

Benedetta Barbisan

For an Italian Way to Constitutional Patriotism

Reflections on Rejuvenating Our Constitution
beyond Hyperboles and Failed Reforms

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Corso della Repubblica, 51
info.ceum@unimc.it
<http://eum.unimc.it>

Impaginazione: Maria Grazia Coco e Carla Moreschini

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Abbreviations

<i>Am. Pol. Sc. Rev.</i>	American Political Science Review
<i>Ann. Enc. dir.</i>	Annali dell'Enciclopedia del diritto
<i>Ann. Am. Acad. Pol. and Social Sc.</i>	Annals of the American Academy of Political and Social Sciences
<i>Denv. U. L. Rev.</i>	University of Denver Law Review
<i>Dir. pubbl.</i>	Diritto pubblico
<i>Enc. dir.</i>	Enciclopedia del diritto
<i>Eur. J. Phil.</i>	European Journal of Philosophy
<i>Eur. L. J.</i>	European Law Journal
<i>Giur. cost.</i>	Giurisprudenza costituzionale
<i>Harvard L. Rev.</i>	Harvard Law Review
<i>Int'l J. Const. L.</i>	International Journal of Constitutional Law
<i>J. Mod. Hist.</i>	Journal of Modern History
<i>Liverp. L. Rev.</i>	Liverpool Law Review
<i>Notre Dame L. J.</i>	Notre Dame Law Journal
<i>Or. Rev. Int'l L.</i>	Oregon Review of International Law
<i>Pol. dir.</i>	Politica del diritto
<i>Quad. cost.</i>	Quaderni costituzionali
<i>Rass. trim. dir. pubbl.</i>	Rassegna trimestrale di diritto pubblico
<i>Utah L. Rev.</i>	Utah Law Review

Acknowledgments

In September 2016, I was invited at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg to deliver a talk about the Italian Constitution within the series “Dialoghi italiani”, coordinated by Sabrina Ragone and Valentina Volpe. For the occasion, I suggested to borrow a paradigm typical of the German constitutional debate – constitutional patriotism – and try to apply it to the Italian constitutional scenario. I am very grateful to Sabrina and Valentina for their generous invitation, the warm hospitality and the opportunity to start a reflection on the topic – still in progress – these pages tentatively summarize.

Giuliano Amato and Cesare Pinelli gratified and enriched my work with their valuable encouragement and insightful comments. As always, I owe them a great deal, although the flaws of this contribution, as well as its still unexplored potentialities, are attributable to me and to me only.

Washington D.C., February, 4th 2020

1. Is It Beautiful?

On 17 December 2012, the Academy Award-winning actor Roberto Benigni performed a stand-up show at prime time on the main Italian public television channel. Entitled *The Most Beautiful Constitution in the World*, the long monologue was devoted to acclaiming the imperishable beauty and the vision of the first 12 articles of the Italian Constitution, and to lamenting the lack of implementation thereof and the moral perdition that may fatally detach Italian society from its constitutional values.

The nationwide televised exaltation of the Italian Constitution conducted by the most popular and glorified of our present-day comedians (with the possible exception of Beppe Grillo, the founder of the political Five-Star Movement and the fierce public scourger) through superlatives and hyperboles celebrating our Constitution as the most beautiful in the world actually symptomises the tepid relation Italians entertain with their fundamental law. Roberto Benigni's show was above all pedagogic, as Italians do not know their Constitution or its history, and even less they know the influence it may exert on their life, the rights they claim and the interests they advocate. The bond between Italians and their Constitution traditionally seems to be established on some degree of indifference, except for the bursts of sheer devotion kindled by the one-sided political attempts to amend it put forward in the last twenty years¹. As Augusto Barbera noted, we appear to fluctuate between a

¹ Note that the Constitution does live in the interpretation of the Constitutional Court and through its implementation, particularly concerning the removal of economic and social barriers in accordance with Article 3, para. 2: it is its impact on the public discourse that has faded.

conventional, ostentatious vision of the Constitution and its delegitimization².

In the seven decades of its history, the Italian Constitution was amended 15 times, 4 before 1990³ and 11 from 1990 until today⁴. In 2001, a major constitutional reform of the regional system was introduced⁵, but for the first time it was passed with a tight parliamentary majority and with the opposition voting against it – a remarkable breach in the traditional bipartisan custom in constitutional amendments that could be overcome only holding the constitutional referendum affirmed by Article 138 of the Constitution⁶ that eventually approved the amendments. Two structural constitutional reforms were then set out respectively in 2005⁷ (supported by the right-wing parliamentary majority and the government run by Silvio Berlusconi) and in 2016⁸ (promoted by the left-wing parliamentary majority and the government led by Matteo Renzi), but both were rejected by voters in the popular referenda. Thus, the only three referenda

² Augusto Barbera, *Fra governo parlamentare e governo assembleare: dallo Statuto albertino alla Costituzione repubblicana*, in *Quad. cost.*, 31, 2011, 9-37.

³ L. cost. 9 February 1963, no. 2 (Artt. 56, 57 and 60 Cost.); l. cost. 27 December 1963, no. 3 (Artt. 131 and 57 Cost.); l. cost. 22 November 1967, no. 2 (Art. 135 Cost.); l. cost. 16 January 1989, no. 1 (Artt. 96, 134 and 135 Cost).

⁴ L. cost. 4 November 1991, no. 1 (Art. 88 Cost.); l. cost. 6 March 1992, no. 1 (Art. 79 Cost.); l. cost. 29 October 1993, no. 3 (Art. 68 Cost.); l. cost. 23 November 1999, no. 2 (Art. 111 Cost.); l. cost. 17 January 2000, no. 1 (Art. 48 Cost.); l. cost. 23 January 2001, no. 1 (Artt. 56 and 57 Cost.); l. cost. 18 October 2001, no. 3 (Title V, Part Second Cost.); l. cost. 23 October 2002, no. 1 (XIII final and transitory regulation); l. cost. 30 May 2001, no. 1 (Art. 51 Cost.); l. cost. 2 October 2007, no. 1 (Art. 27 Cost.); l. cost. 20 April 2012, no. 1 (Artt. 81, 97, 117 and 119 Cost.).

⁵ L. cost. 18 October 2001, no. 3.

⁶ Article 138 provides that the amending laws passed by both Houses in two successive debates at intervals of no less than three months, the second being approved by an absolute majority of the members of each House, are submitted to popular referendum when, within three months of their publication, one-fifth of the members of a House or five hundred thousand voters or five Regional Councils request it. To validate the amendment, it must be approved by a majority of votes.

⁷ The reform intended to amend 57 articles of the Constitution. The referendum took place on 25 June 2006. Voters against were nearly 16 million (61.3%) out of 26 million.

⁸ The reform intended to change the composition and functions of the Italian Parliament and to revise the division of powers between the State and the Regions. The referendum was held on 4 December 2016. Voters against were about 19.5 million (59.12%) out of a little more than 33 million.

voted in the Italian Republican history took place in 2001, 2006⁹, and 2016¹⁰.

Accordingly with the *bipartisan* sense that the Italian Constitution – entered into force in 1948 – would need systemic reforms to be updated to an utterly different climate than the order and culture of its infancy, the three aforementioned attempts to change it were carried out in the 2000s, but always by *partisan* parliamentary majorities and governments. Common feelings, we might say, but sectarian solutions. It happened that, in those years, constitutional reforms became part of polarised political agendas instead of being undertaken across the spectrum of diversified political forces. That historical phase was the prolonged aftermath of the fall of the Berlin Wall and the collapse of all the traditional Italian political parties because of the widespread corruption unearthed by the judiciary. But it was especially the time when a bipolar system gained a foothold in Italy¹¹, juxtaposing for the first time two alternately ruling coalitions, after the 45-year long rule of the Christian Democratic Party and the political estrangement¹² of the Communist Party.

⁹ As noted in Cesare Pinelli, *L'Italia e il recupero della sua identità smarrita*, in *Italianeuropei*, 7, 2011, 67, it was not constitutional patriotism that induced Italians to vote No at the constitutional referendum in 2006, but the alternative between a seasoned Constitution, in need of mending and updates but tested, and a constitutional mess.

¹⁰ The three constitutional referenda belong to a moment in Italian history when the temptation and need of a direct democracy was carried out through the use of referenda to by-pass political parties and create a direct relation with the electorate. In the Nineties, referenda multiplied both in numbers and in variety of issues submitted to the people's vote and, while in the Seventies referenda were limited to important matters of social and civil relevance, they were transformed into a permanent component of the political system (see, in this regard, Anna Chimenti, *Storia dei referendum*, Rome-Bari, Laterza, 1994 and Marcello Fedele, *Democrazia referendaria*, Rome-Bari, Laterza, 1994, but also Mauro Calise, *Il partito personale*, Rome-Bari, Laterza, 1998).

¹¹ Sergio Bartole, *Democrazia maggioritaria*, in *Enc. dir.*, Aggiornamento vol. V, Milan, Giuffrè, 2001, 346-355.

¹² In his widely renowned issue *Governo (forme di)* (in *Enc. dir.*, vol. XIX, Milan, Giuffrè, 1970), Leopoldo Elia freshly minted the definition *conventio ad excludendum* to explain the non written rule in force in Italy during the Cold War according to which the Communist Party could be included in the parliamentary representation, but not in the coalitions supporting the government.

But, even before 2001 and among the parties that had contributed to drafting the Constitution, the urgency of revising the fundamental law, at least the machinery operating the form of government, had emerged since the late 1970s. In response, three ad hoc bicameral parliamentary commissions were instituted in the years between 1983 and 1998 to elaborate proposals to improve the form of government's efficiency: the first, headed by Aldo Bozzi of the Liberal Party in the years 1983-85, proposed to vote the confidence only to the President of the Council of Ministers instead of the entire Cabinet; the second, led first by Ciriaco De Mita of the Christian Democratic Party and then by Nilde Iotti of the Communist Party in 1993-94, put forward a rationalisation of the parliamentary system including the constructive vote of no confidence like in Germany; the third, presided over by Massimo D'Alema of the Leftist Democratic Party¹³ between 1997 and 1998, suggested, among other things, the popular election of the President of the Republic¹⁴. Despite every political force was represented and involved, none of these endeavours were eventually successful and the form of government remained unmarred¹⁵.

¹³ In 1991, the Communist Party's secretary, Achille Occhetto, transformed it in a new social democratic political force, the Leftist Democratic Party (PDS). In 1998, after the experience of its first participation in a government coalition with other liberal forces, it established to merge with other movements and to originate the Leftist Democrats (DS). In 2007, a unitary party derived from the further merge with former Christian Democrats (Margherita), Republicans and Social Democrats was inaugurated under the label of Democratic Party (PD).

¹⁴ According to Antonio Baldassarre, *Una Costituzione da rifare. Il progetto della Bicamerale sotto la lente di un costituzionalista*, Turin, Giappichelli, 1998, the constitutional design of the third bicameral parliamentary commission was doubtlessly affected by ambiguity in all its parts, but especially in the form of government. In particular, the zenith of this ambiguity concerned the relation between the President of the Republic and the Prime Minister: in this regard, nobody could tell whether it would configurate a weak semi-presidentialism, like in Austria, or a strong one, like in France. 'It is unbelievable – he wrote – that our leadership did not realize what a bomb this design of the Constitution would turn out to be. When it explodes, it will not be the end of democracy but, in all likelihood, an authoritarian twist of it. The ignorance of our leaders raises a disquieting question: has our country a leadership worthy of the name? (*Ibid.*, 25).

¹⁵ A comprehensive analysis of the suggestions elaborated by the three bicameral parliamentary commissions can be found in Leopoldo Elia, *La forma di governo*, in Maurizio Fioravanti (ed.), *Il valore della Costituzione*, Rome-Bari, Laterza, 2009, 65 ff.

Despite its manifest inefficiencies and the well spread desire to change it, the Italian Constitution is indeed a beautiful constitution, if we look at it through the lens of linguistics: it is roughly 10,000 words long, with 1,300 recurring lemmas, a 1,000 of which belonging to the common vocabulary of the basic language (covering 92 percent of the entire text). As a result, the Italian Constitution qualifies as a highly readable legal text, with its 20-25 words per sentence compared with the 120-180 of the average Italian statutes¹⁶. On the report of the 1951 census – the first taking place after the entry into force of the Constitution –, 60 percent of the Italian population over 14 was at the time as good as illiterate, devoid of any school degrees, and there the Constitution's readability index scored 50, making it comprehensible, although with some assistance, even to the citizens holding only an elementary school degree¹⁷. The Italian Constitution is then rather approachable and easy to go through and, yet, swinging between hyperbolic exaltation and failed reforms, the relation Italians have with it is however troubled¹⁸.

¹⁶ But the prevalence of short sentences and a comprehensible vocabulary that determined the Constitution's readability was abandoned on occasion of the lately revisions. For instance, Article 111, amended in 1999, contravenes the basic rules for a text to be intelligible: with its eight paragraphs, some of which considerably too long, it looks more like a penal code provision than a constitutional norm. See Bice Mortara Garavelli, *L'italiano della Repubblica: caratteri linguistici della Costituzione*, in Vittorio Coletti and Stefania Iannizzotto (eds.), *L'italiano dalla nazione allo Stato*, Florence, Le Lettere, 2011, 211.

¹⁷ As reported in Tullio de Mauro, *Introduzione. Il linguaggio della Costituzione*, in *Costituzione della Repubblica italiana* (1947), Novara, De Agostini, 2015, the 1948 Italian Constitution had only 355 lemmas out of 1,357 that did not belong to the basic vocabulary, and very few of them required a legal background. The effort the constituents directed to the quality of the language in the Constitution is glaring considering that the text was submitted to three tests: the first within the Commission of the 75, i.e. the body inside the Constituent Assembly in charge of designing a constitutional proposal that took very good care of the clearness and readability of the text; the second was performed by Pietro Pancrazi, a journalist and essayist, who suggested grammar improvements as well as some vocabulary tricks, but also too elevated solutions that would have made the text too sophisticated and difficult to understand. Finally, the third, needless to say, occurred in the plenary assembly, when the text was definitively voted.

¹⁸ At this point, it is appropriate to mention what Augusto Barbera, *Costituzione della Repubblica italiana*, in *Ann. Enc. dir.*, vol. VIII, Milan, Giuffrè, 2016, 282 ff. replied to the question: Is the Italian Constitution, close to its seventieth anniversary,

Why is it so? Why Italians do not credit their Constitution for their individual and social welfare, for getting response to their petitions, to have justice for their rights? And, subsequently, why Italians do not seem to partake in a constitutional patriotism, that is political attachment to norms, values, procedures of their Constitution – in short, to the idea of Constitution with its agenda and pledges?

To expound the Italians' detachment from their fundamental law, it might help to argue that the Italian Constitution was actually born in a time and inside a society much less complicated

still fertile and strong? He summarized two main views in this regard enforced within the constitutional doctrine: the first corresponds to the idea of those that believe the Constitution to be timeworn, inspired to principles unfitting the contemporary Italian society, and in need of a substantial mutation to the point of evoking a new constituent assembly (see, for instance, Giovanni Bogneri, *Il modello economico della democrazia sociale e la Costituzione della Repubblica italiana*, in Gianfranco Miglio (ed.), *Verso una nuova Costituzione*, Milan, Giuffrè, 1983). The second deals with the corresponding and opposite radical thought that the Constitution is still so topical and modern that it rejects any attempt to amend it. Barbera concedes how nuanced this second view presents itself, embracing both those idealising the past splendor of the Constitution, now frustrated and disattended (Michele Aini, *Vita e morte di una Costituzione*, Rome-Bari, Laterza, 2006), and those that would wield the Constitution as a political orthodoxy against allegedly alien political cultures (see, for example, Paolo Flores d'Arcais, *Realizzare la Costituzione!*, in *Micromega*, December 2013). In spite of these divergencies, it is quite common to consider that the 1948 Constitution has stood the test of time (Sergio Bartole, *Interpretazioni e trasformazioni della Costituzione*, Bologna, il Mulino, 2004; Valerio Onida, *La Costituzione*, Bologna, il Mulino, 2004; Alessandro Pizzorusso, *La Costituzione ferita*, Rome-Bari, Laterza, 1999).

Barbera pointed out that both these views fail to distinguish between the first and the second part of the Constitution to judge its endurance, so he proposed a third way: 'constitutional principles have not weakened but, on the contrary, they have further rooted in the conscience of Italians and only thanks to this rooting it has been possible to try to change the second part of the Constitution without fear' (283). The Italian Constitution, then, includes two parts, two sets of expectations, two national sentiments: the supreme principles, i.e. those that cannot be amended and that, for their same nature, the Constitutional Court could never specify or list, and the constitutional set of rules.

That these supreme constitutional principles have grown in the conscience of Italians, as Barbera contends, does not mean that the Constitution with its promises, programs and ideals has rooted in the national conscience. And this is precisely the point: it is doubtlessly true that Italians have evolved in their democratic identity thanks to the foundations of our Constitution, adopted in a given historical moment with its challenges and prospects, but it is as much true that they are not educated to turn to the Constitution to aspire to those goods they actually expect to be provided with by political parties.

than the current ones, or that politics and representation are today less and less connected to stable affiliations and more and more affected by discrete and contingent interests, or that in *two-thirds societies*¹⁹, where two-thirds of the population enjoy the benefits of affluence, democracies are destined to change. But these are arguments recurrent in Western democracies in general and not specifically describing the Italian context. Conversely, the weakness of Italian constitutional patriotism is significantly due to conditions inherently attached to Italian history, politics and civic-mindedness. This essay aims at exposing these conditions and at proposing a reflection on why a true constitutional patriotism never took root in Italy and why it is now urgent to work on it.

Since 1948, two factors have thrived and mutually reinforced in Italian institutions: the evolution of the party system and the inefficiency of the form of government. The indispensability and gravitas of political parties became evident already in 1943, when the National Liberation Committee (CNL), gathering all the political groups with the exception of the Republican Party, was invested of organising the military resistance against the Nazis occupying Italy and then delegated to lead the governments from the liberation of Rome in June 1944 to the first post-war elections in June 1946.

The monarchy was coming out of the war severely tarnished for its acquiescence with Mussolini, having promulgated even his most brutal policies, like the racial laws against the Jewish community that were introduced in 1938 and that opened the way to the deportation to Auschwitz. After Mussolini was deposed in July 1943 and, in September of the same year, the king Victor Emmanuel III hastily fled from Rome without leaving behind any instructions for the armed force on how to deal with the consequences of the armistice with the Allies, Italy was left with no leadership. It was the political parties, then, that played a crucial role in liberating Italy from fascism and

¹⁹ The *two-thirds society* definition was coined by the German social democratic politician Peter Glotz. See Peter Glotz, *The Two-thirds Society*, International Metalworkers Federation, 1986.

in its transition to democracy. No wonder that Italians learned then to confide so much in them as to entrust them with the rebirth of the nation and, later, with their whole welfare.

