Foreword

In this book, I analyze the origins, the foundation, and the development of western constitutionalism, as well as the structure and the transformations of constitutional law in the western world. Although complex issues and ambivalences will be taken into account, the main aim of the book is to handily introduce the western constitutional law to university undergraduate and graduate students.

The analysis will start stressing the doctrines and the political claims of constitutionalism. In the European Modern Age – especially between the 15th and the 17th Century – extraordinary transformations of the political scenario took place: the sunset of the political and legal orders of the Middle Ages led to the birth of new legal structures. In the field of private law, the legal orders of the new Nations moving from the common foundations of the Roman law, progressively undertook different paths and they separated in two different traditions, i.e. Common law and Civil law [Samuel]. In the field of public law, the settlement of the National Monarchies redefined the basic principles of sovereignty as conceived in the Roman Age and in the Middle Ages. The new principles led to the settlement of the Nation-State and to the development of a *Jus Publicum Europeum*, destined to regulate the relationships among the States for several Centuries, and to shape the basis and the principles of the modern and contemporary international law [Grotius].

These political phenomena and the related transformations in the legal structures allowed the demarcation of a broad space, synthetized at the beginning in the idea of "Europe", characterized by common religious roots, economic transactions and cultural mutual influences, common principles of politics, common legal values and mutually acknowledged methods of international relations [Schmitt, Chabod]. With the colonization of the American lands by the European powers, the area of the *Jus Publicum Europeum* broadened also in the new American Colonies. Hence, in the two sides of the Atlantic Ocean a west-

ern society took place. It is in this institutional framework – the Nation-State – and in this geopolitical landscape – the Atlantic world – that the doctrine of constitutionalism was elaborated. Here, starting from the age of the Modern Revolutions (1689-1789), constitutionalism was established, beginning a historical path, which is still in progress in contemporary days.

In the book, I start by providing an explanation of the theoretical roots and the historical premises of constitutionalism (Chapter 1). I then examine the foundation of constitutional law in western Countries since the age of the Revolutions (Chapter 2) and in the 19th Century (Chapter 3), underlining the different constitutional traditions in the western world. Moreover, starting from the end of the First World War, I also describe the transformations of constitutional law brought by the transition toward the pluralistic societies (Chapter 4). Thereafter by focusing on the contemporary age, I analyze the political and the legal features of constitutional democracies, taking into consideration several constitutional experiences in the environment of contemporary State (Chapter 5). I finally discuss the worldwide expansion of the pattern of western constitutionalism (Chapter 6) and the contemporary challenges of constitutionalism in the age of globalization, focusing on the development of a European constitutional space (Chapter 7).

As for the methodology that I follow in this book, taking into account that modern and contemporary Constitutions, and constitutional law in general, are the outcome of a mixture of legal and political institutions shaped within the common tradition of western constitutionalism, the best way to introduce the study of constitutional law is through a comparative and historical method. Constitutionalism – both as a political doctrine and as a legal practice – is, indeed, a travelling idea. It crossed national boundaries, with boats, traders, books, chronicles and newspapers. Therefore, only after a general knowledge of the fundamental structure of constitutionalism as a transnational tradition, it is possible to study and understand the national constitutional law, as provided by the Constitutions and the constitutional sources of law of any specific Country.

Moreover, in the global age, law created and applied within the Nation-State borders is affected by processes of opening, convergence and mutual learning, and suffers the competition with supranational overlapping legal orders. Hence, the use of

the historical and comparative approach is the most suitable in order to understand our society, and to reveal the tradition to which our legal orders belong to and the transitions underway [Glenn, Legrand].

Lastly, the historical method also allows a better understanding of the existing relationships between the development of the legal structures and the historical background, as determined by the political struggles, the social and economic claims, and the cultural transformations that took place in the western world. Thanks to this method, it will be shown that constitutional law and constitutional structures are more the product of history than the rational outcome of abstract categories [Cervati].

In other words, constitutional law does not mirror a closed and rational system, but rather norms and legal institutions live in their cultural contexts [Häberle] and depend on the social dynamics and the political fight [Muir Watt].

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In writing this book, I had the opportunity to benefit the essential support of some friends and colleagues. I desire to express my gratitude to Alessandra Di Martino, Chiara Filippucci, Marco Fioravanti, Gianluca Mastromattei, Federico Nania, Antonella Ratti, Giorgio Repetto and Francesco Saitto.

Maria Romaniello deserves a special mention for her brilliant support.

Chapter One
Rediscovering the tradition of resistance against the political power: the theoretical roots of modern constitutionalism

1.1. Constitutionalism: a definition

The notion of «constitutionalism» identifies a political doctrine first appeared in England during the 17th Century, which quickly spread over North America and European western Countries, and became the leading political doctrine of the three Revolutions of the Modern Age.

