of public authorities has moreover, in the past few years, opened the way to technical cooperation in the drafting of laws (through the checking of their 'feasibility') which has inevitably led to further limits on the legislator.

It is in this way that the fact that the post-war constitutional justice institutions have gone far beyond the extension of the legislative activity of the principle of legality can be explained, as can the fact that this development has led above all to reflection on the juridical notions of constitution and the conception of state and government, the most notable result of which consists in the renewed search, along different lines, for clear limits to sovereign power, even when this is democratic. It is no coincidence, moreover, that in some countries discussion has once more centred on the topic of 'inviolable' rights and defined certain constitutional principles as inviolable, even through revision procedures, as occurred in the times of the *ancien régime*.

WEAKNESSES HIGHLIGHTED

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In the case of Italy this development has manifested itself with particular and significant characteristics due to certain chance events which have stimulated the institutional fantasy of the jurists and, in particular, of the judges of the Constitutional Court. The most important of these was probably the one which led to the adoption of a constitution based on democratic principles, but which did not ensure that the corresponding legislative reforms were enacted; the court has thus for many years found itself in the position of having to fulfil the function of the

promoter of legislative reforms required by the constitution itself, rather than that of the guarantor of the constitution against any eventual violations. This came about through the acceptance of a legal notion of the constitution which allowed it to be used as a legal norm and as a higher law, along the lines of the American concept. Given that the paralysis of legislative activity that derives from the peculiar characteristics of Italian parliamentary proceedings has not been cured by the constitutional crisis of the 90s and the electoral reforms of 1993, it is more than likely that this function of the Constitutional Court will find the opportunity to manifest itself again in the future.

No less important is the German case, where the contribution of the *Bundesverfassungsgericht* to the restoration of a democratic way of life has been decisive; or those of Spain and Portugal, whose constitutional courts have played a decisive role in the re-establishment of fundamental rights.

Released from the obligation to protect the rights of individuals, other important functions exercised by some constitutional courts have also been extremely significant – from the checking of electoral procedures for the highest offices of state to the resolution of conflicts between state authorities, and between the state and territorial agencies (in regional and federal states).

One particularly important example of this can be seen in the work of the French *Conseil constitutionnel*, which was neither instituted in reaction to an authoritarian regime nor conceived as a true and proper system of constitutional justice. Despite this, it has managed to carve out precisely this kind of role for itself, adapting any procedural and organisational rules that are not entirely appropriate to the exercising of this function.

The lack of links with ordinary judges, the possibility of checking the constitutionality of laws only as a preventive measure and on the initiative of political subjects, together with the rules established for the selection of its members, had led many commentators to believe that the *Conseil* could not operate in the manner of a true constitutional court and that it would inevitably have taken on an essentially political role (which was in fact the role

that the Gaullist constitution had reserved for it). However, the influence of legal culture, which circulates freely over state boundaries and through the cultural traditions of different peoples, has led members of this body to behave like judges. This has allowed them to assume a role of great importance, which has been reinforced ipso facto by the modifications made to the rules which govern it.

The activity of the European constitutional courts, like that of the Supreme Court of the USA, has thereby created a tradition of great importance, both in the protection of fundamental rights and with regard to the democratic system of the organisation of public powers. This tradition is referred to explicitly by the constituting treaties of the European Union and it is towards them that the new democracies of Eastern Europe, Latin America and other parts of the world now look.

No one can doubt, especially since the fall of the Soviet Union, that the principles of liberal democracy constitute an irreversible step forward in political thought that is no less important than the advances in scientific thought which have allowed the great technological developments characterising these times to take place. It is however no less true to say that the experiments in liberal democracy which have taken place over the last two centuries have also highlighted the many weaknesses of the organisational models which have been experimented with. It is precisely this kind of comparison between the various results of the applications of scientific theories that has allowed the surprising incompleteness and imperfection – and the consequent serious risk of exposure – of the constitutional orders to be noted. Recent developments which have led to the developing of the role of constitutional jurisdictions and the other guarantor institutions mentioned above obviously constitute an attempt to meet the needs of technology also in the area of politics. 🇮🇹

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