On the other side, the inefficiencies and lack of transparency characterising the form of government enforced in the 1948 Constitution have magnified sentiments and self-interests inside the parties so as to make them the actual propellant of the institutional machinery. While Germany has had 9 Chancellors since 1949 and 25 governments, in the same length of time Italy has collected 29 Presidents of the Council of Ministers and 65 governments. The average duration is slightly more than one year (1.07), going from a minimum of 23 days (Fanfani, 1954) to a maximum of 3 years, 10 months and 12 days (Berlusconi, 2001-2005)²⁰.

The persistent combination of these two elements along the Republican era has educated Italians to depend on the party system for their needs and rights. Parties have always been the main actors on the stage, cluttering the scene and pushing the Constitution behind the curtain. And while traditional parties have sunk and new movements and dynamics have grown, the Constitution with its values and civilisation is still in the backdrop. In fact, despite the executive presided over by President Giuseppe Conte in 2018-19 with the support of the coalition between the Five-Star Movement and the League, had pledged to act as the so called *government of change* in Italian politics, institutions are still occupied rather than represented, political parties in power demand their turn to inhabit the institutions and, therefore, *de facto* present themselves – just like the predecessors they are bitterly determined to contradict – as the self-important, overly decisive character to the point of overshadowing, or even twisting, constitutional values.

²⁰ Up to late 1980s, Italy was considered a very stable system: to the average short duration of governments corresponded an invariable majority, with the Christian Democratic Party at the core of it, and the very same establishment: in the first thirty years of the Republic, the number of ministers coming from a previous appointment as undersecretary raised from 16.7 to 73.2 percent. In 68 years, 1,332 executive appointments involved only 152 people, a real *superélite* (for this definition, see Mauro Calise, *La Costituzione silenziosa. Geografia dei nuovi poteri*, Rome-Bari, Laterza, 1998, 21 ff.).

On the contrary, this seems the time when it should be essential to finally acknowledge the relevance of some kind of constitutional patriotism in Italy: firstly, because, if some change is in order, the major transformation our institutions should undergo is an emphasis on their being constitutionally generated bodies instead of entities depending for their existence on their sole political administration. Secondly, because Italy is involved, like many other Western countries, in the hard consequences of globalisation and the 2008 economic crisis in terms of an increase in its social inequality and a sour attitude towards the future. Thirdly, because Italy has been undergoing a process of considerable change in its society: immigration, with its cultural and religious corollary, has impacted on our traditional social structures deepening resentments and indignation. In moments when cardinal values like solidarity, tolerance, social peace seem perilously at stake, a constitutional patriotism would mean introducing a patrimony of unshakable, immutable principles, capable of helming Italy through its stormy transformations, interpreted by political forces but not entirely subsumed under their power.

In these pages, we will get back to the moment prior to the entry into force of the 1948 Constitution, between the years 1943-46, when political parties united in the National Liberation Committee (CLN) remained the sole interlocutors for the Allies and led Italy towards its democratic transition. This institutional void could have been the premise for the cultivation of a new collective identity, had political parties played a less ambiguous role in the rebuilding of the country, especially when they came to elaborate the parliamentary form of government, very feebly rationalised, and to devise the constitutional discipline of political parties, lacking any public control over them. The combination of political parties' power with the form of government's fragility determined the occupation of institutions and sub-constitutional bodies by political parties and the subsequent instability of the executive. Argue that, in this way, they pushed the Constitution behind the curtain and weakened the chances to edify Italians on a constitutional patriotism.

In the second part, this essay will explore the constitutional patriotism developed in Germany as the most relevant paradigm in this area. How did this kind of patriotism take root there? What does it amount to and what purposes does it serve? Finally, why should a constitutional patriotism be in order in Italy today and how could it be encouraged to enforce the contemporary Italian civic-mindedness?

Part One

2. When Political Parties and the Constitution Met: How To Make a Form of Government Deliberately Inefficient and Unstable

To understand what occurred in the proceedings of the Constituent Assembly²¹ and how the new form of government was engineered, we need to start our story before, in fact from the so called *svolta di Salerno* (turning point of Salerno) in April 1944, when the leader of the Communist Party, Palmiro Togliatti, put forward the idea of a compromise between antifascist parties gathered in the CLN, the House of Savoy and the then Prime Minister, Marshal Pietro Badoglio, to create the first government of national unity since Mussolini's deposition.

In the late summer 1943 – after the fall of the fascist regime caused by the Grand Council of Fascism passing a vote of no confidence against Mussolini –, a network of committees mushroomed in several cities and provinces for the purpose of

²¹ The Constituent Assembly included 556 representatives chosen in the election of 2 June 1946. 207 seats were attributed to the Christian Democratic Party (DC), 115 to the Socialist Party of Popular Unity (PSIUP), 104 to the Communist Party (PCI), 41 to the National Democratic Unity (formed by liberals, laborists and independents), 30 to the Uomo Qualunque Front, 23 to the Republican Party, 16 to the National Bloc of Freedom (*Blocco nazionale delle libertà*), 7 to the Action Party (*Partito d'Azione*) and the remaining 13 to other minor lists. Left-wing parties together amounted to 219 seats corresponding to 39% of votes, the DC had 35%, 8% was represented by revanchist movements (fascists and monarchists), while the others were scattered in minuscule percentages. As for the internal organization of the Constituent Assembly, since it started to work without a draft of constitution to discuss, it was created a special commission of 75 members (*Commissione dei 75*), proportionally selected, to prepare a constitutional project. On a proposal from its President, Meuccio Ruini, three sub-commissions within it were instituted: the first to debate the rights and duties of citizens, the second on the constitutional organization of the state, and the third on the economic and social principles (see Enzo Cheli, *Il problema storico della Costituente*, in *Pol. dir.*, 1973, 494 ff.).

coordinating the political and military activities of the Resistance. The national flag might have sufficed against the Germans, but, against Mussolini's puppet Fascist Social Republic in the North and the royal dictatorship in the South, Italians needed a new banner of democracy that only the committees could champion. Symbolising the democratic political unity of the country, the CLN was 'the most important political innovation of the Resistance'²².

The CLN was composed of the Communist Party (PCI), the Socialist Party (PSIUP), the Action Party (Pd'A), the Christian Democratic Party (DC), the Labor Democrats (LD) and the Liberal Party (PLI), each accorded an equal voice. During the years of the exile in France, the antifascist groups had attempted to stay together, but in 1933 the effort had definitively failed. It was immediately after the armistice, then, that the CLN self-attributed a true constituent power in the guise of an original public institution²³.

The ethos and nature of the CLN is worthy of closer attention, both for the role it played in those years and for its flaws, foreshadowing future disfunctions and even pathologies of the Republic's institutional system. Operating an irreplaceable political and institutional part within the provisional system, the CLN became a Parliament-like body²⁴ in a *de facto* parliamentary form of government²⁵. The CLN located in the South struck a political deal with the Crown with the turning point of Salerno, whilst in the North the National Committee for the Liberation of Northern Italy (CNLAI) acted as a revolutionary force in the territories occupied by the Nazis or under the rule of Mussolini's Social Italian Republic and as a ruler in the zones gradually liberated.

²² Charles F. Delzell, *The Italian Anti-Fascist Resistance in Retrospect: Three Decades of Historiography*, in *J. Mod. Hist.*, 47, 1975, 68.

²³ Carlo Lavagna, *Comitati di liberazione*, in *Enc. Dir.*, vol. VII, Rome, Istituto Enciclopedia italiana, 1960, 778-786.

²⁴ Costantino Mortati, *La Costituente. La teoria, la storia, il problema italiano*, Rome, Darsena, 1945.

²⁵ Giuseppe Guarino, *Due anni di esperienza costituzionale italiana*, in *Rass. dir. pubbl.*, 1946, 61 ff.

The CLN experience in the Italian democratic transition did not resemble other coeval national liberation movements, like the Yugoslavian or the French, headed by charismatic leaders as Josip Broz Tito and Charles De Gaulle. On the contrary, the CLN was always directed by a coalition of political parties and operating under the rule of unanimity and equal representation. All the forces convened in the CLN were unanimous in pursuing the Liberation, but not as much in singling out the aims to achieve and in drafting a political program of the Resistance²⁶. What the political parties collected in the CLN were skilful at was approaching democracy by providing representation, but they could not be as much resourceful at organising that representation. As a result, the CLN ended up tracing out worn out models of Italian institutional past²⁷.

The first government of national unity forged in Salerno in April 1944 involved all the parties included in the CLN and was presided over by Marshal Badoglio. The deal was closed on the firm understanding that, retaining the formal ownership of the throne, the king Victor Emmanuel III handed over the royal prerogatives to his son, Umberto, as Lieutenant General of the Realm²⁸.

Marshal Badoglio, that had until then opposed the collaboration with the underground parties, felt obliged to abide the agreement also in light of the declining reputation of the Crown to the benefit of the CLN²⁹. But Badoglio would

²⁶ Cesare Pinelli, *Comitati di Liberazione Nazionale*, in *Enciclopedia giuridica*, vol. VI, Rome, Istituto Enciclopedia italiana, 1988.

²⁷ *Ibid.*, 8.

²⁸ The appointment of Umberto di Savoia as the Lieutenant General of the Realm (of the Realm and not of the King to emphasise the connection with the state and not with the dynastic heritage) put the institutional quandary of the monarchy off and opened the door to an institutional truce. On 25 June 1944, Umberto signed the D. Lgs. Lgt. n. 151/1944, establishing that, ‘after the liberation of the entire territory of the nation, the institutional form will be chosen by the Italian people that, through universal, direct, secret suffrage, will elect a constituent assembly to draft the new constitution’ (Article 1). At the time of the turning point of Salerno, then, the Constituent Assembly was supposed to decide in favour either of the monarchy or the republic. It was two years later, with the D. Lgs. Lgt. n. 98/1946, that the choice shifted to the electorate (see Cheli, *Il problema storico della Costituente*, cit., 487-488).

²⁹ Salvatore Bonfiglio, *I partiti e la democrazia. Per una rilettura dell’art. 49 della Costituzione*, Bologna, il Mulino, 2013, 51.

remain in power less than two months, resigning right after the liberation of Rome from the German occupation, on 8 June 1944. Ivanoe Bonomi, the President of the CLN, was then entrusted with forming the second government of national unity in virtue of the support offered by all the parties of the CLN. With public institutions collapsing and the moral fibre of the nation decomposing, the commitment political parties were capable of in that phase through the CLN allowed the participation of popular masses in the democratic rebirth of the country³⁰.

The transfer of power from Badoglio to Bonomi took place in the lapse of just few days, but it amounted to a radical constitutional transition, with an unprecedented gain in importance for the CLN's political parties: on 22 April 1944, Marshal Badoglio and his ministers had sworn in before the king, according to the precepts of the Albertine Statute; on 18 June 1944, instead, Bonomi installed his government as the direct expression of the CLN's parties. By 18 April 1945, the date of the first national elections after the war, the monarchy, the army, the liberal élite were all already out of the picture, with CLN's political parties remained as the sole interlocutors for the Allies. So much had been slow the evolution of popular political parties under the monarchy how fast and profound their transformation between 1943 and 1948³¹.

After the end of the war, the major issue was how to generate democracy in Italy. On this account, there were those, like Ferruccio Parri, who contended the failure of democracy in Italy even before the coming of Mussolini, having been fascism a litmus test of sorts of the evils already affecting Italian institutions; on the other side, Benedetto Croce asserted that Italy had experienced a real democratic development between 1860 and 1922 and exhorted to restart from there to found a new democracy. For the former, Italy had a democratic *will* but not a democratic regime to look up to; for the latter, the

³⁰ See Roberto Cherchi, *La forma di governo dall'Assemblea Costituente alle prospettive di revisione costituzionale*, in www.costituzionalismo.it.

³¹ Salvatore Vassallo, *Il governo di partito in Italia (1943-1993)*, Bologna, il Mulino, 1994, 101 ff.

past would teach the future. Whether Italy had ever known democracy was, then, what the dispute was about³².

An *undemocratic* mass society was the critical heritage fascism had left behind, and the major challenge the Italian transition after the war would pose is the access of these popular masses in a newly established democracy. After the First World War, both Mussolini and one of his fiercest opponents, Don Luigi Sturzo, the founder of the Popular Party, had realised that the state had to be restructured entirely and masses finally pulled into public political life. The Fascist National Party (PNF) was used to build a mass society inside a totalitarian regime. Once it lost its general approval – not for the entry into the war or because of the antifascist wave, too feeble and almost non existing, but by implosion, by inner erosion –, it had already indeleibly marked not only Italian laws and institutions, but, more importantly, Italians' mentality.

The debate inside the Constituent Assembly mirrored this climate and the latest momentousness of the parties that had animated the CLN. We saw already that the germinal idea of a constituent phase had been concocted between the fall 1943 and the early 1944, during the intricate negotiation in Salerno among the Crown, the political parties and the Allies. The parties inside the CLN envisioned the involvement of the people as the most befitting solution to sort the Italian crisis out, also because they wanted to ease the work of the Constituent Assembly. Also the monarchy and the representatives of the Allies were in favour of this option, convinced in this way to get better chances to survive.

The process of devising the form of government put at its very core two ingredients: the centrality of political parties and the refusal of any snap decision method. On 20 November 1946, Giuseppe Dossetti proposed an agenda (*ordine del giorno*) for the acknowledgment of constitutional prerogatives to political parties, as suggested by Lelio Basso the day before. Although

³² In that phase, then, democracy was not a clear notion nor a defined set of common values; rather, it represented an arena of harsh political unrest. See Pietro Scoppola, *La Repubblica dei partiti. Evoluzione e crisi di un sistema politico: 1945-1996*, Bologna, il Mulino, 1997, 55 ff.

this agenda was never discussed, it reveals the inspiration underneath, aiming at locating political parties in the very bosom of the new institutions. And the discussion on how to design the form of government was conducted on the implied premise that political parties could manoeuvre it.

A few key sessions within the Constituent Assembly outlined this address. On 4 and 5 September 1946, three positions emerged concerning which form of government to introduce: firstly, everybody, with the sole exception of the Action Party (Pd'A)³³, was against presidentialism and inclined to promote a parliamentary government; secondly, catholics and liberals were endorsing a more rationalised system; thirdly, socialists and communists insisted on avoiding too rigid constitutional limitations on the form of government. On this latter account, it was the member of the Communist Party Giorgio Amendola that, on 5 September 1946, delineated this viewpoint:

Although it is evident that a democracy must embrace a model of stability, if governing and realising a program is the goal, that stability cannot be achieved through legislative devices; on the contrary, *discipline and stability in a form of government derive from a political conscience that democratic political parties are in charge of generating*³⁴.

In his analysis, the unprecedented involvement of great popular movements in the political life, the contrast between new social claims and the forces resisting their fight, had provoked the institutional instability that had characterised the first decades of the Twentieth century. Only the action of political forces, then, could generate discipline and stability

³³ Always on 5 September 1946, Piero Calamandrei of the Pd'A asserted that 'Law cannot change the reality, but may be one of the stimuli to bring into political life the uses and methods to change the social reality'. To the arguments of those contending the uselessness of constitutional norms, for constitutions cannot come in useful in changing the society as it is, he objected that the laws had a pedagogic value and effectiveness. 'To function, democracies need to have a stable government: this is the fundamental problem of democracy. If a democracy cannot express a government that governs the country, it is fatally doomed. [...] Dictatorships do not descend from governments that govern and last, but from the impossibility for democracies to govern'.

³⁴ Giorgio Amendola, speech during the meeting of 5 September 1946 (italics added).

of the system, insufflating life into institutions even through political crisis endangering the efficiency of the government but allowing a gradual adaptation and preventing deeper fractures. Being aware of the fluidity and undetermination of the political situation, Amendola maintained that omitting constitutional stability, while giving political parties leeway to define their balance of power, seemed the most recommendable approach.

Even on the side of the Christian Democratic Party (DC), the leader Alcide De Gasperi was very critical against any attempts to strengthening the executive branch. After all, the ‘provisionary constitution’ in force between 1944 and 1948 had already embraced a plain parliamentary form of government – with the Constituent Assembly acting as a parliament, although deprived of the legislative power³⁵ –, rationalised but not too vigorously: for instance, with reference to the relation between the executive and the Constituent Assembly, Article 3, paras. 3 and 4, D. Lgs. Lgt. n. 98/1946 provided for the executive to resign only if an absolute majority of the Assembly passed an explicit vote of no confidence and not by virtue of a simple vote against the government.

However, on that very same day, the representative Egidio Tosato of the Christian Democratic Party presented the idea of a *constructive* vote of no confidence, similar to what the German Basic Law would codify the next year in its Article 67. Tosato believed that only a rationalised parliamentarism could keep up with a presidential form of government and in this spirit presented the following text:

For a vote of no confidence, at least a third of representatives of both Chambers shall deliver a motivated motion of censure to the President of the Republic. The Head of State shall convene the Chambers and, should the majority pass the vote of no confidence, the first signatory of the motion shall be considered the designated President of the government. Were several votes of no confidence presented and passed, the first signatory of the motion of censure gaining the relative majority shall be the designated President of the government.

³⁵ See Article 4, D. Lgs. Lgt. n. 151/1944 as modified by Article 3, D. Lgs. Lgt. no. 98/1946.

This forward-looking suggestion, alongside with his notion of chancellorship³⁶, that came from Tosato's meditated knowledge of Leon Blum³⁷ and others according to which the frailty of democracy is the frailty of the executive power³⁸, would get progressively eroded during the meetings of the assembly.

With the benefit of hindsight, the true day of reckoning within the Constituent Assembly was 6 September 1946, when the Republican Tomaso Perassi noted that a parliamentary system could not be disjoined from the necessary stability devices to ward off a parliamentary degeneracy and therefore proposed an agenda (*ordine del giorno*) to address the constitutional discipline of the parliamentary form of government. At that point, then, the kernel of the debate was not between a presidential or a parliamentary system, but between a parliamentarism endowed with stability contrivances or devoid of them.

Yet, Perassi's proposal was never placed on the agenda. Three months later, in December 1946, the discussion on the Head of State and the executive will take place in an altogether mood: this is the time of the socialist split³⁹ and Alcide De Gasperi is about to fly for the first time after the war in the United States. By May 1947 when, with the empowerment of the fourth government led by Alcide De Gasperi, the left-wing parties are

³⁶ With reference to the formation of the government, Tosato proposed that the President of the Republic conducted consultations to make a list of potential candidates for the premiership to be voted by the Chambers. The President of the Republic would appoint the candidate elected.