Since its origins, constitutionalism has aimed at reaching the goal of limiting the absolute political power through the quest of three legal tools: (i) the adoption of a written constitution, prescriptive toward the institutions of the State and suitable to act as paramount law upon its acts; (ii) the separation of powers of the State; (iii) the legal protection of a wide range of individual rights. Constitutionalism is, therefore, the legal outcome of philosophical doctrines of the Modern Age – jusnaturalism, contractarianism, and their political synthesis, liberalism – with which it shares not only theoretical premises, but also political goals: transforming the political, legal and economic structures of the *Ancien Régime* according to the interests and the objectives of an increasing social class, i.e. the bourgeoisie.

As the historical analysis will show, the doctrine of constitutionalism places its roots in ancient political and philosophical thought, where not only were needs of limitation of political power present, but also many of the legal tools developed by modern constitutionalism had been already proposed and discussed. Furthermore, a presentation of the features of this "ancient constitutionalism" allows a better construction of modern

constitutionalism and it sheds light on its connection to other theoretical premises than those shaped in the Modern Age within the cultural and social environment of bourgeoisie. The deeper historical approach, indeed, is able to show the existing connections between the liberal doctrine of constitutionalism and the goals of popular movements, with their democratic claims for social redemption. Generally, the traditional approach presents constitutionalism as the exclusive outcome of liberalism and – on the perspective of social classes – of bourgeoisie. The traditional approach looks at the popular movements that took part to the Revolutions and to the following developments just as parenthesis, inconsistencies, and breakages of continuity [Furet, Matteucci]. Here, I consider the democratic doctrines and the popular quests for equality and political participation as relevant factors in the building up and affirmation of constitutionalism and constitutional law. In other words, liberalism and democracy, although with different theoretical origins and identified with different social classes, met in the age of the Revolutions, leading to a combination, on the one side, of legal protections against the political power and, on the other side, of social improvements in the field of equality and political participation.

The Constitutions of the Modern and Contemporary Age are the outcome of this multi-faceted doctrine. Liberal-democratic Constitutions are, indeed, the legal texts and the political hallmark of the combination of all these fundamental claims of the Modern Age, always providing constitutional rules to guarantee the rights of men, a regulation of the structure of the government in order to grant separation and balance among its several branches, principles and plans of development of people's social conditions and rights in fields such as equality and participation in the political life of the Country. Thanks to this more comprehensive definition of constitutionalism, it is possible to conceive the contemporary tasks of constitutional law – the constitutional protection of social rights and social justice and the deeper regulation of social life – as a natural development of constitutionalism.

1.2. The contribution of ancient constitutionalism

Even if western constitutionalism is a product of the Modern Age, it has deep roots in the classical thought. Scholars are used to speak about an "ancient constitutionalism", different

but strictly connected with modern western constitutionalism [McIlwain].

The first reflections on the limitation of political power bring us back to the Greek ancient political philosophy, where a first discussion about the best form of government of the State appeared as a result of the separation of politics from religious beliefs and boundaries. In Aristotle's *Politika*, the question on the best form of government for the *Pòlis* is addressed in an original way. The philosopher, indeed, refuses Monarchy – the government by one man – as it could easily become a tyranny; he refuses also aristocracy – the government by the richest part of the society – since it could easily become an oligarchy; and also refuses democracy, that he conceives as the government by the majority. Democracy, according to Aristotle, could lead to the government of the popular class, and thus it would boost only the interests of the poorest part of the society against the other social classes. As an alternative, he proposes, instead, a mixed form of government, where all the social classes are represented and share powers through different institutions, closely linked each other. He calls this perfect and balanced form of government "Politeia".

Throughout the Centuries, the theory of Aristotle influenced other philosophers and politicians. In the Roman Age, the most important of those was Cicero. As a member of the aristocracy, he fought against both the desire of the Tribunes – representatives of the plebs – to acquire more power, and the attempts to confer all the political power to one man. To this end, he proposed the same idea of Aristotle, i.e. a mixed and balanced form of government, that he called "Repubblica".

Several features of these doctrines are linked to specific elements of cultural and political landscape of the Ancient Age: both Aristotle's and Cicero's doctrines are strictly connected to the historical and social condition of their times and to their main political project, i.e. the need to achieve political peace and social stability [Rimoli]. According to them, this goal could only be reached through a mixed form of government, in which all the powers are shared and divided. Furthermore, alike to the philosophy of the Ancient Age, the two philosophers based their theories on a specific interpretation of the social body. That is, the political community is comparable to a human body, in which all of its parts are connected, and no one is more important than the other, regardless the function performed by

each of them. Such a general view of the political community is linked to a static and organicistic interpretation that cannot be applicable to modern societies. Nonetheless, in these doctrines we can find the first assertions on the relevance of a mixed government, whence the modern doctrine of the separation of powers derives [Vile].

A second contribution on government and politics that the ancient thought bequeaths to modern constitutionalism regards the idea of the boundaries of law.

In ancient political philosophy, indeed, the idea of a higher law – shaped by nature, human reason, or given by God – that binds all men, began to appear. In the Greek thought the theory was not clearly developed, and it is only with the Christian and the Roman philosophy that it was fully defined and, today, it is commonly acknowledged as jusnaturalism. The theory, despite its several sources, varying each from the other, generally claims for the existence of a natural limit to the law of men. In Cicero's *De Republica*, we find a precise explanation of the bounds to the law of men represented by law of nature:

> True law is right reason in agreement with nature; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge.

In the Christian political theory, developed throughout the years in which Christians were a persecuted minority, the natural law, based on the will of God, represented the main constraint to the doctrine of unbounded sovereignty, which was expressed by the main political and legal thought in the age of the Roman Empire. Following Origen, a Christian theologian living in the III Century a.C.,

> As there are, then, generally two laws presented to us, the one being the law of nature, of which God would be the legislator, and the other being the written law of cities, it is a proper thing, when the written law is not opposed to that of God, for the citizens not to abandon it under pretext of foreign customs; but when the law of nature, that is, the law of God, commands what is opposed to the written law, observe whether reason will not tell us to bid a long farewell to the written code, and to the desire of its legislators, and to give ourselves up to the legislator God, and to choose a life agreeable to His word, although in doing so it may be necessary to encounter dangers, and countless labours, and even death and dishonor. For when there are some laws in harmony with the will of God, which are opposed to others which are in force in cities, and when it is impracticable to please God (and those who administer laws of the kind referred to), it would be absurd to condemn those acts by means of which we may please the Creator of all things, and to select those by which we shall become displeasing to God, though we may satisfy unholy laws, and those who love them.

During the Middle Ages, this doctrine was kept alive and developed by many philosopher and Christian theologians – among which John of Salisbury and Thomas Aquinas –, for whom it represented the consequence of their religious vision of political obligation, as well as a powerful tool of resistance against the secular power and its attempts to reduce the political leverage and the liberties of the Christian Church.

In the specific context of Great Britain, the claim for the intangibility of natural law merged into the quest for the rule of law, a doctrine defended by the jurists of the Middle Ages, aimed at establishing boundaries to the power of the King to legislate and govern. These boundaries were found in natural law and human reason, as well as in the customary law belonging to the historical tradition of the Country (*lex terrae*). According to authors such as Bracton, the main function of the rule of law was to limit the political authority to the exclusive power of administrating justice (*iurisdictio*), excluding any power of shaping norms (*gubernaculum*) [McIlwain].

A third contribution to modern constitutionalism comes from the doctrine of contractarianism. As we will see, the idea that the State and the political institutions were born on the basis of

a social compact among free men is a fundamental pillar of modern constitutionalism. This doctrine had already been introduced by several philosophers and politicians in the Ancient Age as well as in the Middle Ages. Also in this case, Christianity played a pivotal role in deepening such doctrine, because the idea of the contract had already been largely addressed in the Bible, exemplifying the foundation of the Alliance between God and men.

The structure of contractarianism was also developed by the legal practice during the Middle Ages, through the affirmation of a new social and economic pattern, that is feudalism. In feudal landscape, the contract was the typical model of setting the relationships among individuals and among communities, both in the realm of work and of production, as well as in the political power. Focusing on the political power, the feudal contract was based on a pact of submission and assistance between individuals, legitimizing the political authority of the lord over the people. In the practice of feudal law, moreover, the contract theory was applied by the Courts as a means to resolve the disputes arising by the violation of agreements and mutual duties, as well as by groups and communities to rebel against the lord and claim their independence [De Benedictis]. In European history, therefore, contractarianism was much more than a doctrine: it was a fundamental legal framework for the development of social and political relationships.

Likewise the natural law theory, the doctrine of contractarianism had a relevant role in the affirmation of the existence of constraints to political power vested in the sovereigns. However, whereas the doctrine of natural law was mainly connected to religious beliefs and religious visions of the world, contractarianism allowed a definition of the boundaries of political power through a secular vision of the world. In the Modern Age, where a vehement process of secularization took place [Hazard], this feature of contractarianism helped constitutionalism in defining the theoretical elements of its doctrine.