³⁷ Leon Blum had written his *La Réforme gouvernementale* in 1918, even though narrowly circulated, and reprinted it in 1936, at the time of the *Front Populaire*. In it, he had tackled the problem he defined *le travail gouvernemental*, that is the set of institutional transformations necessary to a modern polity, according to which the Parliament remains the controller and inspiration of the Government, but with a strong, unifying address determined by the head of the executive, that the people entrust with their sovereignty.

³⁸ Giuliano Amato, *Egidio Tosato e le ragioni dell'esecutivo*, in Mario Galizia (ed.), *Egidio Tosato costituzionalista e costituente*, Milan, Giuffrè, 2010, 78.

³⁹ After its fusion with the Proletarian Unity Movement in August 1943, the Socialist Party, known now as the Italian Socialist Party of Proletarian Unity (PSIUP), underwent the split of the social democrats in 1947 that created the Social Democratic Party (PSDI).

ousted from the antifascist coalition operating since 1944⁴⁰, everybody is in fear that the political opponent could disregard the democratic rules, upset the public order and even re-enact the tyranny. Mutual suspicion was the watchword. Needless to say, all that political parties could aspire to achieve was a weak government, with no constitutional dispositions to safeguard its efficiency and reinforce its stability, capable of wearing out whatever majority in power.

The mutual mistrust of political parties, on one hand, and the political conscience they were in charge of bringing into being, on the other, caused the frail, unstable, inefficient institutional arrangement that was born with the 1948 Constitution. The debate on the form of government was perhaps the richest and most intriguing of the entire process⁴¹. As unexpected as it may sound, the least rationalised parliamentarism that prevailed in the end, mainly endorsed by the Communist Party, had been totally minoritarian inside the Constituent Assembly. Two institutions, in particular, attracted the highest regard: the President of the Republic, accordingly with the classical prerogatives attributed to the Head of State in constitutional monarchies, and the Constitutional Court, to counterbalance the Parliament. It was the executive power that stayed in the shadows.

Abundance of mutual guarantees and paucity of discipline, we could say, were the strongest suits of the new institutional machinery. Certainly, in those years political parties were utterly strong, but not only because in that time Twentieth century societies like Italy naturally tended to see themselves

⁴⁰ See Fabio Grassi Orsini, *I liberali, De Gasperi e la «svolta» del maggio 1947*, in *Ventesimo secolo*, 3, 2004, 33-69 and Guido Formigoni, *De Gasperi e la crisi politica italiana del maggio 1947. Documenti e reinterpretazioni*, in *Ricerche di storia politica*, 3, 2003, 361-388.

⁴¹ Giuliano Amato and Fernanda Bruno, *La forma di governo italiana. Dalle idee dei partiti all'Assemblea costituente*, in *Quad. cost.*, 1, 1981, 64.

in big popular parties, as Maurice Duverger theorised⁴². They were strong because they could legitimize the state, they *were* the state, for the state, in the person of the monarch with his government, had escaped and stopped to function, while political parties in the CLN had assured the operativeness of the essential services, starting with the daily distribution of milk. They felt strong because they did represent the only hope to redeem Italians' dignity⁴³.

⁴² Maurice Duverger, *Les parties politiques*, Paris, Colin, 1951.

⁴³ Giuliano Amato, *Per i sessanta anni della Costituzione*, in *Riv. trim. dir. pubbl.*, 1, 2008, 162.

3. Parliamentarism as the container of political parties' power: the ineliminable bequest of the past

One of the long-lasting and most negative effects of the fight among political parties in the infancy of the new democracy was the initiation of a staunch party affiliation, juxtaposing separate political identities and, accordingly, unnerving a sentiment of national identity and democratic citizenship⁴⁴. In this phase, political parties' action was twofold: on one hand, within the Constituent Assembly they could translate the experiences and values of the people especially into the first part of the new Constitution, laying the foundation of a potentially accomplished democracy; on the other, though, they developed separate, conflicting identities. If, through the Constitution, they created an unprecedented democratic arena, at the same time, by advocating and voicing the interests of their respective communities, they became the surrogate for democratic institutions⁴⁵.

Paired with a poorly rationalised parliamentarism, the new democracy decided on a method of proportional representation to elect its representatives. It was after all the only possible choice to make such radically divergent, ideologically incompatible popular parties coexist. Ultimately, the deal the Constituent Assembly struck meant to defer the true democratic revolution some time in the future and to give up any modernization of the parliamentary system⁴⁶. The worst use of power by political parties to achieve a large popular approval would compensate for the lack of rationalisation in the form of government.

⁴⁴ Scoppola, *La repubblica dei partiti*, cit., at 168.

⁴⁵ *Ibid.*, at 174.

⁴⁶ *Ibid.*, at 225.

Therefore, the 1948 Constitution ended up engineering a model of parliamentarism very much in continuity with the previous experience of the Albertine Statute, that Augusto Barbera has called a *pseudo-parliamentarism*⁴⁷. Between 1861 and 1922, the Crown had never lost its grip on the executive power, always retaining the last word on the ministers' appointment and exerting a veto power against the Parliament in lack of true political leaderships. The absence of political leaderships was due in the first place to a very slim popular participation in the political representation that never really increased – if, in 1861, right after the Unification of the country, only 1.9% of the people was allowed to vote, in 1909 the percentage had grown to 8.3 only⁴⁸. Even after the electoral reform of 1882⁴⁹, the opposition against the enlargement of the suffrage was still rather strong: political rights had to be accorded to *things* and not to citizens – representation of the land, since the Middle Age the source of sovereignty, and not of men⁵⁰.

⁴⁷ Barbera, *Fra governo parlamentare e governo assembleare: dallo Statuto albertino alla Costituzione repubblicana*, cit.

⁴⁸ These figures appear even more miniscule if compared with the gradually increased voting rights in the United Kingdom by virtue of the three major electoral reforms enforced during the Nineteenth century: the Reform Act 1832 raised the number of voters from 400,000 to 650,000, going from 4% of the population to 7%. The Second Reform Act 1867 increased to 2 million (16%) and to 28.5% in 1868. Finally, the Representation of the People Act 1884 brought the electorate to 5,5 million, corresponding to 60% of the male population.

⁴⁹ The electoral reform enforced with the law 7 May 1882, the majoritarian two-round, single member constituencies system was replaced by a proportional, multi-member districts, list-voting system. Italy was divided in 135 constituencies, each of whom could elect between 2 and 5 representatives. The number of citizens enabled to vote passed from 621,896 to 2,049,461 (6.9% of the population). Yet, abstention remained decidedly high, especially in the North (in Veneto 49.7%, in Piedmont 42.8, compared with Calabria (21.4), Molise (23.9) and Basilicata (27)). These figures account for the usual weakness of the Italian political system and against the erroneous idea – always very popular among constitutional engineers and politicians – that it is the political system that models the electoral system (see Paolo Pombeni, *La rappresentanza politica*, in Raffaele Romanelli [ed.], *Storia dello Stato italiano dall'Unità a oggi*, Rome, Donzelli, 1995, 87 ff.). The law 5 May 1891, then, will reintroduce the two-round majoritarian system to avoid local manipulations of the lists. Only the law passed on 26 June 1913 will achieve the quasi-universal suffrage, extended to male voters over 21 literate or over 30 illiterate. This reform raised the electorate to 8,443,205 voters (23.2% of the population).

⁵⁰ Bonfiglio, *I partiti e la democrazia*, cit., at 20.

Such a narrow suffrage had caused a substantial delay in the creation of mass political parties, in lack of which it was very hard for the Presidents of the Council of Ministers to follow a coherent political guidance and to count on stable parliamentary majorities, possibly curbing the engagement of the Crown. As a result, between 1861 and 1922, a sequence of 60 executives, presided over by 26 Presidents of the Council of Ministers, followed, with an average duration of 9 months, not too far from that of the Republican era⁵¹, when the democracy of political parties replaced in the end the democracy of notables.

The Italian Republic as we know it has very little to do with that designed in the Constitution, and this is for two reasons⁵²: the first is the *viscous force of the past*, with the old institutional system outliving the Constitution. The second is the evolution of the party system during and after the constitutional convention. Too heavy, then, was the burden of the past institutional tradition, especially among the old liberal establishment, to make them focus on the deficiencies of parliamentarism and the proportional system. But how heavy and in what sense? How is the 1948 Constitution consecutive of the Nineteenth early Twentieth century constitutional practice? In this concern, two patterns seem relevant: the imprints of the Albertine Statute in the 1948 form of government and the identification between the party and the state in the fascist regime as the paragon for Republican political parties.

On the first account: the king Carl Albert had proclaimed the Albertine Statute as the fundamental law of the monarchy 'perpetual' and 'irrevocable', qualifications that made the Statute appear excessively rigid, hindering a further dialogue between the king and the nation. Thanks to the President of the Council of Ministers, Camillo Benso di Cavour, that in 1863 explained that only the pact underneath the Statute was perpetual and irrevocable, the fundamental law could live and evolve. In this vein, the Statute provided in Article 2

⁵¹ Barbera, *Fra governo parlamentare e governo assembleare: dallo Statuto albertino alla Costituzione repubblicana*, cit.

⁵² Giuliano Amato, *Una Repubblica da riformare*, Bologna, il Mulino, 1980, 49 ff.

that the institutional machinery, never intended to function as a parliamentary form of government, was ‘a Representative Monarchical Government’, the king firmly clutching the control on the executive but, at the same time, involving somehow the parliament in the support of the government, although not as an exclusive source of legitimization. These were the conditions for a double confidence. Yet, what we would tend to dispose of as an unresolved ambivalence of the Statute was in reality its most appreciated virtue: the flexibility of the form of government preventing drastic unilateral fractures and easing a gradual, reassuring development – a balance between the monarchy and the representation without leaning towards one or the other once and for all⁵³.

Adaptability, moderation, balance: this was the constitutional heritage the Statute had been very efficient to keep safe. No wonder that, for example, when the Constituent Assembly discussed the establishment of a Constitutional Court, the old liberal leader Vittorio Emanuele Orlando, the former President of the Council of Ministers to the Paris Peace Conference, objected that, by introducing such rigid, formal control over public powers, Italy would lose its national tradition⁵⁴.

The Albertine Statute, then, would be able to offer guidelines only in the negative: firstly, the ruling class of the CLN considered it the anteroom of fascism or, in the best case scenario, the last defensive line of the monarchy. Secondly, and most importantly, it embodied the void of an ‘institutional strategy’⁵⁵ useful for the design of a more stable and efficient form of government. As a result, the new form of government was surely equipped to soften the challenges, but not to respond forcefully to any; to absorb the transformations, but not to promote any; to accommodate itself but not to innovate; to centralise instead of facilitating a democratic change in power⁵⁶.

⁵³ Maurizio Fioravanti, *Costituzione e legge fondamentale*, in *Dir. pubbl.*, 2, 2006, 477.

⁵⁴ Vittorio Emanuele Orlando, *Studio intorno alla forma di governo vigente in Italia secondo la Costituzione del 1948*, in *Riv. trim. dir. pubbl.*, 1, 1951, 5 ff.

⁵⁵ Cheli, *Il problema storico della Costituente*, cit., at 491.

⁵⁶ Gianfranco Pasquino, *Art. 49*, in Giuseppe Branca and Alessandro Pizzorusso

The second account is the legacy of the fascist regime, the heaviest impending on the development of political parties in the newly devised democracy. The mark impressed by the National Fascist Party (PNF) was indeleble, but – to understand the process leading to Article 49 of the 1948 Constitution disciplining political parties, their taking roots in the Republican institutions and their degeneration – we need first to take a step back and to reconstruct the doctrine of the political party since the Nineteenth century.

3.1 *Political Parties: From One to Many?*

As we noted above, within the Constituent Assembly the cooperation among political parties was difficult and littered with misunderstandings from the very start: the elections of 2 June 1946 would show that the country still leaned towards the political right, embittering the left parties and rivitalizing the most conservative of catholics. The long-lasting effect of this ulcered landscape would instill a strong sense of juxtaposed political affiliations in the Italian popular culture and, consequently, enfeeble a true national identity, a real democratic citizenship.

As the historian Pietro Scoppola maintained, the breakdown of the nation on 8 September 1943, when the armistice of Cassibile with the Allies entered into force, amounted to the disintegration of the national sentiment, opening a void in the public conscience of the people, and to the exasperation of the always typical Italian attitude of fending for oneself⁵⁷. Political parties filled that void and guided the country through the hardships towards the democratic transition. Such pre-eminence of political parties should have required a firm control on their internal democracy, as Costantino Mortati had suggested⁵⁸. But

(eds.), *Commentario della Costituzione*, vol. 21, I, Bologna, Zanichelli, 5.

⁵⁷ Scoppola, *La Repubblica dei partiti*, cit., at 173.

⁵⁸ This was the inspiration behind his proposals pursuing controls over the democratic structure and methods of political parties, for example on the procedures to select the candidates, convinced, on one hand, that political parties constituted the democratic ground of the state, and consequently, on the other, that political parties couldn't but be submitted to external control of their democratic nature: 'a state

even this proposal, just like Perassi's agenda, encountered the strenuous opposition of the Communist Party and was rapidly discarded.

What model of political party was then adopted in the 1948 Constitution? Which rules were introduced both for their public role and their internal functioning? As a matter of fact, Article 49 presented some special novelty with reference to the Nineteenth century liberal doctrine: old politicians and legal thinkers like Vittorio Emanuele Orlando – according to whom the majority supporting the government could not correspond to a majority of parties, otherwise it would endanger the balance between the monarch and the Parliament so hardly enforced after the Albertine Statute – had endorsed a *social* notion of the party, moving from what established in Article 6⁵⁹ of the 1789 French Universal Declaration of the Rights of Man and of the Citizen, that does actually not mention political parties, but refers to people's representatives through which citizens can participate in the general will's foundation.

The people is sovereign, then, through its representatives, gathered in political factions, but not through parties, which can facilitate the citizens in concurring to the law in the capacity of a *social* body and certainly not of an institutional one⁶⁰.

grounded on democratic grounds cannot tolerate that political parties refuse systems and methods of liberty in their internal structure', as he said at the Constituent assembly on 18 September 1947 (see Costantino Mortati, *Interventi alla Costituente*, in Id., *Raccolta di scritti*, Milan, Giuffrè, 1972, vol. I, 925 ff.). On this note, see also Oreste Massari, *Mortati e il problema del partito politico*, in *Costantino Mortati. Potere costituente e limiti alla revisione costituzionale*, Quaderni di NOMOS – Le attualità del diritto, Padova, CEDAM, 2017, 177-192. Later, after the entry into force of the 1948 Constitution, Mortati would recede from this line of thought with a complete abjuration of any public control on the internal systems and methods of political parties in his *Concetto e funzione dei partiti politici*, Quaderni di ricerca, s.l., 1949, bitterly remarking that 'all was an illusion'. In this concern, see also Fulco Lanchester, *Nota introduttiva*, in *NOMOS – Le attualità del diritto*, 2, 2015.

⁵⁹ 'Law is the expression of the general will. Every citizen has the right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents'.

⁶⁰ Between the first half of the Nineteenth century and the first of the Twentieth, the attention to political parties went through four stages according to Heinrich

Traditionally, political parties were the result of the spontaneous association of people and opinions, like the transfer in the public domain of the individual autonomy characterising the liberty of modern. The real turning point, though, occurred when new political parties started to flank those originated in parliament – groups representing for the first time workers, classes, religions, and already operating within the society, even in lack of political representation⁶¹.

Article 49⁶², on the contrary, welcomed the idea of the political party as an *institution*: Santi Romano had already realised that parties could not be considered anymore like mere associations⁶³ and even Costantino Mortati had maintained the urgency of such a shift towards more modern institutional conceptions⁶⁴. Three motivations sustained the need for this passage: firstly, the idea of ‘people’ or ‘nation’ had become more and more controversial, tightly embroidered with a plethora of potentially conflicting interests. Society was, then, the place of contrasts and peculiar claims, and not of unity. Secondly, before the multiplication of such juxtaposed interests, only political parties could aggregate claims. Thirdly, the party was

Triepel, *Die Staatsverfassung and die politischen Parteien*, Berlin, 1927: from an overt hostility on the part of the State (*Bekämpfung*) to a manifestation of indifference (*Ignorierung*), to a legal recognition of political parties (*Anerkennung* and *Legalisierung*) to their inclusion in the State organisation (*Inkorporation*).

⁶¹ The classical literature in this field is, among many others, Max Weber, *Politik als Beruf*, Leipzig, Reclam, 1992; Roberto Michels, *La sociologia del partito politico*, Bologna, il Mulino, 1966.

⁶² ‘Any citizen has the right to freely establish parties to contribute to determining the national politics through a democratic method.

⁶³ In his classic book *L'ordinamento giuridico*, published for the first time in 1916 (Santi Romano, *L'ordinamento giuridico*, Florence, Sansoni, 1977), Santi Romano had maintained his antipositivistic approach, according to which the law is a spontaneous emanation of society (*ubi societas ibi ius*).

⁶⁴ Costantino Mortati's production shows his constant, always keen interest in political parties, witnessed by his specific contributions like *Sulla posizione del partito nello stato*, in *Stato e diritto*, 1941, 279 ff.; *Concetto e formazione dei partiti politici*, in *Quaderni di ricerca*, s. 1, 1949; *Disciplina dei partiti politici nella Costituzione italiana*, in *Cronache sociali*, 1950, 25 ff.; *Sindacati e partiti politici*, in *Atti della XXI settimana sociale dei cattolici italiani*, Rome, 1952; *Note introduttive ad uno studio sui partiti politici nell'ordinamento italiano*, in *Scritti in memoria di Vittorio Emanuele Orlando*, Padova, CEDAM, 1957. He envisioned political parties as the joint among civil society, political society and institutions.

intended as a faction counting for the whole – an entity capable of creating unity. As Maurizio Fiorevanti noted,

it was the role of political parties to overcome the indistinctiveness of popular sovereignty, to canalise the torment into a constituent effort, to discipline, make legal, produce the new constitution. In this sense, it can be said that political parties were the ‘authors’ of the Constitution⁶⁵.