In conclusion, even though from different paths, jusnaturalism and contractarianism led to the affirmation of superior and intangible limits to the commands of the political power of men. This also brought to a radical outcome, the theorization by some of the philosophers – who contributed to the definition of those doctrines – of a right of resistance against the political institu-

tions: in the form of disobedience to unjust commands and norms, as well as in the form of rebellion against the tyrant. As we will see in paragraph 1.4, the claims for a right of resistance were the ideological tools of minority groups, and allowed to keep alive and preserve the tradition of constitutionalism throughout the Centuries of absolutism [Buratti, 2006].

1.3. The foundation of the Nation-State in the Modern Age

Although the theoretical roots of constitutionalism date back to ancient and medieval political thought, the actual development of political structures followed divergent directions. In western Europe, indeed, the Roman Imperial Age, the Middle Ages and the first Centuries of the Modern Age were characterized by the development of a completely opposite doctrine about political obligation, based on the claim for an absolute sovereignty. This doctrine supported the growth of the Empire and, later on, of national Monarchies. In the intellectual landscape of those Centuries, only a minority of theorists and communities considered constitutionalism as a sound political doctrine.

The idea of the political power as absolute was established in the context of the Roman Empire: at the end of the Roman Republican Age, the weakening of the Senate and the Tribunes' roles gave to the Emperor the right to act as superior to and not bounded by the law, identifying the law with his own will (*quod principi placuit legis habet vigorem*). In the following Centuries, these doctrines shaped the codification of law led by Emperor Justinian, according to whom «the imperial majesty should be armed with laws as well as glorified with arms» (Inst. Just.). A relationship of mutual support exists between the consolidation of the doctrine of absolute sovereignty and the growth and development, throughout the last Imperial Age and the Middle Ages, of the Civil law legal system. Roman law of the late Imperial Age was characterized, indeed, by the prevalence of written sources of law responding to the will of the sovereign and able to prevail on norms resulting from customs and opinions of lawyers. The development of the European civilian legal system follows these premises, building hierarchical relationships among the sources of law, on top of which the written law, issued by the sovereign, rests. Accordingly, the role of the Courts is strictly limited to the

application of the provisions issued by the written law.

During the Middle Ages, the falling of the Roman Empire brought to political fragmentation and the consolidation of local lords and communities: in the field of law, local customs and local traditions came back to life, while the jurisprudence of the Courts fostered the consolidation of a *jus commune* characterized by ancient principles of Roman civilian codification and maxims of interpretation delivered by the lawyers.

In order to contrast this fragmentation, since the beginning of the Modern Age the premises of the doctrine of absolute sovereignty has been stressed: the political power was thought to be legitimized by God and granted by him to the King or to the Emperor, his representative on the Earth. The French philosopher Bodin is considered the main representative of this theoretical approach. The identification of the person of the sovereign with the features of divinity led to extremist popular visions, such as those recognizing to the Monarch a mystical and sacral value [Kantorowicz]. Accordingly, the political power was considered to be indivisible and illimitable. The theorists of the absolute political power fought against all theories aimed at establishing boundaries to the power of the sovereign to legislate; for their part, the sovereigns acted to abolish jurisdictional authority of the territorial lords, as well as to modify ancient legal traditions and privileges of the cities, communities, guilds and nobles, which were very widespread in the medieval legal order.

The spreading of the Civil law legal system, with its rational and centralized hierarchical structure, fostered during the years the development of the Modern Nation-State, the settlement of a centralized authority able to bound all the local powers existing in the fragmented legal order of the Middle Ages, as well as the progressive overcoming of the *jus commune*, at least as the main source of law. This last achievement occurred thanks to the acquisition by the Monarch of the power to produce normative acts and introduce normative innovations: a radical change if compared with the medieval legal order, which conceived the law as eternal, and the role of political authority as strictly limited to interpret and apply the law.

The State – as a political and legal order spread over a vast territory, driven by a centralized political authority, and imposing a homogeneous law on people – started to appear in the 15th Century, with the settlement of new Monarchies in France, En-

gland, Spain and Portugal. The phenomenon followed common routes in Europe, with a lord becoming able to centralize fundamental public functions, such as keeping a centralized army and granting internal security, raising revenues, imposing common regulations to commerce, organizing the jurisdiction and granting the execution of its rulings.

However, it was only with the Peace of Westphalia (1648) that the form "State" was finally acknowledged. The Peace of Westphalia recognized the exclusive sovereignty of the State over its population and excluded religion from politics. In other words, within the boundaries of the State there could not stand religious authorities, such that of the Church, neither was recognized the authority of other political institutions (commons, lords of the Feudal system). Thus, the State is "*superiorem non recognosens*" both in internal side as well as in foreign relationships. The transformations brought by Westphalia to the form of political obligation is easily understandable through the analyses of three basic elements of the Modern State, which distinguish it from the previous forms of political obligations.

The first one is territory: while in the Middle Ages, after the fall of the Roman Empire, the political obligation was based on individual trust and fidelity, here the State boundaries identify the space in which the State's legal order is in force. The identification of the effectiveness of the legal order through the State boundaries meant not only the overcoming of the intersection among different belongings and fidelities, as common in the Middle Ages; it also meant the direction toward an equal application of law over the people [Di Martino, 2010]. The second element to be taken into consideration is the people: all the people living within the boundaries of the State are subject to State legal order; territory and boundaries of the State identify the community of people, excluding from the citizenship every people not belonging to the State. The third element is sovereignty: Modern State does not allow the recognition of other authorities within its boundaries and over its people; it claims the legitimate use of the force, the power to produce norms, to apply them, to judge over controversies and crimes. In the relationships with foreign States, each State is equally legitimated to stand, negotiate and join into Treaties. For this equality between States, here is the beginning of the international law system, as we know it today.

Compared to the political orders of the Middle Ages, such as

the Empire and the Church, the Modern State overcomes feudal and local resistances and privileges, centralizing the political power. Consequently, it begins to build a centralized and organized administration; it overcomes religious conflicts within the State, imposing to citizens a sole religious belief and limiting the role of the Church in politics; it harbors an international law system of States equally entrusted with the power to bargain and sign treaties and any other kind of international agreement. It is the birth of the *Jus Publicum Europeum* [Schmitt].

1.4. The minority paths of constitutionalism in the age of absolute sovereignty

In the first years of the Modern Age, ancient constitutionalism was resumed by those thinkers, landlords, minority groups and local communities that tried to oppose and resist to the tremendous building of a new, absolute, theory of the political power's foundation.

In many Countries, aristocracy resisted to the attempts to affirm a centralized Monarchy through the imposition of Charters of rights: compacts drafted in the typical form of a feudal pact, in which the aristocrats accepted the King as legitimate and, the King, on his part, confirmed privileges, immunities and rights of the lords. In all of these Charters, the pacts were granted through the codification of a right of resistance, allowing aristocrats to resist, rebel and remove the sovereign in case of violations of the Charter. The English *Magna Charta Libertatum* (1215 a.C.) – which was adopted several Centuries before, as I will explain in next Chapter – was assumed as the pattern of such documents. These Charters are hardly comparable to modern Constitutions and modern Bills of rights: they were only aimed at protecting privileges of social class rather than individual rights, and their structure is more easily comparable to compacts between lords and vassals typical of feudal system; but at the same time they contributed to the settlement of the conception of individual rights as constraints to the political power of the Monarchs.

The opposition to the modern pattern of political sovereignty was also carried on by the religious minorities persecuted by the Monarchs all over Europe. According to the main leading authors of these groups (Hotman, Theodore of Beza, Calvin), the political

power derived from a compact with the people. Therefore, the government of one man had to be considered unjust and oppressive, and the people should always have had the power to resist to the tyrant and to remove and kill him. At the same time, these authors refused the binding authority of Roman law, since it was considered as the source of the absolutist doctrine of sovereignty. A sound political system, instead, should had been based on a system of constraints over the power of the Monarch, consisting in the traditional institutions of the Country and in other innovative institutions entrusted with competences to check the Monarch's powers.

The insurgency of the United Provinces of the Netherlands against the Habsburg's Empire (1581-1588) was the occasion for the consolidation of these doctrines – supported by Calvinist religion spread in those territories – and for the settlement of the Republic, an institutional organization setting a first form of power-sharing [Clerici]. The Dutch painting of the 17th Century clearly shows the link between the modern society of the merchant class and the constitutional organization of powers.

Also during the Italian Renaissance we can find elements of a political thought with strong connections to ancient constitutionalism: though far from the premises of modern constitutionalism, Machiavelli, in his *Discourses upon Tito Livio* (1513-1519), magnified the institutional structure of the Roman Republic, and most of all the role played by the tribunes, who were described as a fundamental tool of check and resistance against the absolute power of the Senate [Skinner].

Clearly, during the Middle Ages and the Modern Age, these doctrines were still a minority and were largely scattered if compared to the widespread absolute sovereignty theory. Nevertheless, this minority circulation of the ancient constitutionalism doctrine granted its survival and its recall at the moment of the growth of the insurgencies against the absolute power of the Monarchs.