Let us look at two European constitutions entered into force in those same years – the 1946 French Constitution and the 1949 German Basic Law: while the French Fourth Republic ignored altogether political parties, Germany gave up the neutrality towards political parties embraced in the Weimar Republic and, conversely, exalted the role of political parties in the newly established democracy; at the same time, the Basic Law disposed that every political party be required to abide by some fundamental constitutional values (*die freiheitliche demokratische Grundordnung*) and hence to be subject to public control⁶⁶.

In this context, the Italian way constituted a middle ground: to begin with, the Constitution provided for political parties. This fact is relevant because the founding fathers broke with the tradition of neglecting the phenomenon of political parties.

⁶⁵ Maurizio Fioravanti, *Costituzione e popolo sovrano. La Costituzione italiana nella storia del costituzionalismo moderno*, Bologna, il Mulino, 2006, 77.

⁶⁶ Article 21 GG (*Grundgesetz*) provides:
 ‘1. Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and the use of their funds.
 2. Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.
 3. Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be excluded from state financing. If such exclusion is determined, any favourable fiscal treatment of these parties and of payments made to those parties shall cease.
 4. The Federal Constitutional Court shall rule on the question of unconstitutionality within the meaning of paragraph (2) of this Article and on exclusion from state financing within the meaning of paragraph (3).
 5. Details shall be regulated by federal laws’.

However, Article 49 is not placed under Title V, devoted to the organisation of the state, but under Title IV, reserved to political relations. The implications of this choice are far from being obscure: political parties were not treated as *institutions*, like gears of the governmental machine, but as a garrison for spontaneous association of citizens and, ultimately, for pluralism. In a comparative perspective with Article 21 GG, it is glaring that, whilst the Italian way focuses on the right of citizens to create political parties to facilitate their participation in the national politics, the German Basic Law attributes directly to political parties the function of taking part in the formation of the will of the people. So, differently from Article 21 GG devoted to political parties, the kernel of Article 49 are the citizens with their freedom. Lastly, Article 49 alludes to the democratic method within political parties, but without foreseeing any control by public authorities to check the practice of internal democratic processes.

According to this approach, then, the citizens are the promoters of a complex dynamics by which they elaborate their political agenda, creating or participating in a political party in charge of advocating the interest thereof: the party contributes to the definition of national politics and, in this way, fulfils the ideals of the citizens represented. Article 49 cares for the freedom of citizens, for political pluralism and its commitment in the national politics analogously with the seminal role they had played in the transitional phase⁶⁷, but nothing is said about the in-between: what if the party method is less than democratic? The impact of a lack of internal democracy would be threefold: on the strategy and political program of the party; on the selection of candidates; on the appointment of managers and officers⁶⁸. But, as strange as it may sound, the 1948 Constitution does not propose any antibody or offer any remedy to these very serious potential abnormalities.

⁶⁷ Paolo Ridola, *Partiti politici*, in *Enc. dir.*, vol. XXXI, Milan, Giuffrè, 1981, 72 ff.

⁶⁸ Gianfranco Pasquino, *Articolo 49*, in Giuseppe Branca, Alessandro Pizzorusso (eds.), *Commentario della Costituzione. Artt. 48-52. Rapporti politici*, vol. 1, Bologna, Zanichelli, 1992, 25.

The thing is that CLN's stakeholders had been not single political representatives or leaders, but political parties, inebriated with the finally regained status after the long fascist era. It is natural, therefore, that the Constituent Assembly treated political parties like *institutions* (for what they had done during the democratic transition) and that any restraints on their role were openly avoided. Article 49, then, exalted the intermediation of political parties between popular preferences and national politics, but too many problems hidden just around the corner were left unattended.

In the 70 years since the Constitution's entry into force, the distance between the idea of political parties dwelling in the mind of the drafters and the role they would in fact act within the institutional machinery has become unmanageable. In the Italian system, political parties are still *institutions* that think of themselves with no restraints. They have radically transformed through the impactful, traumatic events of the last 25 years – from the majestic collective organizations of the first half century of the Republic to the present-day personal parties or movements that aim at getting rid of representative democracy –, but they are still tempted to subsume that old identification. It is as if political parties have moulted but their relation with power have stayed. And, most importantly, the Italian people seem to entertain the same expectancies from political actors, in spite of their radical mutation.

But political parties' identification with the state is a bequest of the fascist era. The idea, largely indebted to Benedetto Croce's interpretation and for decades prevalent among Italian legal scholars⁶⁹, that Mussolini's regime was incidental in the Italian history is hugely misleading. It is undoubtedly reassuring for contemporary generations to mark a distance between that authoritarian experience and our previous or future institutions,

⁶⁹ Livio Paladin, *Fascismo (diritto costituzionale)*, in *Enc. dir.*, vol. XVI, Milan, Giuffrè, 1967, 887-888 was critical against the tendency to see fascism as the outcome of a fracture with previous institutions, even because, among other things, it would be far from simple to single out the event or historical moment when this fracture is supposed to occur, given the gradual and certainly not sudden fascist grip of power.

but it corresponds more to a wishful thinking than to the truth of the matter⁷⁰.

Fascism has not been a parenthesis in the Italian history since Unification, but only a *bridge* between “before” and “after” – a long, painful transition⁷¹.

Three aspects of the Fascist National Party (PNF)'s action and significance seem conspicuously relevant to understand the long-lasting influence exerted on the Italian attitude towards political parties: on a first account, PNF was the only public channel that enabled the *political participation*, individual or collective, of the Italian people in the state; secondly, the overarching PNF touched the ordinary life of millions of men and women by administering the *welfare system* of the time; lastly, the membership to the PNF injected the notion of a *second citizenship* in the Italian society.

Despite the numerous amendments to its charter⁷², the PNF always represented a very critical ambiguity of the regime. Essential but cumbersome, functional but unsettling, powerful, too powerful, but insuppressible, it was at the core of multiple tensions and conflicts – with the Ministry of Interior and the prefects, with the executive branch and its ministers, with the Grand Council of Fascism, with *il Duce* Mussolini⁷³. In 1925, after the entry into force of the so called *legge Acerbo*⁷⁴ and

⁷⁰ Sabino Cassese, *Lo Stato fascista*, Bologna, il Mulino, 2010, loc. 267.

⁷¹ *Ibid.*, loc. 1231 (italics added).

⁷² After the first charter of 1921, new versions of it will be promoted in 1926, 1929, 1932, 1938.

⁷³ See, in this regard, Tullio Cianetti, *Memorie dal carcere di Verona*, ed. by Renzo De Felice, Milan, Rizzoli, 1983, 201 and Giordano Bruno Guerra (ed.), *Giuseppe Bottai, Diario 1935-1944*, Milan, Rizzoli, 1989, 128. More generally, see Loreto Di Nucci, *Lo Stato-partito del fascismo. Genesi, evoluzione e crisi 1919-1943*, Bologna, il Mulino, 2009, 423 ff.

⁷⁴ The so called *legge Acerbo* is actually the L. 18 November 1923, no. 2444, engineered by the then undersecretary to the Presidency of the Council of Ministers Giacomo Acerbo in pursuance of Mussolini's wish to have an electoral law for the House of Representatives capable of exalting PNF's representation. The *legge Acerbo* abrogated the proportional system in force since 1919 with a majority premium of 2/3 of the parliamentary seats assigned to the party reaching the quorum of 25 percent of votes. When the Council of Ministers approved the bill and sent it to the House of Representatives, its President Enrico De Nicola summoned a commission composed

Giacomo Matteotti's murder⁷⁵, fascism was at some crossroads: either the PNF should coherently carry on with the purity of its origins or turn into a national party – the one party of the Italian people. In other words, the PNF should make up its mind whether to be a *party avanguard* or a *party collector*. This latter appearance would gradually take hold, being the PNF the fundamental connection between fascism and the masses, generating the intimate, indissoluble unity between the party and the state accordingly with an unprecedented model of immanence of the state in the society⁷⁶.

Since the mid-1920s, the PNF attended the task of guaranteeing the indispensable regime's legitimization through the organization of the masses and of using its pedagogy to instruct a new, ideal fascist leading class⁷⁷. In a speech pronounced before the second quinquennial fascist assembly in Rome on 18 March 1934, Mussolini proclaimed the strategic function of the PNF, 'the formidabile instrument, and at the

of eighteen members (Ivanoe Bonomi, Antonio Casertano, Giuseppe Chiesa, Alcide De Gasperi, Alfredo Falcioni, Luigi Fera, Giovanni Giolitti, Giuseppe Grassi, Antonio Graziadei, Pietro Lanza di Scalea, Costantino Lazzari, Giuseppe Micheli, Paolo Orano, Vittorio Emanuele Orlando, Raffaele Paolucci, Antonio Salandra, Michele Terzaghi, Filippo Turati) to discuss it. Several amendments were advanced, but in the end the bill was approved with a majority of 10 against 8. In the plenary assembly, the opposition parties still tried to reform it, but with no success, and the law was finally passed with 223 votes against 123.

⁷⁵ Giacomo Matteotti (1885-1924) was a socialist politician, leader of the Unitary Socialist Party after its division from the Socialist Party. Elected three times at the House of Representatives (1919, 1921, 1924), he conducted an overt, very vocal opposition against Benito Mussolini and his power. On 10 June 1924, he was bundled into a car and stabbed to death. His corpse was finally found after an extensive search north of Rome on 16 August 1924. Five men were arrested few days after the kidnapping (Amerigo Dumini, Giuseppe Viola, Albino Volpi, Augusto Malacria and Amleto Poveromo), but only three were convicted. King Victor Emmanuel III allowed their release under amnesty shortly after.

⁷⁶ Guido Melis, *La macchina imperfetta. Immagine e realtà dello Stato fascista*, Bologna, il Mulino, 2018, loc. 3768. In the years 1926-1930, when the PNF was managed by Augusto Turati, a myriad of apparently negligible measures were introduced to integrate the PNF into the state. The R.D. 12 December 1926, no. 2061, then converted into L. 9 June 1927, no. 928, would elevate the fasces to the Italian coat of arms; the R.D. 27 March 1927, no. 1048, would command its adoption to every administration; the R.D. 11 April 1929, no. 504, inserted it in the state seal.

⁷⁷ Guido Melis, *Fascismo (ordinamento costituzionale)*, in *Digesto*, vol. VI, Turin, UTET, 1990, 266.

same time widespread, that leads the people into the general political life of the state⁷⁸. The leader of the PNF, Achille Starace, set in motion three major policies: he extended the physical, tangible presence of the party to the tiniest alley, encompassing within the PNF the largest number of social institutions already existing; he grew the influence of the party on the economic life of the country; lastly, he promoted the development of youth organizations to achieve the whole fascist education – spiritual, political, and warlike.

With such branched out structure, broadened to cover every single aspect of ordinary life, the PNF became the means for the modernisation of Italians, who got accustomed to its pervasive presence and learned through it what modernity entailed – radio, cinema, trains for the people, holidays at sea or in the mountains with sleep-away camps⁷⁹. The PNF's mission was to make every Italian the perfect fascist, regardless of their social condition, sex, age, in order to create a political community integrated in the state⁸⁰.

But the PNF was also a source of social protection for the individuals that were moving from the countryside to urban areas; it gave assistance for the accommodations, to find a job, to get ahead in one's profession, and was active with the utmost responsiveness in welfare policies⁸¹. If the PNF was always excluded from the political address of the government, it was conversely located at the core of a system of social aid that affected quite permeatingly the common life of millions, young and old, children and parents, men and women, labourers and white collars, illiterate and well cultivated – what today we would refer to as the *welfare state* (to name a few, price control, rental market, job placement, job assignment in public

⁷⁸ Reported in Di Nucci, *Lo Stato-partito del fascismo. Genesi, evoluzione e crisi 1919-1943*, cit., 439.

⁷⁹ Luciano Cafagna, *La grande slavina. L'Italia verso la crisi della democrazia*, Venice, Marsilio, 1993, 62.

⁸⁰ In this sense, see Emilio Gentile, *La via italiana al totalitarismo. Il partito e lo Stato nel regime fascista*, Rome, Carocci, 2018, 186-190.

⁸¹ Cafagna, *La grande slavina. L'Italia verso la crisi della democrazia*, cit. and Id., *Una revisione necessaria*, in J. Jacobelli (ed.), *Il fascismo e gli storici di oggi*, Rome-Bari, Laterza, 1988, 20-25.

offices, mass media management)⁸². It was reported that, during the winter 1934, 1,750,000 families, equalling nearly 3 million people in total, had been daily supported with the distribution of 17,000 tons of white flour, over 17 million rations of beans, 14 million of rice, over 5 million of milk, 33 million of people's meals (*rancio del popolo*), almost 10 million of school refectations, all amounting to more than 130 million liras⁸³. Kids involved in sleep-away camps reached half a million and instructions were imparted by the PNF for the national reforestation, wine transportation, fresh fruit consumption, the national festivity for grapes, the toy day, the protection of the Sardinian rough woollen fabric (*orbace sardo*)⁸⁴. The PNF took advantage of the legal vacuum in which associations had sprung and flourished during the Nineteenth-century liberal state promoting associations intervening in every moment of an average Italian's life: not one single profession, trade or craft, from birth to death, was left unattended – *figli della lupa, balilla, avanguardisti*⁸⁵. The PNF was always above them all like a *state-party*, an equivocal merge of public institutions and the PNF, symbolising, on one hand, the fatal attraction of the state on the party and, on the other, the infiltration of the party in the state⁸⁶.

The PNF leader Achille Starace was especially eager to translate into practice Mussolini's watchword *to get close to the people*. Through this system of welfare, the greatest majority of Italians became dependent on the PNF, with a remarkable growth in terms of enrollments in the party⁸⁷. Such a capillary

⁸² Paolo Pombeni, *Demagogia e tirannide. Uno studio sulla forma-partito del fascismo*, Bologna, il Mulino, 1984, 261.

⁸³ Di Nucci, *Lo Stato-partito del fascismo. Genesi, evoluzione e crisi 1919-1943*, cit., 45-54.

⁸⁴ *Ibid.*, 454.

⁸⁵ Cassese, *Lo Stato fascista*, cit., loc. 1130.

⁸⁶ With the fourth PNF charter passed in 1932, article 1 provided that PNF was a 'civilian militia', 'under the orders of Duce', 'at the service of the state'. As noted by Gaspare Ambrosini, *Il partito fascista e lo Stato*, Rome, Istituto nazionale fascista di cultura, 1934, the PNF had finally become 'an institution of the state' (reported in Melis, *La macchina imperfetta. Immagine e realtà dello Stato fascista*, cit., loc. 3995).

⁸⁷ Between October 1932 and October 1933, the members of PNF passed from around a million to nearly a million and a half (Renzo De Felice, *Mussolini Il Duce. Gli anni del consenso (1929-1936)*, vol. I, Turin, Einaudi, 1974, 224. See also Di

intervention of the PNF in response to the most fundamental population's needs in everyday life engendered the divide between fascist and non-fascist Italians, the membership to the PNF functioning as the basic pre-requisite for a full enjoyment of citizenship rights⁸⁸.

In Matteotti's poignant, prophetic words,

Being fascist is, in sum, *a second and more important Italian citizenship*, in lack of which civil rights, the right to vote, the freedom of establishment and movement, the right of assembly, employment, the freedom of expression and even of thought cannot be practiced and enjoyed⁸⁹.

Many decades later, Pietro Scoppola enlightened this anomalous, endurable notion of citizenship rooted in the Italian civic identity with rare clarity and discernment:

Citizenship in Italy is a legal notion, devoid of the sociological, cultural and moral acceptance typical of other countries [...]. Fascism has realized the accession of masses to politics through political parties in the guise of a *political religion*, but political religion is altogether different from a democratic sense of citizenship. The post-war ideological juxtapositions, in the climate generated by the political fight against communism, have assumed the form of 'political religions' [...]. But political religions are not easily compatible with a good functioning of democracy⁹⁰.

Political religions and churches are now buried in a remote past. And yet the attitude towards political parties has not changed so remarkably: in spite of the different circumstances of their genesis, the relation parties develop with citizens, on one side, and with power, on the other, has not sensibly changed. The *expectations* of voters are not changed – revolving today around a political leader and not around an ideology anymore – nor has the *occupation of institutions* changed.

On 21 April 1993, the then President of the Council of Ministers, Giuliano Amato, stepped down after the referenda

Nucci, *Lo Stato-partito del fascismo. Genesi, evoluzione e crisi 1919-1943*, cit., 440).

⁸⁸ Di Nucci, *Lo Stato-partito del fascismo. Genesi, evoluzione e crisi 1919-1943*, cit., 424.

⁸⁹ Giacomo Matteotti, *Un anno di dominazione fascista* (1923), Milan, Rizzoli, 2019, 96 (italics added).

⁹⁰ Scoppola, *La Repubblica dei partiti*, cit., 529.

aiming at reforming the parliamentary electoral system had collected a wide consensus among the population. In his intervention before the House of Representatives⁹¹, he acknowledged a true regime change: the type of party-state – i.e. a party predominantly inhabiting state institutions – introduced with fascism in the singular and adopted by the Republic in the plural was about to die. The assertion stirred a hornet's nest⁹² and Norberto Bobbio for one warned Amato against perilous misunderstandings⁹³ in the attempt of striking inappropriate comparisons. The day after, Amato replied to the many reactions to his speech and explained that 'it is a fact that the regime established on political parties acquiring consensus through the use of public institutions was born in Italy with fascism'⁹⁴. Then, the party system during the Republic degenerated when its legitimization came more from inhabiting the institutions than from its rooting within the society.

Do Giuliano Amato's words still speak to us after 25 years? Should we keep seeing the Italian form of government solely as the arena for winning political parties to exert their power? And, more importantly, do political parties still see the form of government in this self-referential perspective⁹⁵? Ideologies have wiped out, traditional parties have vanished, new political subjects and protagonists once raised as top-billing actors have fallen to meager supporting roles. Everything has changed along the road of Italian politics. Still, voters' endorsement evaporates with the utmost immediacy, messianic leaders are worn out in a heartbeat, affiliation is nomadic and extremely volatile. For a present-day political movement, putting down roots in the Italian electorate is but an easy task and every campaign for

⁹¹ The parliamentary debate can be retrieved in its entirety from <<http://legislature.camera.it/dati/leg11/lavori/stenografici/stenografico/34736.pdf>>.

⁹² Salvatore Lupo, *Partito e antipartito: una storia politica della Prima Repubblica, 1946-78*, Rome, Donzelli, 2004, 16 spoke of 'revisionist cacophony' (*cacofonia revisionista*).

⁹³ Norberto Bobbio, *Presidente non faccia confusione*, in *La Stampa*, 23 April 1993.

⁹⁴ The parliamentary debate can be retrieved in its entirety from <http://legislature.camera.it/_dati/leg11/lavori/stenografici/stenografico/34736.pdf>.

⁹⁵ Amato, *Per i sessanta anni della Costituzione*, cit., at 164.

the ballot box may shrink to a race for power, oblivious of the past like in an ideal year zero, as if the Italian identity is an instantaneous invention and not the outcome of a decades-long Constitution.

Part Two

4. Constitutional Patriotism

Constitutional patriotism is the theory according to which political attachment ought to hinge on the norms, values, and, more indirectly, the procedures encompassed in a liberal democratic constitution. In this vein, it is neither the national culture or unity nor a cosmopolitan approach that inspires the sentiment and vision of a democratic polity; rather, its set of constitutional rules and principles embodies its foundational and inspirational assumptions.

Constitutional patriotism has gained an unprecedented relevance in the mid-1990s, when observers inside and outside Germany began to find in it ‘a normatively attractive form of civic, non-national (or perhaps even post-national) attachment for increasingly multicultural societies’⁹⁶. Germany is typically considered the motherland of constitutional patriotism, and for good reasons. Although it did not invent either constitutionalism or patriotism, it elaborated this theory as a distinct idea from liberal nationalism at a time when the greatest challenge for its tentative stable democracy was to avoid repeating the political breakdowns of the interwar period and to foster civic solidarity in a society segmented into different classes and different religious and ethnic groups, even more complex because of the antagonism with communism.

It is well known that all started in the immediate aftermath of the Second World War, when – among several other reflections on the German collective responsibility for the crimes of the Nazi regime⁹⁷ – the liberal philosopher Karl Jaspers published

⁹⁶ Jan-Werner Mueller, *Constitutional Patriotism*, Princeton NJ, Princeton University Press, 2007, 2.

⁹⁷ Ernst Wiechert, *Rede an die deutsche Jugend*, Munchen, Zinnen-Verlaine

the book *The Question of German Guilt*⁹⁸. Jasper's unsullied record as an anti-Nazi, removed from his post at the University of Heidelberg in 1935 and isolated all along the years of power and war, made him an outstanding point of reference for his compatriots who wished to reconstruct a new Germany, free and democratic. His book was an attempt to deal with German guilt, recommending free public communication between equals and the so called *solidarity of charitable struggle*, and to discuss rationally the highly heated question whether the German people was to be held responsible for the atrocities of the Thirties and Forties. He claimed that 'it is illogical to accuse a people as a whole in committing crimes. A criminal is always an individual [...] A people cannot be made into an individual' and classified guilt in four types and degrees of responsibility: the *criminal guilt*, identified with the actual commitment of criminally sanctioned acts; the *political guilt*, i.e. the diffuse political acquiescence towards the Nazi regime; the *moral guilt*, a private judgment that a person may share with her friends; the *metaphysical guilt*, a universally shared responsibility of those who chose to survive instead of fighting the Nazi brutalities – a guilt before humanity and God.

On these latter accounts, Jaspers opposed the idea of *collective responsibility* to the notion of collective guilt that was being levelled against Germany: according to Jaspers, 'a democratic political identity and proper social integration could only be achieved if the Germans shouldered collective responsibility. For Jaspers, even a negative past could become a source of social

Kurt Desch.; Zurich, Rascher Verlag, 1945; Wilhelm Hoffman, *Nach der Katastrophe*, Tuebingen-Stuttgart, Rainer Wunderlich Verlag, 1946; Alfred Weber, *Abschied von der Bisherigen Geschichte*, Bern, Verlag A. Franke; Hamburg, Claassen und Govers Verlag, 1946; Wilhelm Roepke, *Die deutsche Frage*, Zurich, Eugen Reutsch Verlag, 1945; Friedrich Meinecke, *Die deutsche Katastrophe: Betrachtungen und Erinnerungen*, Zurich, Aero-Verlag; Wiesbaden, E. Brockhaus Verlag, 1946. A review of all these books and pamphlets is S.D. Stirk, *The German Catastrophe through German Eyes*, in *Int'l J.*, 2, 1947, 343.

⁹⁸ Karl Jaspers, *Die Schuldfrage. Ein Beitrag zur deutschen Frage*, Zurich, Artemis-Verlag, 1946. A portion of the work had already appeared in the *Neue Zurcher Zeitung* (4 October 1946) and was translated for the first time into English in Karl Jaspers, *Significance of the Nurnberg Trials for Germany and the World*, in *Notre Dame L. Rev.*, 22, 1947, 150.

cohesion⁹⁹. Memory (of the Shoah) and militancy (against the enemies of democracy), then, were the two pillars of the German reconstruction of its own identity.

The years between 1949 and 1963 will be known as the *latency period*, in which Germany dwelled on an overwhelmingly political apathy and sublimated its political energies in the reconstruction. The result was the *Wirtschaftswunder* (the economic miracle) under the leadership of the Christian Democratic Chancellor Konrad Adenauer. While the rest of the Western Europe was enquiring about the so called German question – how can German aggressiveness be curbed? –, many officials from the Nazi regime skipped trials for their crimes and found positions of power and influence¹⁰⁰.

It was right in 1963 that one of Jaspers' pupils, the political scientist Dolf Sternberger, revived the attention on those theories in contrast with the *integration theory* of Rudolf Smend¹⁰¹. Another unblemished figure of the Third Reich period, deprived of his chair at the University of Berlin in 1928, Smend had been one of the most vocal opponents of legal positivism during the Weimar Republic and, after the War, he had turned out to be one of the most distinguished supporters of the Basic Law, in spite of the unsophistication of the 1949 Constitution – a mere list of articles, drafted under the aegis of the Allies and devoid of any gravitas – if compared with the prodigious intellectual achievement of the Weimar Constitution. Smend's theory centered on the connection between law and society, applying a combination of sociological and legal analysis. Instead of a strictly juridical method of interpreting legal norms, he had elaborated a conceptual framework for the study of the social phenomena making up the reality of the state¹⁰². Accordingly with this sociological approach, Smend maintained that the

⁹⁹ Müller, *Constitutional Patriotism*, cit., 16-17.

¹⁰⁰ Richard Wolin, *Introduction*, in Jürgen Habermas, *The New Conservatism. Cultural Criticism and the Historians' Debate*, Cambridge MA, The MIT Press, 1989, loc. 420.

¹⁰¹ Rudolf Smend, *Verfassung und Verfassungsrecht*, Munich-Leipzig, Duncker und Humblot, 1928.

¹⁰² See Werner S. Landecker, *Smend's Theory of Integration*, in *Social Forces*, 29, 1950, 39.

Basic Law represented an order of values derived from the political culture and tradition of the country and emphasised the role of the Federal Constitutional Court in strengthening social integration.

Yet, after the seminal *Lüth* decision in 1958¹⁰³, in which the Court attributed to basic rights the protection of the citizen against the state but also the incorporation of an objective set of values applying throughout the legal system, the Court began to wonder how citizens could be made *Sich-in-diesem-Staat-zu-Hause-Fublen* (to feel at home in the state). It was in the years immediately after *Lüth*, then, that Sternberger developed the notion of *Staatsfreundschaft* (friendship towards the state)¹⁰⁴, while in 1979 the word *Verfassungspatriotismus* made its first appearance in a book¹⁰⁵ and in a series of articles Sternberger published in the *Frankfurter Allgemeine Zeitung* on occasion of the thirtieth anniversary since the entry into force of the Basic Law.

Sternberger associated his constitutional patriotism to the idea of militant democracy¹⁰⁶ – a democracy defending itself from its internal and external enemies. A democracy that needs to protect itself¹⁰⁷ is the key to explain the Constitutional Court's

¹⁰³ BVerfGE 7, 198 I. Senate (1BvR 400/51).

¹⁰⁴ Dolf Sternberger, *Staatsfreundschaft. Rede zur Hundertjahrfeier der Sozialdemokratischen Partei Deutschlands*, Frankfurt am Main, Insel-Verlag, 1963.

¹⁰⁵ Dolf Sternberger, *Verfassungspatriotismus*, Frankfurt am Main, Insel-Verlag, 1990.

¹⁰⁶ See 5 BVerfGE 85, 139: 1956.

¹⁰⁷ A self-protecting democracy, as in the German case, was not the choice the Italian founding fathers did when they drafted the 1948 Constitution. Germany is called a 'democratic and social federal state' in Article 20, para. 1 and the following Article 21 para. 2 of the 1949 Basic Law provides for the unconstitutionality of political parties that seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany, para. 3 (as amended in 2017) excludes these parties from state financing and para. 4 empowers the Federal Constitutional Court to deal with this unconstitutionality. Germany considers itself a *Parteienstaat*: accordingly, political parties enjoy constitutional status allowing them to adjudicate their rights as primary agents of electoral politics, as stated in 1 BVerfGE 208 (1952). Conversely, the Italian Constitution does not oppose any limitations of aims to the exercise of collective liberties: Article 17 guarantees the right to assemble *peaceably and unarmed*, while Article 18 forbids *secret associations* and associations that, even indirectly, *pursue political aims by means of a military organization*. In other words, the Italian Constitution did not want to protect

decisions to ban the Socialist Reich Party (SRP) in 1952¹⁰⁸ and the Communist Party of Germany (KPD) in 1956¹⁰⁹ and the draconian intolerance against terrorist associations later on¹¹⁰. Yet, despite Sternberger's efforts to overcome the conventional notions of nation-state, 'the affective ties of Sternberger's constitutional patriotism, you might say, were mainly vertical, rather than horizontal – citizens would "care for" concrete, particular institutions by identifying their interests in peace and protected liberty with those of the institutions'¹¹¹. As a consequence, 'it would be hard to deny that he remained substantially indebted to familiar traditions of *étatisme*'¹¹² and that the primary purpose of his *protective* constitutional patriotism was to ensure political stability.

Still during the federal election campaign in 1986-87, the debate concerning the normalization of Germany was orchestrated by the ruling party in order to remove the blot of shame of the Nazi era on the honour of the nation: the parliamentary president of the Christian Democratic Party, Alfred Dregger, pronounced a speech before the Bundestag on 25 April 1986 against the erection of a new memorial in Bonn, objecting to the distinction between victims and perpetrators in the experience of the Third Reich; and Franz-Joseph Strauss of the Bavarian Christian Social Party urged Germans to emerge from the ruins of the Nazi regime and to become at last a normal country again. Yet, it is as much noteworthy the speech that, in overt contrast to this attitude, the then President of the German

democracy from potentially dangerous political objectives, but only from *methods* polluting the democratic dialogue and coexistence of different political orientations either using violence or instilling the idea of political enemies instead of adversaries. See Donald P. Kommers, *The Federal Constitutional Court: Guardian of German Democracy*, in *Ann. Am. Acad. Pol. Sc. and Social Sc.*, 603, 2006, 111.

¹⁰⁸ 2 BVerfGE 1 (1952).

¹⁰⁹ 5 BVerfGE 85 (1956).

¹¹⁰ The process to prohibit the National Democratic Party of Germany (NPD) was initiated in 2001 and discontinued in 2003 for procedural reasons. On 17 January 2017 the Federal Constitutional Court decided on the prohibition, but NPD was not prohibited in the end as there were no indications that it would succeed in achieving its anti-constitutional aims.

¹¹¹ Müller, *Constitutional Patriotism*, cit., 25.

¹¹² *Ibid.*, 22.

Federal Republic Richard von Weizsäcker delivered on 8 May 1985 on occasion of the fortieth anniversary since the end of the Second World War – a date that he unhesitatingly called *ein Tag der Befreiung* (a day of liberation). Before too long, the fall of the Berlin Wall and the solution of the so called *Deutschlandfrage* (the problem of the reunification) would ignite a process of ‘westernisation’ of the Eastern Länder and a ‘de-germanisation’ of the *Sonderweg* – literally, ‘the special way’, i.e. the assumption of a culture that used to be ‘specifically German’ –, dropping the notion of Nation-state and State of power (*Machtstaat*) and embracing concepts like *Zivilmacht* (civil power), wholly centered on the civil society (*Zivilgesellschaft*) and a process of civilization (*Zivilisierung*)¹¹³.

At the same time, in the pages of *Die Zeit*, *Frankfurter Allgemeine Zeitung*, *Historische Zeitschrift*, historians like Andreas Hillgruber¹¹⁴, Ernst Nolte¹¹⁵ and Michael Stürmer¹¹⁶, later joined by Klaus Hildebrand¹¹⁷ and the journalist Joachim Fest¹¹⁸, animated the *Historikerstreit*, the public debate about the problem of the *Aufarbeitung der Vergangenheit* (coming to terms with the past), that is the dichotomy between the desire of Germans to normalize the past and the increasingly intensive preoccupation of the victims. In his notorious article, Nolte aired that

a conspicuous shortcoming of the literature of National Socialism is that it doesn’t know, or doesn’t want to admit, to what extent everything

¹¹³ See Gian Enrico Rusconi, *Berlino. La reinvenzione della Germania*, Rome-Bari, Laterza, 2009; see also Id., *Patria e Repubblica*, Bologna, il Mulino, 1997.

¹¹⁴ Andreas Hillgruber, *Zweierlei Untergang: die Zerschlagung des deutschen Reiches und das Ende des europäischen Judentums*, München, Siedler Verlag, 1986.

¹¹⁵ Ernst Nolte, *Vergangenheit, die nicht vergehen will*, in *Frankfurter Allgemeine Zeitung*, 6 June 1986.

¹¹⁶ Michael Stürmer, *Geschichte in geschichtslosem Land*, in *Frankfurter Allgemeine Zeitung*, 25 April 1986; Id., *Dissonanzen des Fortschritts*, Munich, Piper Verlag, 1986.

¹¹⁷ Klaus Hildebrand, *Historische Zeitschrift*, 242, 1986; Id., *Das Zeitalter der Tyrannen. Geschichte und Politik. Die Verwalter der Aufklärung, das Risiko der Wissenschaft und die Geborgenheit der Weltanschauung*, in *Frankfurter Allgemeine Zeitung*, 31 July 1986.

¹¹⁸ Joachim Fest, *Höhepunkte*, in *Frankfurter Allgemeine Zeitung*, 29 August 1986.

that was later done by the Nazis, with the sole exception of the technical procedure of gassing, had already been described in an extensive literature dating from the early 1920s [...] Could it be that the Nazis, that Hitler carried out an 'Asiatic' deed only because they regarded themselves and those like them as potential or actual victims of an 'Asiatic' deed?¹¹⁹

It would be Jürgen Habermas in the late 1980s to popularize constitutional patriotism in order to move Germans away from these attempts to normalize German identity through a relativisation of Nazi crimes and an ethnically homogeneous nation-state. Habermas rebuked this revisionist historiography, its apologetic tendencies and the efforts to remove the uniqueness from the history of the Third Reich. He intervened in the discussion with an article of his own in which claimed that, although the situation had changed since when Karl Jaspers had written on differentiating between the guilt of the perpetrators and the collective liability of those that had failed to do anything, nonetheless the present generations indeed had a problem of shared liability in some way¹²⁰. He argued that the life of the present generations, in the late 1980s, was inwardly linked with the context that made Auschwitz possible, because their form of existence was inextricably correlated to the form of existence of their parents and grandparents by a mesh of family, local, political, intellectual traditions very difficult to untangle. It was that historical milieu that had made the present generations what they were:

(n)o one among us can escape unnoticed from this milieu, because our identity both as individuals and as Germans is inextricably interwoven with it. This extends from mimicry and physical gestures through language right up to the subtle capillary ramifications of our intellectual habitus¹²¹.

The real question, then, was what had to follow from the historical milieu keeping together old and new Germans.

¹¹⁹ Nolte, *Vergangenheit, die nicht vergeben will*, cit.

¹²⁰ Jürgen Habermas, *Die Zeit*, 7 November 1986, then republished in Id., *Die Art Schadensabwicklung*, Frankfurt am Main, Suhrkamp, 1987 and translated into English as Id., *Concerning the Public Use of History*, in *New German Critique*, 44, 1988, 43.

¹²¹ *Ibid.*, at 44.

Habermas was convinced that something of the original collective responsibility had been transferred to the next and next-but-one generations:

after Auschwitz, we can only create national self-consciousness from the better traditions of our history, traditions which we must appropriate critically and not blindly. We can only continue to shape a national context of existence, which once allowed a unique injury to the substance of human commonality, in the light of such traditions which stand up to the suspicious gaze made wise by the moral catastrophe. Otherwise we will not be able to respect ourselves or expect respect from other¹²².

To historians like Stürmer, who asserted that ‘Germans must find their identity in the reality of a divided Germany, an identity that can no longer be grounded in a nation state but can also not be grounded without a nation’¹²³, Habermas opposed that

the practice of breathlessly collecting an illogically moralized past from fathers and grandfathers for pedagogical purposes could then yield to detached understanding, careful differentiation between understanding and condemnation of a shocking past could also help to dissolve the hypnotic paralysis. But [...] this kind of historicizing would not be guided by the impulse to *shake off* the debts of a successfully demoralized past¹²⁴.

And then concludes:

(t)hat the Federal Republic opened itself without reservation to the political culture of the West is the great intellectual accomplishment of the postwar period, an accomplishment of which precisely my generation could be proud¹²⁵.

The key theoretical argument that Habermas mobilized in his refutation of the revisionist wave is the differentiation between conventional and postconventional identities. Influenced by Kierkegaard’s *Either/Or*, Habermas assumes that the individual who lives ethically and makes the existential decisions about whom she wants to be is fully conscious that she assumes

¹²² *Ibid.*, at 45.

¹²³ Stürmer, *Dissonanzen des Fortschritts*, cit., 328.

¹²⁴ Jürgen Habermas, *Apologetic Tendencies*, in Id., *A New Conservatism: Cultural Criticism and the Historians’ Debate*, cit., 225.

¹²⁵ *Ibid.*, at 232.

responsibility for deciding what is considered essential in the life history she has taken: '(t)hen one knows who one wants to be and who one doesn't want to be, what is to be an essential part of oneself and what isn't'¹²⁶.

Drawing also from Lawrence Kohlberg's and Jean Piaget's developmental psychology¹²⁷ to reconstruct how individuals relativize what they want and the expectations of others, Habermas moves this approach from individual to collective identities that, in disenchanting societies, develop outside the realm of unproblematic, revered ideals and emphasizes how responsibility for a piece of history is assumed *consciously*. 'Nor should our postwar history be abandoned to hollow lip service in its decisive point, the renunciation of our own disastrous traditions'¹²⁸.

In analogy with individuals, then, societies cannot refer for their rule to sacred principles or procedures as sources of legitimacy, but only to popular sovereignty. In a democratic setting whose pillars are potentially universalistic rights and liberties, their implementation requires a nation-state in what Habermas defines as a *post-conventional society*, in which values or conventions are reinterpreted accordingly with the universalistic core operating fundamental rights and constitutional norms. In this way, the fabric of a collective identity is grounded on an open and ever learning, rational process taking place in a public sphere.

Some differences between Sternberger's vision and Habermas' theory are now evident: while the former embraced a defensive, militant, statist and static approach, constitutional patriotism being a nervous¹²⁹ bulwark for democracy and the nation-

¹²⁶ Jürgen Habermas, *Historical Consciousness and Post-Traditional Identity: The Federal Republic's Orientation to the West*, in Id., *A New Conservatism. Cultural Criticism and the Historians' Debate*, cit., 263.

¹²⁷ See Jürgen Habermas, *Historical Materialism and the Development of Normative Structure*, in Id., *Communication and the Evolution of Society*, Boston, Beacon Press, 1979.

¹²⁸ Habermas, *Historical Consciousness and Post-Traditional Identity: The Federal Republic's Orientation to the West*, cit., 266.

¹²⁹ Mueller, *Constitutional Patriotism*, cit., 30. Theodor W. Adorno, *Was bedeutet: Aufarbeitung der Vergangenheit*, in *Gesellschaft-Staat-Erziehung*, 5, 1960,

state that operates it, the latter is universalist, dynamic, open and rational – a learning process that uses the public sphere for communication and dialogue, in which the *Rechtsstaat* and the *Sozialstaat* replace the nation-state. While Sternberger's main purpose was *protective* of the polity, Habermas' patriotism represents the normative *purification* of public argument. In short, Habermas recognizes West Germans capable of reconstruct their patriotism less on historical traditions and identities and more on abstract principles (rights and democratic procedures) and inclusive forms of political belonging. 'Where Sternberger's civic friendship had essentially focused on the state, Habermas envisaged civic solidarity as an outcome of unconstrained discourse leading to mutual civic recognition, and an ongoing process of mutual learning'¹³⁰.

Constitutional patriotism has not been immune from criticism: a former Justice of the Federal Constitutional Court dismissed the notion as idealistic if not naive – a 'pale thought born in the seminar room' – and Joachim Fest called it a 'kind of professor's idea which is invented at the writing table, then further discussed by other professors' only to conclude 'a beautiful idea – but it doesn't work because people don't feel that way'¹³¹.

An important specification of the Habermasian political philosophy¹³² came from Harvard legal scholar Frank Michelman, who addressed the question on how an empirical

1 (translated into English in Id., *The Meaning of Working through the Past*, in Id., *Critical Models: Interventions and Catchwords*, New York, Columbia University Press, 2005) is an illuminating pathologisation of the nation (see R. Crownshaw, *The Afterlife of Holocaust. Memory in Contemporary Literature and Culture*, Heidelberg, Springer, 2016, at 251, fn 8). Adorno noted that some of the attitudes in the German character of the post-war years revealed traits highly *neurotic*: for instance, the use of euphemistic circumlocutions (such as *Kristallnacht*), a certain lack of affection before serious matters, defensive gestures, and typical inventive rationalizations, such as five and not six millions Jews exterminated, or the bombing over Dresden equivalent to Auschwitz, or even the political radicalization of the Iron Curtain as the plastic evidence of what Hitler had anticipated.

¹³⁰ Müller, *Constitutional Patriotism*, cit., 31.

¹³¹ Reported in *Ibid.*, 6.

¹³² In response to Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in *Eur. J. Phil.*, 1, 1993, 128.

notion of constitutional patriotism – i.e. the disposition of attachment to one’s country in light of a certain spirit in deciding constitutional disagreements – can function in terms of constitutional theory. He maintained that the *idea* of the constitution does the crucial work as opposed to the thing itself. In other words, he did not find that ‘constitutional patriotism’ meant a devotion to any specific choice of constitutional content or a devotion to any country in view of that country’s specific constitutional choice. Rather, he believes that political justification depends on a population’s conscious sharing of sentiments of attachment to a concrete *community*, Habermasian constitutional patriotism consisting in a conscious sharing of sentiments of attachment to the community. In short, constitutional patriotism

is the morally necessitated readiness of a country’s people to accept disagreement over the *application* of core constitutional principles of respect for everyone as free and equal, without loss of confidence in the *univocal content* of the principles, because and as long as they can understand the disagreement as strictly tied to struggles over constitutional identity¹³³.

Community, shared values, agreed upon procedures, selected traditions, public dialogue, national identity, civic solidarity: what purpose does constitutional patriotism intend to serve in the end? Does it generate political stability? Is it to underpin societies divided by deep disagreements? Could some form of constitutional patriotism relieve or advantage Italy and Italians in this moment of their history? Despite its limits, but also in consideration of its argumentative potentialities, in the next pages I shall argue the urgency for Italy and Italians to embrace and grow constitutional patriotism to remind them what their community is about, to rejuvenate their democracy through the constitutional fulfillment not completed yet and the revival of our community’s relational foundations.

¹³³ Frank Michelman, *Morality, Identity and Constitutional Patriotism*, in *Denv. U. L. Rev.*, 76, 1999, 1026.

5. A Prince Without a Sceptre

After the local elections in 1975, when the Christian Democratic Party (DC) and the Communist Party (PCI) almost tied (the former with 35.3% and the latter with 33.4%) and the season of the so called *compromesso storico* (historic compromise) and *solidarietà nazionale* (national solidarity) opened with a stricter cooperation and a possible change in the government of the country, no institutional reforms were actually elaborated and Italy carried on with the usual dominion of political parties. This first major transformation in the party system could have led to the necessary reforms for so long wished for but, unfortunately, Italy remained trapped in the *paradox of reforms*, according to which political parties are willing to approve reforms in order to avoid to decide politically charged matters and, yet, reforms are themselves impossible to be carried out in lack of a political determination to decide¹³⁴. No stability, then, and no institutional change came out of this new phase, with the result that, thirty-five years after the entry into force of the Constitution, Italy was still using power not to run the country, but to interfere with running the country.

For many years, Italian constitutional scholars have insisted on the incompatibility between the majoritarian principle and the Constitution¹³⁵. And, for as much long time, it was believed that Italian consociation – i.e. the attitude of searching for a final reconciliation despite ideological divides – made our fortune to

¹³⁴ See Gustavo Zagrebelski, *Le istituzioni di governo*, in *La scienza politica in Italia. Materiali per un bilancio*, Quaderni della Fondazione Feltrinelli, 1984, 28-29.

¹³⁵ See, for instance, Carlo Lavagna, *Il sistema elettorale nella Costituzione italiana*, in *Riv. trim. dir. pubbl.*, 2, 1952, 849.

pacify a radically fragmented system¹³⁶. But, after a first season when this may have happened to be true, in the immediate aftermath of the war, the consensual model started laying the bill in terms of functionality of the form of government and its decision-making¹³⁷.

Italy is the only European and Western democracy to have changed (entirely or substantially) its party system twice in the last 25 years: the first in the early Nineties, when, united in a crooked but successful coalition, Forza Italia, the instant party founded in few months by Silvio Berlusconi, the far-right wing party Alleanza Nazionale and the secessionist Lega Nord won the 1994 general elections and inaugurated the first government without the involvement of any of the traditional parties. Being entirely alien to the history of the Republic and its foundation, they grasped the power somehow distant to the fundamental principles of the Constitution and impatient to its checks and balances. The old leftist parties – those survived after the judiciary storm that had torn down their counterparts – still cared for the Constitution, but they could not tell why. The revolution of the judiciary for the parties' wrongdoing had been extraordinary for intensity and extension, but rather ordinary in its inspiration to the Constitution. Still, although the constitutional values seemed at that time to gain an unprecedented relevance, it was the judiciary and not the Constitution to appear as the architect of this change¹³⁸. Again, Italians were led to credit leaders (this time judicial and not political) and not the Constitution for the political overturn.

¹³⁶ In this sense, see Joseph LaPalombara, *Democracy Italian Style*, New Haven CT, Yale University Press, 1987.

¹³⁷ Giuliano Amato, *Il dilemma del principio maggioritario*, in *Quad. cost.*, 14, 1994, 171.

¹³⁸ For the competition between political forces (both majority and minority) and judges to gain the greatest public acknowledgment and approval, see Alessandro Pizzorno, *Il potere dei giudici. Stato democratico e controllo delle virtù*, Rome-Bari, Laterza, 1998. In the same vein, see Cesare Pinelli, *Il caso, la necessità, e una cabina di regia. Come la Repubblica superò la crisi*, in Id., *Nel lungo andare. Una Costituzione alla prova dell'esperienza. Scritti scelti 1985-2011*, Naples, Editoriale Scientifica, 2012, 53-75.

The second transformation was in 2013, when the Five-Star Movement elected its first representatives inside the Parliament and, more significantly, in 2018, when they have formed first a coalition with the League and then with the Democratic Party and a couple of smaller groups to support the government in power to date. Even in this case like in the Twenties with Benito Mussolini and fascism and in the Nineties with Silvio Berlusconi and his instant party, Italy stands out for being a laboratory of unexampled political experimentation as the first old European democracy with a *populist* government.

But what are we talking about when we talk of *populism*? To investigate this phenomenon and, in particular, the Italian manifestation of it, I shall construe my analysis of populism drawing inspiration from Jan-Werner Müller's book *What Is Populism?*¹³⁹ but adding my own reflections on it, especially urged by what has been going on in Italy.

Combining my understanding of populism and Müller's, I would suggest five features that can conjure up the definition of this phenomenon:

a) Populism is a political and institutional *narrative*, that is a representation of reality – i.e. a perception of it. Indeed, populist movements promote and exploit the *ambiguity between reality and perception*, between *facts and opinions*: in this way, they are always in control of the decisive arguments and can master the rhetoric of their politics.

b) Populism hinges on the idea of people as a *moral* entity, a custodian of the virtue, the good, the truth.

c) Henceforth, populism is critical *against the élites*: since populism is a moralistic imagination of politics, it juxtaposes a morally pure, fully unified people against élites that are deemed corrupt or morally inferior.

d) Populism is *antipluralist*: they only represent the people because they can divine the proper will of the people. As counterintuitive as it may sound, populists do not want people to participate continuously in politics. They do not encourage

¹³⁹ Jan-Werner Müller, *What Is Populism?*, Philadelphia PA, University of Pennsylvania Press, 2016.

referenda or too frequent elections: rather, they count on a more direct mandate from the people. Accordingly, only elected representatives can express the voice of the people.

e) Populism juxtaposes the *rule of law* and the *majoritarian democracy*: the institutional actors in charge of checking and balancing the other branches of power that do not derive their legitimacy from a popular mandate are not part of the ‘people’ and cannot express their will. In other terms, non-representative institutions are treated as *enemies of the people*.

Populism is, hence, a *pars pro toto* political phenomenon, in which only some of the people are really the ‘people’. Constitutional guarantees, procedures and principles inherently questioned by this kind of attitude are respectively the prohibition on a binding mandate (Article 67 of the Italian Constitution), the constitutional checks and balances against the legislative but, much more relevantly, the executive branch¹⁴⁰, and the constitutional notion according to which political opponents are to be treated as adversaries, but never as enemies (Article 18 Const.). As I mentioned *supra*, populism ends up generating a continuous tension between the *rule of law* and the *majoritarian democracy*, and this is the greatest danger that comes from within the democratic world: it is a dilemma usually related to young, uncertain democracies but, conversely, now it affects even older and more consolidated polities. Free and fair

¹⁴⁰ There is a mechanical but less than logical passage between the popular source of legitimization of the legislative power and the mandate of the executive to give voice to the people’s will. Members of the Italian government supported by the League and the Five-Star Movement never missed a chance to rag any other institutional actors justifiably critical or in contrast with their decisions by arguing that only if elected they could contradict the executive’s narrative: just to name a few episodes, when the President of the Republic refused to sign the decree of appointment of Paolo Savona as Minister of Economic Affairs and Finance; when the President of INPS (Istituto Nazionale della Previdenza Sociale), the main Italian body for social security collecting every public or private employee and most self-employed workers, produced figures and data against the expected outcomes of the governments’s policies. On the same token, even the Governor of the Bank of Italy and other members of its establishment were reprimanded for their ‘improper’ interference with the executive’s assumptions. It is worth noting that not even the President of the Council of Ministers, Giuseppe Conte, had been elected and, on the contrary, had qualified himself as ‘the lawyer of Italians’.

elections, inclusive even of undemocratic forces, are a victory of democracy, but growing its own enemies within, the germs of its own deconsolidation, is utterly its defiance. This is the dilemma that populism brings today in old democracies: what happens if the will of the people and the rule of law are at odds?

The populist wave affecting the current Italian political scenario with its pejorative ramifications makes the centrality of political parties even more dangerous and the Constitution more necessary than ever, present-day Italian political parties still *occupying* the institutions instead of serving them: in spite of their history, the mission they declare and the discontinuity with their predecessors¹⁴¹, they did not deny the habit of old political parties to instill in the people the identification with their message and action. Like traditional parties, they are still *the prince* of our days¹⁴².

The Constitution is, instead, a prince with no sceptre. For there is another element that has in all likelihood contributed to the disaffection Italians entertain for their fundamental law:

¹⁴¹ An abundant and perspicuous literature has analyzed the process of transformation of political parties in Italy during the Republican era and especially in the last 25 years. I do not look too deep into it not only because it would require a long investigation that would detour the main purpose of this book, but because, in spite of the radical change political parties have undergone – from political religions and churches to post-ideological instant parties (see, above all, Piero Ignazi, *Party and Democracy. The Uneven Road to Party Legitimacy*, Oxford, Oxford University Press, 2017; Giovanni Sartori, *Homo videns. Televisione e post-pensiero*, Rome-Bari, Laterza, 2000; Id., *Mala tempora*, Rome-Bari, Laterza, 2004; Id., *Mala Costituzione e altri malanni*, Rome-Bari, Laterza, 2006; Id., *Il sultanato*, Rome-Bari, Laterza, 2010), from partitocracy to the narcissism of personal parties (see Giovanni Orsina, *Il berlusconismo nella storia d'Italia*, Venice, Marsilio, 2013; Piero Ignazi, *Vent'anni dopo. La parabola del berlusconismo*, Bologna, il Mulino, 2014), from politics to anti-politics (see Giovanni Orsina, *La democrazia del narcisismo. Breve storia dell'antipolitica*, Venice, Marsilio, 2018) from locally organized parties to intangible, internet-based movements (see Cristian Vaccari, *La politica online. Internet, partiti e cittadini nelle democrazie occidentali*, Bologna, il Mulino, 2012; Jacopo Jacoboni, *L'esperimento. Inchiesta sul Movimento 5 Stelle*, Rome-Bari, Laterza, 2018; Id., *L'esecuzione. 5 Stelle da movimento a governo*, Rome-Bari, Laterza, 2019), from coalition governments to President of the Council of Ministers prominence (see Mauro Calise, *Il partito personale*, Rome-Bari, Laterza, 2004) –, their role in Italian politics, with special reference to their relation with the Constitution, has not so significantly changed: they are still the main actor on the stage and the Constitution is still pushed behind the curtain.

¹⁴² Scoppola, *La Repubblica dei partiti*, cit., 449.

the failure to implement. This was huge already in the first decade after 1948, when the former member of the Constituent Assembly Lelio Basso pointed out the indelible mark the delay in implementing the Constitution had impressed in the relation between Italians and their fundamental law¹⁴³. According to his reconstruction, the transition from the old to the new regime was unreasonably slow: more than a year elapsed between the Liberation in the spring 1945 and the election for the Constituent Assembly on 2 June 1946. In addition, the Constituent Assembly was only assigned the task to draft the Constitution, the legislative power being conferred to the executive until the entry into force of the new basic norms; subsequently, economic and social matters were postponed to a time when the inspiration that had nurtured the Resistance had already waned. The establishment, and the Christian Democratic Party especially, displayed an inexhaustible supply of expedients to evade the duty to enforce the Constitution¹⁴⁴.

By the same token, Piero Calamandrei spoke of *majority filibuster (ostruzionismo di maggioranza)* through which the parliamentary majority avoided in those years to pass the legislation in obedience to the spirit and letter of the Constitution and in replacement of the old fascist laws¹⁴⁵. Lelio Basso aired that

(a) part from the permanent constitutional disorder, this situation contributed to bring the Constitution into disrepute, if not even the branches of power who should comply with it apply it. This condition of discredit made the citizens insecure of the guarantees encompassed in the Constitution, infusing reasonable doubts on the validity of its norms¹⁴⁶.

¹⁴³ It took five years to pass the laws creating the Constitutional Court (l. cost. 1/1953 and l. no. 87/1953) and eight years before it could become operational (1955); nine years for the law instituting the National Council for Economics and Labour (CNEL) (l. no. 33/1957); ten years to pass the law creating the High Council of the Judiciary (CSM) (l. 195/1958); twenty-two years for the law on the referendum (l. 352/1970) and the first elections for the representatives at the regional councils after the entry into force of the law no. 108/1968.

¹⁴⁴ Lelio Basso, *Il principe senza scettro* (1958), Milan, Feltrinelli, 1998, 85.

¹⁴⁵ Piero Calamandrei, *L'ostruzionismo di maggioranza*, in *Il Ponte*, 9, 1953, at 129, 274 and 433.

¹⁴⁶ Basso, *Il principe senza scettro*, cit., 110.

In this vein, the comparison between the Albertine Statute and the Republican Constitution in terms of authoritativeness and reverence is uncompassionate: the former, with its very generic formulations, could ingrain in the subjects the conscience of few rights, such as the freedom of press, they were entitled to and upon which the legislature would not trespass; the latter, with its rigidity and far-reaching pledges, could not rectify the silent non-compliance of the legislature.

In this context, it is the relation between citizens and public authorities to be severely altered. It is altered, to begin with, when the laws allow what the Constitution forbids or, in reverse, when the laws forbid what the Constitution authorizes. Above all, it is altered in its most intimate essence¹⁴⁷.

What Lelio Basso poignantly evoked here is a long-lasting effect projecting onto future generations – an ineradicable sentiment of uncertainty, distrust, disaffection, arbitrariness that makes Italians cynical against the Constitution and subordinate to political powers. Sixty years later, the democracy of parties (new actors like the Five-Star Movement included) still occupies, more than serving, the institutions. A glaring evidence of this is that, between 2018 and 2019, the Five-Star Movement and the League had promised a revolution in terms of social justice, reparation of the damages coming from an allegedly uncontrolled and too tolerant immigration, standing up against the EU institutions, more meritocracy and solidarity, a renovated trust towards public authorities, but this new political culture can do perfectly fine without referring to the Constitution and its values, as though they were rethinking the Italian identity against a constitutional blank slate. As always, the political dimension overthrows the legal (constitutional) one. Italians still charge political parties and movements with their welfare, the Constitution still remaining behind the scene only as a possible supporting actor. As the former President of the Constitutional Court Gustavo Zagrebelski has noted in one of his op-eds, political scientists, sociologists, journalists, laymen, all participate in the contemporary public debate, but

¹⁴⁷ *Ibid.*, 111.

not constitutional scholars. ‘It seems’ – he guesses – the matter of their doctrine is evaporated¹⁴⁸. If the Constitution is vanishing, then, this definitely is constitutional patriotism’ cue.

¹⁴⁸ Gustavo Zagrebelski, *Basta con il silenzio, è venuto il tempo della resistenza civile*, in *la Repubblica*, 23 November 2018.

6. Why Constitutional Patriotism May Be Good for Italy

Constitutional patriotism is a political argument that – after the seminal contribution of the philosopher Karl Jaspers in the 1940s concerning the German guilt – was elaborated by Dolf Sternberger first in the 1960s and 1970s and then thrived during the 1980s with Jürgen Habermas reacting to the so called *historikerstreit*, that is the revisionist debate aimed at normalizing the uniqueness of the Third Reich and the German national identity.

It is enlightening to note that, constitutionally speaking, Italy and Germany may have been twins in the wake of the Second World War as to the process of adopting their constitutions and revitalizing their democracy. Yet, the 1948 Italian Constitution and the 1949 German Basic Law remarkably differ in many respects and certainly in the constitutional discipline reserved to political parties.

The German *Parteienstaat* (state of parties) refers to the occupation of key roles in the public administration of post-war West Germany (and later of the united Germany) by party members. This occupation is motivated by the idea that the presence of political parties in apical seats of public authorities safeguards the democratic nature of the state. In other words, the *Parteienstaat* preserves the typical Prussian state absolutism in terms of centrality of the public machinery and pursuance of the communal good, but through the democratic legitimization of political parties¹⁴⁹. The *Parteienstaat*, then, represents a successful attempt to solve the dilemma of the democratic

¹⁴⁹ In this concern, see the seminal Kenneth Dyson, *Party, State and Bureaucracy in West Germany*, Beverly Hills CA, Sage, 1977.

absolutism – enlarging the popular source of legitimization without getting rid of the monistic state machinery.

As much as the *Parteienstaat* evolved in the Federal Republic, its development owes to the Weimar experience, when for the first time the Prussian tradition of the state bureaucracy – always torn between a monarchic, authoritarian identity and a universalistic, democratic mission – combined with the innovation of mass parties. Through the tragic twist of the Nazi regime, the defects of this encounter could be unveiled and what had proven impossible during the Thirties became possible in the newly restored German democracy.

G.W.F. Hegel formulated the first theory of modern bureaucracy in 1820 in his *Grundlinien der Philosophies des Rechts* (Philosophy of Right), particularly in the paras. 287-297 devoted to the executive power. According to Hegel, the executive mediates between the state and civil society. In this relation, the executive upholds universal interests among a plurality of particular interests. In this vein, civil officials are a *universal class* – the bureaucratic body elevated to a number of privileged citizens, the ideal members of a bureaucratic democracy and not mere executioners of the sovereign's will – as their task is to realize the *universal interests*. Therefore, they are the pillars of the state because they are endowed with the highest political consciousness and knowledge about public affairs¹⁵⁰ – they are the legitimate representatives of society. Just like they used to appear as the derivation of the absolute power, now they were a privileged piece of society admitted to public affairs¹⁵¹.

These historical antecedents account for the esprit de corps and the bureaucratic ethics for so long associated with the Prussian notion of state administration. Later, after the collapse

¹⁵⁰ Carl K.Y. Shaw, *Hegel's Theory of Modern Bureaucracy*, in *Am. Pol. Sc. Rev.*, 86, 1992, 381. Hegel's theory belongs to that historical moment when Prussian bureaucracy succeeded for few decades in gaining a popular legitimization without involving political parties.

¹⁵¹ See the classic Reinhart Koselleck, *Preussen zwischen Reform und Revolution. Allgemeines Landrecht, Verwaltung und soziale Bewegung von 1791 bis 1848*, Stuttgart, Ernst Klett Verlag, 1967.

of the empire, the Republic of Weimar seemed to sort the dilemma brilliantly out by replacing the state bureaucracy with political parties's internal organization: after all, political parties had compounded the masses whose rights had been insistently neglected, operated the process of people's involvement in national politics and absorbed the universal interests once underpinning the reform absolutism. It is now that the duty to establish a new *Parteienstaat* lied with political parties¹⁵².

During the Federal Republic, the *Parteienstaat* would replace the *Beamtestaat*, the state of officials, and introduce in the administration the popular will of which political parties are the real depositary to integrate it in the national politics¹⁵³. So, in the German experience, political parties have gradually become a constitutional force functioning the form of government because of their popular investiture. In accordance, Article 21 of the German Basic Law – included not in the first part, devoted to basic rights, but in the second, dealing with the organization of the Federation and the Länder – provides that political parties 'shall participate in the formation of the political will of the people'.

The Italian model is altogether different. In the Nineteenth century, with a very narrow suffrage, political parties reflected a homogenous social environment, merely aggregated private opinions of members and projected it in the public arena. No connection linked political parties and a shared vision of the common good. Parties were factions, reducing to impotence the good men excluded from the government of the country and depriving the state of beneficial and useful forces.

If the essence and aim of the state is to render justice and do good to everybody, who cannot see that the justice of political parties and the administration of political parties deny the essence and aim of the state?¹⁵⁴

¹⁵² Mauro Calise, *Dopo la partitocrazia. L'Italia fra modelli e realtà*, Turin, Einaudi, 1994, 19 ff.

¹⁵³ See Gerhard Leibholz, *Strukturprobleme der moderne Demokratie*, Karlsruhe, Mueller, 1967, 89 ff. where he defines mass parties as *politischen Handlungsseinheiten* (political offense units).

¹⁵⁴ Marco Minghetti, *I partiti politici e la loro ingerenza nella giustizia e nell'amministrazione*, Bologna, Zanichelli, 1881.

The Constituent Assembly debated thoroughly, especially within the first sub-commission, on the discipline and the role of political parties. On 9 November 1946, the socialist Lelio Basso promoted a two-article proposal, the first of which safeguarding the right of every citizen to associate freely and democratically with others in political parties with the aim of determining the national politics (then Article 3) and the second attributing to parties with at least 500,000 votes some constitutional prerogatives (then Article 4). Basso argued it was time to overcome the old parliamentary democracy with a democracy of political parties and, in this vein, elaborated an approach transcending the individualism that had characterized political parties and their previous institutional role.

During the discussion, Basso and others explained the constitutional prerogatives they had in mind for political parties: examining constitutional amendments, participating in the protection of civil rights, controlling the forms of free expression, appealing before the Constitutional Court. Nevertheless, instead of focusing on political parties as bodies integrated in the form of government, the attention of the drafters went in the end only to guaranteeing the spontaneous association of citizens and the enjoyment of their freedom. As a consequence, political parties are disciplined in Article 49 of the Italian Constitution – encompassed in the first part, title IV concerning political rights and duties and not in the part reserved to the organization of the state – as an entitlement acknowledged to all citizens, a sort of gemmation from the more general right to freely associate disposed in Article 18.

May constitutional patriotism be of assistance in all this? As reconstructed above, this theory helped Germans to debate around their national identity and to object to the attempts of normalization of their Nazi past – in short, it elaborated the counterarguments to the simplification of their collective responsibility. Needless to say, Italy is not facing today the same challenges, and I can certainly see some of the critiques that might be directed to my appeal to constitutional patriotism: Italy does not have the same history (and problems) of Germany; a country does not necessarily need to revere its own constitution

in a patriotistic sense to be healthy and positive; Italians do not lack patriotism intended as love for their country, its culture, its beauties, its history, so it is possible to have a form of patriotism grounded on a liberal nationalism or on other bases that have nothing to do with the Constitution...

Nonetheless, I do argue that we do need a constitutional patriotism to avoid the normalization of this political moment – when the overt simplification of the will of the people as a single, homogeneous, authentic body¹⁵⁵ may occasionally appear at odds with the rule of law – and of the solutions proposed to address the most contentious issues of our time. Constitutional patriotism would mean returning to the Constitution with its pledges, duties and values, bringing it back to the main stage instead of keeping it behind the curtain, to restore the sense of our national identity not as political parties and movements invent it, but as it was fixed at the dawn of the post-fascist Republican era in our fundamental law – in a word, to foster our civic solidarity and our civic-mindedness. The question constitutional patriotism would help reply is not what our Constitution is and commands, but what Italians are – what our identity is – according to our fundamental law. In other terms, my idea is by no means aimed at restituting the constitutional legality, never in peril, but to recreate a constitutional *idem sentire* to move from a Republic of parties to a true Republic of citizens¹⁵⁶.

Last but by no means least, constitutional patriotism would imply the commitment of the legal academia in popularizing the Constitution, far from paternalism, rhetoric, monolithic and unquestioning adhesion and towards a vital, viable *civic minimalism* capable of infusing new blood in the affection Italians entertain with their basic rules and principles – in one word, towards a true *constitutional identity*.

¹⁵⁵ Ralf Dahrendorf once noted that ‘populism is simple, democracy is complex’. See Id., *Acht Anmerkungen zum Populismus*, in *Transit: Europäische Revue*, 25 2003, 156-163, reported in Müller, *What Is Populism?*, cit., loc. 168.

¹⁵⁶ As heartily wished for at the end of his monumental contribution by Scoppola, *La Repubblica dei partiti*, cit., 500.

The reasons why I am persuaded some form of constitutional patriotism is urgent in our country are multifarious. They have surely to do with the populist wave, but also with other challenges of these days: firstly, we are, much more than in the past, a *multicultural* and *diversified* country. The total uniformity of few decades back has given way to a cohabitation of different religions, cultural backgrounds, national legacies. Colored players convened in our national football or volleyball teams – the tip of the iceberg, I will admit to that, but nevertheless a meaningful reality for its popular impact – is a completely new event in Italy, and the reactions triggered subsequently are telling of a transformation our national identity has been undergoing that questions the social traditional structures. Immigrants, Muslim residents, gypsies, gays and lesbians with their ‘irregular’ families, and the tide of new right claims surfacing from these and others social conditions have been radically changing our customary idea of ourselves. And, secondly, Italy has been experiencing the effects of globalisation, hardened by the sometimes dramatic outcomes of the 2008 economic crisis and the inherent social alterations due to the deepening of social and economic inequality and the stalemate of social mobility.

The latest Report on the Italian Social Condition that the distinguished think-tank CENSIS (*Centro Studi Investimenti Sociali*) publishes annually¹⁵⁷ has portrayed Italians as ‘embittered, in the grip of being nasty (*cattivismo*) and longing for invisible defensive walls’. CENSIS has described this condition as *psychic sovereignty*, in which disadvantage, resentment, a frozen social mobility, the shift from an economy of systems to an economy of individual actors have disappointed the hope for a miraculous change. As a result, ‘nastiness – unfolding through a latent, individualized, nebulised conflict – would work as the cynical stepping stone of an alleged redemption’. Italians are ‘hunting for a scapegoat’ and the figures are nothing but reassuring: with the complicity of ‘a pliable, docile silence from the elite’, 63% are anti-extra EU immigrants (the percentage

¹⁵⁷ Censis, *52° Rapporto sulla situazione sociale del Paese/2018*, Milan, Franco Angeli, 2018.

raises to 71 among citizens above 55 and to 78 among the unemployed), 58% believe immigrants steal job positions, 63% are convinced immigrants are a burden for our welfare system and only 37% recognize their positive contribution to national economy. 75% think immigration necessarily implies an increase in crimes, while 59.3% do not deem possible a good integration and only 23% think to live a better life than their parents – the lowest percentage among the 28 EU countries. 63.6% lament a failure in defending interests and identity, with a peak of 72 among the less educated and 71.3 among low incomes. At the same time, prejudices appear to skyrocket: for example, 69.7% do not want gypsies to live in their neighborhood. For sure, the aging population in Italy is part of this scenario so antagonistic and inhospitable to the other: youth typically functions as an antidote, as a stock of optimism, but in Italy the population between 15 and 34 years of age amounts only to 20%, the lowest in the entire EU.

In sum, Italy stands midstream in its history where the old identity does not properly fit anymore, but a new one is still over the rainbow. At the same time, present-day politics seems especially committed to reckoning with the past every time the government promises an alleged discontinuity with the predecessors – a discontinuity based most of the times on an impulsive, over-simplifying, biased assessment and account of our past politics.

Constitutional patriotism, then, could help to work both on our *memory* and our *militancy*: out of any paternalism, hypocritical idealization or one-sided schematisation, we need to go back to our past and acknowledge the reasons of pride and disappointment, the role of parties – their ambiguities but no less their force and fruitful importance – and the flaws of our form of government. For once, we ought to get rid of any alibi: we cannot absolve ourselves of our failures and always find the culprit elsewhere. And to do this we need to bring again to the surface the real fabric of our living together, the texture of our community. There cannot be anymore ‘us’ (the common people, the *true people*, victimized, unheard, pristine) and ‘them’ (the evil establishment, the privileged, malicious leading class). And

the Constitution is the cornerstone for this re-foundation of our society. To this aim, we ought to promote the Constitution and its values to get more conscious of its principles and objectives.

Let us take, to name one, what the Constitution provides for education. Article 34 provides that schools are open to everyone – without exception. In the last months, a rather hot debate in the media concerning schools was about the local regulations forbidding kids of immigrant families to access to the school canteens in lack of a documentation proving their income and properties also in their native or original country. In short, a story of school exclusion. The Constitution cannot and should not be used to sustain a rhetorical, specious approach to these matters. Instead, it is high time our educational system returns to draw attention for the inclusivity the Constitution commands: far from any dichotomy, school is open to everyone, and this program should be implemented especially in those metropolitan suburbs where school drop-out rates are intolerably too high.

On a different note, ‘us’ and ‘them’ should be proven wrong through an *open* educational system that contradicts the notion that leading class is out of reach unless being blessed with privileges. Accordingly, the second paragraph of Article 34 disposes that capable and deserving people, even when lacking financial resources, have the right to attain the highest levels of education. To this aim, scholarships, allowances and other benefits can be assigned through competitive examinations. Capable and deserving students are valuable to the Republic, which commits to support financially those underprivileged. But this rule is not only about solidarity: it is also about merit and competition¹⁵⁸. For we know today that social divides grow not only when those deprived are excluded from social mobility, but also when those deserving do not succeed as they should.

This is how our founding fathers foresaw and designed the Italian society. This is what the Italian society should recall to be. Subsequently, an open educational system rewarding

¹⁵⁸ In more general terms on this point, see Cesare Pinelli, *Ancora Costituzione della Repubblica o repubblica senza costituzione?*, in *Studi parlamentari e di politica costituzionale*, 107, 1995, 35.

the deserving is something more than the casual intuition of a political party. Let us get back to the original design. Let the Constitution speak. In sum, then, if for Germans the issue was to create a post-nationalism, Italians need today a *post-partitism*. Instead of reckoning with the past, we primarily need to resuscitate a *collective agency* over the future based on our constitutional identity. But what is this identity about?

I have always liked to think of constitutions as legal artifacts with a literary tone. The connection with literature is indeed threefold.

Historically, one might ask how it was that men living in societies built on slavery, subordination and natural subservience could imagine those who were not at all like them as equals; how was it that this new sense of selfhood came into being? It has been argued that the advent of the novel, and the fact that reading novels became increasingly widespread in that time, greatly contributed to the development of a new and profound sense of sympathy – or, as we would say today, empathy – for the autonomy and well-being of other human beings. This new shape of narration in the Western literary canon, revolving around down-to-earth, regular individuals, made the point that all people are essentially similar because of their inner feelings. Novels helped develop the attitude to see these similarities, and to go beyond appearances¹⁵⁹.

Structurally, the literary and philosophical development of the concept of *individual* in the Western civilization accompanied and somehow sustained the birth of constitutionalism in Europe and North America¹⁶⁰. When, in the 1730s, it was introduced to England's political discourse, the word 'individualism' had a negative connotation, expressing hostility and aversion. It is not by chance, then, that the four modern myths representing this negative model of individual – Faust, Don Quixote, Don Juan, and Robinson Crusoe – are used to depict the limits and vices of individualism. The punitive aspects of these myths was

¹⁵⁹ In this sense, see Linda Hunt, *Inventing Human Rights: A History*, New York, Norton, 2008.

¹⁶⁰ See Ian Watt, *The Rise of the Novel. Studies in Defoe, Richardson and Fielding*, London, Penguin Books, 2015.

only softened in the Romantic period, and the transformation resulted in countervailing positive models of individuals¹⁶¹.

Technically, every contemporary constitution has at its kernel a prototype of individual, person, citizen – a *character* – whose interests and claims meet the duties and responsibilities of public actors in a format – the relation between individuals and the community, the balance between the individual needs and the common good as originally written and gradually interpreted – that characterises that given society. I do not need to remind that the *individual* inhabiting the U.S. Constitution is another thing from the *person* living within the German Basic Law or the Italian Constitution. Privacy in the United States as elaborated in the U.S. Supreme Court case-law has become one of the constitutional paradigms of the relation between the individual and the community. It is well known that, in its infancy, the notion corresponded to a defense available to the individual from invasion of an enterprising press into her private life and, therefore, to the public circulation of private details through *yellow journalism*¹⁶². After the precedents set in the 1920s with *Pierce v. Society of Sisters*¹⁶³ and *Meyer v. Nebraska*¹⁶⁴, it was in the 1960s that the U.S. Supreme Court expanded the idea of privacy, acknowledging the individual not only as the bearer of fundamental and classic rights relevant to the state, but of a constitutionally protected personal dimension concerning the development of her personality and the ability to determine her own identity. Through landmark decisions about birth control through contraceptives for married couples (*Griswold v. Connecticut*¹⁶⁵) and unmarried couples (*Eisenstadt v. Baird*¹⁶⁶) and on abortion (*Roe v. Wade*¹⁶⁷), the U.S. Supreme Court recognised the right to privacy in the penumbras of

¹⁶¹ Ian Watt, *Myths of Modern Individualism. Faust, Don Quixote, Don Juan, Robinson Crusoe*, Cambridge, Cambridge University Press, 1997.

¹⁶² Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, in *Harv. L. Rev.*, 4, 1890, 193.

¹⁶³ 268 U.S. 510 (1925).

¹⁶⁴ 262 U.S. 390 (1923).

¹⁶⁵ 381 U.S. 479 (1965).

¹⁶⁶ 405 U.S. 438 (1972).

¹⁶⁷ 410 U.S. 113 (1973).

some of the Bill of Rights amendments and incorporated it in the Fourteenth Amendment via the Due Process Clause. Thus, the U.S. Supreme Court held that no state interests, if not compelling, could curtail the intimate individual rights claimed by the appellants¹⁶⁸.

In contrast, the German *Grundgesetz*, hinged on the norm of dignity, has overcome the conception of the human being as an autonomous and detached entity¹⁶⁹. The term *Persönlichkeit* (personhood), a recurring feature of Article 7 of the *Grundgesetz*, exemplifies the refusal of a faded conception of the human being as found in atomistic individualism. According to the *Bundesverfassungsgericht*, the human is not an isolated and self-regarding individual (*Life Imprisonment Case*¹⁷⁰), but a community-bound person. Having the Basic Law decided in favor of a relationship between the individual and the community – in the sense of a person's commitment to the community, as stated in the *Investment Aid Case*¹⁷¹ – means that, compared with the U.S. system, completely different duties descend on German public authorities with regard to the members of the community¹⁷².

So, the relation between the individual responsibility and that of public powers is very different in these two contexts: the U.S. constitutional pattern is centred around the freedom to pursue one's own vision in life, people are empowered to live their lives as they choose, free from governmental restraint if not commanded by compelling public interests. The German model, on the contrary, is anchored in the value of human dignity, meaning that each person is valuable *per se*, as an end in herself. The two main consequences of this difference is that

¹⁶⁸ Akhil R. Amar, *The Bill of Rights: Creation and Reconstruction*, New Haven CT, Yale University Press, 2000.

¹⁶⁹ Edward J. Eberle, *The German Idea of Freedom*, in *Or. Rev. Int'l L.*, 10, 2008, 1; Id., *Dignity and Liberty. Constitutional Visions in Germany and the United States*, Westport CT, Praeger, 2001.

¹⁷⁰ 45 BVerfGE 187.

¹⁷¹ 6 BVerfGE 32.

¹⁷² Edward J. Eberle, *Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview*, in *Liverp. Law Rev.*, 33, 2012, 201.

the German Basic Law is a value-ordered constitution around the norm of dignity radiating through the entire order whilst the U.S. Constitution is value-neutral, and that in the German *Grundgesetz* rights are coupled with duties, an obligation rather common in European constitutional experiences, but alien to the U.S. context¹⁷³.

And what about the Italian Constitution? What is its *character*? Even more explicitly than in the German Basic Law, the *person* embedded in it cannot flourish but in a relational dimension: Article 2 in fact recites that ‘the Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups (*formazioni sociali*) where human personality unfolds’, while Article 3 refers to ‘the full development of the human person’, for which fulfillment (and for the effective participation of all workers in the political, economic and social organisation of the country) it is the duty of the state to remove the economic and social obstacles impeding it. It is to be noted that the unfolding of the human personality and the full development of the human person do not coincide: if the latter entails the responsibility of the Republic to correct situations where the disadvantageous economic means or social conditions could negatively interfere with the full development of the person, the former accentuates where the human personality can grow. Another purposeful notation concerns the fact that the intervention on the part of the Republic to allow the full development of the person otherwise obstructed does not exhaust all the possibilities in which a personality can unfold. This means that, even when the Republic is engaged in easing the full development of the person, the person can keep on unfolding her personality in ways that are unpredictable and imponderable to the state and possibly also in contradiction with the aims brought about by it¹⁷⁴.

¹⁷³ Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, in *Utah L. Rev.*, 1997, 963.

¹⁷⁴ Cesare Pinelli, *Nelle formazioni sociali ove si svolge la sua personalità*, in Roberto Bin and Cesare Pinelli (eds.), *I soggetti del pluralismo nella giurisprudenza costituzionale. Atti del Seminario di Macerata, 5-6 May 1994*, Turin, Giappichelli, 1996, 207 ff.

When political forces claim to perform the wish of the people, to speak the voice of the people – the will and voice of Italians – they deliberately indulge in the plain equivocalness of such a slippery notion, even when people is referred to in the same Constitution. However, we should resist the temptation to look at the Constitution like a totem, or an idol, and instead counting it as a living document. The Constitution ought to be defended but, even more importantly, it is to be passed on to present and future generations as a fecund patrimony out of rhetoric and with the force of its pledges still to fulfill.

On occasion of the fiftieth anniversary since the entry into force of the Italian Constitution, it was remarked – and it is not far from being true also today, two decades later – that Italy has risen again in its economy and is finally in peace, but Italians ‘are not well. The Constitution is scarcely known, hardly rooted in their conscience and little applied’¹⁷⁵. The lack of a living together under the Constitution was and still is largely accepted and, combined with never mended imperfections, is certainly not perceived as a flaw to transcend¹⁷⁶.

Since the early 1980s several experiments have been orchestrated to tackle the inefficiencies of the Italian Constitution. After the assassination in 1978 of Aldo Moro, the President of the Christian Democratic Party, at the hand of the Red Brigades, the Socialist Party initiated discussions on strengthening the executive branch in pursuance of more efficiency and transparency of the form of government. The first bicameral commission worked surgically on the revision of five provisions of the Constitution, from Article 92 to Article 96, aiming in particular at differentiating the position of the President of the Council of Ministers, conventionally conceived as a *primus inter pares* (the first among equals inside the Cabinet), as it happens in more rationalised parliamentary systems. But the proposal did not get the support of the chambers and failed.

¹⁷⁵ Luciano Corradini and Giuseppe Refrigeria, *Civismo oggi: valori, comportamenti, impegni*, in Id. (eds.), *Educazione civica e cultura costituzionale*, Bologna, il Mulino, 1999, 13.

¹⁷⁶ Cesare Pinelli, *L’incivilimento degli italiani e la Costituzione della Repubblica*, in *Giornale di storia costituzionale*, 16, 2008, 29.

Before the second bicameral commission reprised the attempt to rationalise the form of government – this time even more resolutely in the sense of the German Chancellorship –, in 1991 and 1993 three legislative referenda were voted with very ample majorities to partially abrogate the Senate electoral law and the public funding to political parties, giving voice to the frustration against traditional parties, discredited for their wrongdoing¹⁷⁷. Lastly, when the third bicameral commission was summoned and worked on the idea of a moderate semi-presidentialism, the party system had already transformed, after the entry into force of new electoral laws introducing a majority system and with brand new political parties contesting the rule of the country. No constitutional reforms of the form of government have ever been approved since, but it is beyond doubts that the form of government conceived by the founding fathers is still deeply critical and in need of some mending.

Today, the Italian political scenario has changed one more time, with the relatively new Five-Star Movement claiming to discontinue the usual practices and pledging to rejuvenate Italian institutions. While approaching the popular referendum on the constitutional reform set in motion in 2016 by Matteo Renzi and the Democratic Party, the Five-Star Movement led a campaign of unshakable resistance against the attempt to reshape the form of government, in defence of the popular sovereignty with which the Constitution is reportedly imbued, to save the fundamental principles the founding fathers asserted. Yet, on occasion of the 4 March 2018 general elections, the Five-Star Movement demanded its representatives to sign a contract in force of which they would be imposed a fine of 100,000 euros did they not comply with the movement's rules, a sanction in overt infringement of Article 67 of the Constitution – according to which every member of Parliament represents the Nation and exercises her functions without a binding mandate – that

¹⁷⁷ Between 1992 and 1994, nearly half of the representatives belonging to the political parties joined in the coalition of government were subjected to investigation. Many key politicians were imprisoned, others were forced to flee the country in order to escape justice. It was the beheading of the leading class of the time. The two main ruling parties, DC and the Socialist Party (PSI), were literally crushed.

the Movement has however in mind to abolish, in spite of a constitutional guarantee in favour of parliamentary members against the abusive dictation of their political party and of a representation that aims at seeking a possible common good through a fair negotiation and beyond factions¹⁷⁸.

To make matters worse, at page 4 of the so called *contract* the Five-Star Movement and the League had put together to present their political program after 80 days since the March 2018 elections, it was reported that, whenever a contrast on the interpretation of the program raised and stayed inside the coalition, a Conciliation Committee would be convened to reach an agreement and act accordingly. The contract provided that such Conciliation Committee was composed by the President of the Council of Ministers, the leaders of the Five-Star Movement and the League, the parliamentary leaders in the Senate and the House of Representatives of both parties, and the Ministers covering the departments at debate. Still, Article 92 of the Constitution very clearly affirms that the government is formed only by the President of the Council of Ministers and the Ministers, and Article 95 entrusts only the President of the Council of Ministers with the conduct of (and holding him responsible for) the general politics of the government, the coherence of political and administrative policies and the coordination among the Ministers¹⁷⁹. The prevision of

¹⁷⁸ Article 67 of the Italian Constitution provides that each member of the Parliament represents the Nation and carries out her duties without a binding mandate.

¹⁷⁹ It was only the law 23 August 1988, no. 400 that, *inter alia*, attributed and specified the prerogatives in the hands of the President of the Council of Ministers to ensure the coherence of political and administrative policies ex Article 95 Const. Before this long awaited piece of legislation, the sole legal source defining the powers of the President of the Council of Ministers had been the royal decree 14 November 1901, no. 466, the so called ‘Zanardelli decree’, organising the relations between the Head of the Government and his ministers. For more in-depth analyses, see Sergio Bartole, *Una prospettiva di valutazione dei poteri normativi del Governo. A proposito della l. n. 400 del 1988*, in *Giur. cost.*, 1, 1988, 1469; Andrea Manzella, *Osservazioni sulla legge 400/1988 sulla Presidenza del Consiglio dei Ministri*, in Associazione per gli studi e le ricerche parlamentari, *Quaderno n. 1 – Seminari 1989-1990*, Milan, Giuffrè, 1991; Livio Paladin, *Governo italiano*, in *Enc. dir.*, vol. XIX, Milan, Giuffrè, 1970; Giovanni Tarli Barbieri, *La disciplina del ruolo normativo del Governo nella legge n. 400 del 1988, ventinove anni dopo*, in *Osservatorio sulle fonti*, 1, 2018.

such a Conciliatory Commission is hence in plain violation of these constitutional provisions, just like the 100,000 euros fine contrasts with the prohibition on the binding mandate. Nonetheless, as it turns out, the Constitution is what the parties believe it is or should be, and the affection to the fundamental law appears to be, to say the least, erratic, contingent upon the expediency of the moment.

Two institutions have embodied a restraint against the drift of political parties in their self-sufficiency: the Presidency of the Republic and the Constitutional Court. These pages have not specifically looked into their essential action to counterbalance the excess of powers of political parties. Their commitment has been untiring and meticulous, rescuing Italy from dooming episodes of its political and legal history.

Nevertheless, there are reasons of concern also in this regard: in his current capacity of justice of the Italian Constitutional Court, Giuliano Amato has released an interview from his chambers about ‘the loneliness of the Court’¹⁸⁰:

A few months ago, on occasion of an international seminar, a justice of the German *Bundesverfassungsgericht* warned the audience: “Don’t leave Constitutional or Supreme Courts alone. We have started issuing judgments that meet the harsh dissent of those against immigrants or the most advanced civil rights. And we’ll go even farther than this, and that will be the time when we shouldn’t left alone”¹⁸¹.

¹⁸⁰ Simonetta Fiori, *Giuliano Amato e la solitudine della Corte*, in *Il Venerdì di Repubblica*, 27 March 2019.

¹⁸¹ *Ibidem*.

7. Conclusion

In 2018, the writer Antonio Scurati has published the first novel of a planned trilogy devoted to Benito Mussolini and the birth and evolution of fascism. The volume, entitled *M. Il figlio del secolo*¹⁸², reconstructs the events from 1919, when the Italian Fasci of Combat (*fasci di combattimento*) were founded in Piazza San Sepolcro in Milan, to 1924, in the weeks of Matteotti's disappearance. It is a narration devoid of any ideological prejudice, with no characters, events, speeches or even sentences invented, in the style of historical dramatizations undertaken by novelists like Javier Cercas¹⁸³, Jonathan Littell¹⁸⁴, Laurent Binet¹⁸⁵ and, more recently and on a different note, Geraldine Schwarz¹⁸⁶. The author motivated his dedication to this project by arguing that, while in the aftermath of the war it was necessary an ideological and educational narration of the Resistance, in our time it is crucial to renovate the reasons for antifascism with no hesitancy or indulgence, but also without any ideological approach.

¹⁸² Antonio Scurati, *M. Il figlio del secolo*, Milan, Bompiani, 2018.

¹⁸³ Javier Cercas, *Anatomía de un instante*, Madrid, Random Spain, 2009 narrates the events of the attempted coup d'état conducted in 1981 in Spain.

¹⁸⁴ Jonathan Littell, *The bienveillantes*, Paris, Gallimard, 2006 depicts the former SS officer Maximilian Aue in his active involvement in the Holocaust.

¹⁸⁵ Laurent Binet, *HHhH (Himmlers Hirn heißt Heydrich)*, Paris, Grasset, 2011 recounts *Operation Anthropoid*, the plot to assassinate in Prague the Nazi leader Reinhard Heydrich.

¹⁸⁶ Geraldine Schwarz, *Les amnésiques*, Paris, Flammarion, 2017 narrates the story of her German family that acquired a company from Jewish entrepreneurs in the Thirties and intertwines it with the crucial passages of Twentieth-century Europe.

It is futile – and sometimes even a little ridiculous – to brandish on a daily basis the flag of militant antifascism. Far more important, and honest, is to raise high the flag of a solid democracy¹⁸⁷.

My idea is that the Constitution is in need of the same treatment. To the question on how Italians that do not recognize themselves in the present-day political culture should react, Gustavo Zagrebelski has replied that we should start over and recommended to object one's own dissent to those speaking in the name of 'Italians' and their 'identity'; to oppose respect and mildness to those wielding strength; cultural rights to the attempts of bureaucratizing schools and universities; condemnation to illegality; solidarity to discrimination and violence. 'To ignorants that utilize the empty and often obscene new language, do ask: what are you saying? How do you speak?, and so on. To the limits of endurance to abuse and of civil disobedience that, in extreme cases, may be virtues'¹⁸⁸.

Despite the undeniably inspirational and motivating appeal, I respectfully disagree. I do not disagree about the sense of his admonition, but on the idea of social fracture that implicitly comes from this exhortation. I do not think the Constitution needs to be weapon to one part against the other, even when the other has been attempting on its values. The Constitution should not divide or juxtapose, nor should it belong to an anthropologically or culturally superior, enlightened group. The Constitution needs to ground and anchor among Italians, to enforce our national, common citizenship, to belong to all.

It is been remarked that, for their constitutional patriotism, Germans 'have been forced by circumstances to deal with these problems intensely and directly', but that 'the Germans' special problems can also be seen as the *special problems of modernity*'¹⁸⁹. And it is high time that Italy faces its own problems of modernity. Though a legal object, a constitution is capable

¹⁸⁷ Antonio Scurati, *Il fascismo è ancora vivo dentro di noi*, in *la Repubblica*, 22 March 2019.

¹⁸⁸ Gustavo Zagrebelski, *Basta con il silenzio, è venuto il tempo della disobbedienza civile*, in *la Repubblica*, 23 November 2018.

¹⁸⁹ Karol Edward Soltan, *Constitutional Patriotism and Militant Moderation*, in *Int'l J Const. L.*, 96, 2008, 97 (italics added).

of extra legal effects and of going beyond its legal validity, acting as an important factor of social integration – a social process that can certainly be promoted but not controlled by the constitution¹⁹⁰. It is the *integrative function of constitutions* by which members of a polity develop a communal spirit and a collective identity¹⁹¹.

Between February and May 1938, Thomas Mann toured in several American universities after having left his exile in Switzerland and established at Princeton. The rousing lectures he gave were published later that year. He wrote:

What seems to me necessary is that democracy should answer this fascist strategy with a *rediscovery of itself*, which can give it the same *charm of novelty* [...]. It should use this wholly unexpected situation – the fact, namely, that it has again become problematical – to *renew and rejuvenate itself* by again *becoming aware of itself*¹⁹².

A constitution is timeless, he remarked, and timelessness always implies a certain degree of potential youthfulness. An Italian way to constitutional patriotism could aim at that charm of novelty and youthfulness that our fundamental law deserves and that would enable our institutions to turn into a true republic of citizens at last.

¹⁹⁰ Dieter Grimm, *Does Europe Need a Constitution?*, in *Eur. L. J.*, 1, 1995, 287-288 and 195.

¹⁹¹ Dieter Grimm, *Integration by constitution*, in *Int'l J. Const. L.*, 3, 2005, 193.

¹⁹² Thomas Mann, *The Coming Victory of Democracy*, New York, Alfred A. Knopf, 1938, 15 (italics added).

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For an Italian Way to Constitutional Patriotism

Reflections on Rejuvenating Our Constitution beyond Hyperboles and Failed Reforms

In 2012, the Academy-Award winning actor Roberto Benigni performed a stand-up show at prime time on the main Italian public television channel entitled *The Most Beautiful Constitution in the World*. Although for a comparatist nothing is as nonsensical as a world-record constitution, the exaltation of the Italian Constitution through superlatives and hyperboles symptomises the tepid relation Italians entertain with their fundamental law. Why is it so?

Since 1948, two factors have thrived and mutually reinforced in Italians institutions: the partitocracy and a deeply inefficient system of government. Their persistent combination, cluttering the scene and pushing the Constitution behind the curtain, has educated Italians to depend on political parties and their power play.

This seems the time when some kind of constitutional patriotism should be in order in Italy to strengthen the Italian civic-mindedness, finally found a common citizenship, and re-establish our cardinal values perilously at stake in a changing society – in brief, to face our own problems of modernity.

Benedetta Barbisan, is associate professor of Comparative Constitutional Law at the University of Macerata and Visiting Professor of Law at Georgetown University Law Center. Previously, she has visited Boston College Law School, Harvard Law School, Yale Law School, King's College London School of Law, the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. She has also taught at the Universidad de Oviedo, Queen's University Belfast and currently at the Université Catholique de Lille.

Among her many publications, she has authored a book on the origins of U.S. judicial review (Bologna, il Mulino, 2008) and co-authored with Giuliano Amato a book on the dialogue between the Italian Constitutional Court and the European Courts (Bologna, il Mulino, 2016). With Giuliano Amato and Cesare Pinelli, she has edited the book *Rule of Law vs Majoritarian Democracy* (Hart Publishing, forthcoming).



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