This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker

The Combination of Negative with Positive Constitutionalism in Europe

The Quest of a 'Just Distance' between Citizens and the Public Power

Cesare Pinelli[*]

Abstract

The article is focused on European constitutionalism as resulting from the transformations following the experiences of totalitarian states. The notion of democracy was then significantly re-shaped, to the extent that democratic devices (federalism and sometimes referendum) were introduced with a view to balance the excesses of a purely representative democracy. The recognition of social rights and of human dignity reacted against totalitarism and, on other hand, against the individualistic notion of rights affecting the XIX century's constitutionalism. Constitutional review of legislation was introduced, thus overriding the myth of parliamentary sovereignty, particularly the idea of parliament as the sole authority capable of granting fundamental rights.

Keywords: democracy, constitutionalism, totalitarism, fundamental rights, judicial review.

A. Negative and Positive Constitutionalism

The question as to what extent constitutions are to be viewed as methods of building power (positive function) or merely as restraining power (negative function) lies at the core of constitutionalism since Henry de Bracton's distinction between *gubernaculum* and *iurisdictio*, or, more generally, since the medieval dichotomy between *leges* and *iura*. These reminescences suffice to demonstrate both the depth and the complexity of the seemingly clear-cut positive/negative constitutionalism issue.

Even the terminology seems here far from innocent, since some theorists tend to identify 'constitutionalism' with the function of restraining power, be it ensured from a certain organization, namely through separation of powers, and/or through judicial intervention. Accordingly, no room is left in this view, corresponding to Locke's or Montesquieu's theories, to positive constitutionalism, even if identified with democracy. Rousseau's followers might object that demo-

* Cesare Pinelli is Professor of Constitutional Law in the Faculty of Law, La Sapienza University of Rome.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker

cratic constitutions primarily rely on the people's will, and that upon that will, being the source of legitimate power, rests the whole array of guarantees against power's abuses. Trust in power, to the extent that it derives from popular consent, prevails here over suspicion for power. Liberal theorists, on the contrary, claim that power is to be suspected irrespective of whether it is issued on popular consent or on authoritarian basis. Hence derives an endless theoretical dispute.

However, the question of to what *extent* constitutions are to be viewed as methods of building, or merely as restraining power presupposes that these might be combined together, as usually occurs in constitutional experience. We are here invited to empirical not less than theoretical accounts. The latter remain necessary for an understanding of the issue, since bare facts are far from being self-evident. But theories might themselves be reviewed in light of the elements afforded from experience.

In this perspective, the diffusion of constitutionalism in an ever increasing number of countries is to be taken into account, with the inherent need for a selective comparison. But differences and analogies emerging from the comparison also require historical explanations, without which we would miss a real comprehension of the issues at stake.

Against this background, my paper seeks to elucidate the specific combination of democracy (positive constitutionalism) with the rule of law (negative constitutionalism) resulting from the post-World War II European constitutionalism.

My hypothesis is that in post-totalitarian countries such combination reflected the quest of a 'just distance' between citizens and the public power, and was pursued through the introduction of constitutional justice on the one hand, and of democratic devices and institutions complementing political representation, as referendum and the federal or the regional model, on the other hand. These changes didn't affect countries whose democratic organization had remained steady, namely the UK, France and the Netherlands, until new circumstances led them to constitutional reform. Shedding light on such diverse developments is likely to help the understanding of the dynamics recently affecting the relationship between negative and positive constitutionalism.

B. The Continental Tradition

During the nineteenth century, the function of negative constitutionalism, namely the rule of law, depended on whether it intervened for limiting an absolutist power concentrating the functions of the state. Given the absence of such power in the UK's history, Dicey could present "the rule or supremacy of law" and "the sovereignty of Parliament" as the two features characterizing "the political institutions of England",[1] without imagining that either judges or parliament would claim the ultimate detention of the state's sovereignty.

1 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885), London, Macmillan, 10th edition, 1959, at p. 183.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker

In continental Europe, the rule of law acquired instead the function of subordinating the crown, and, later on, the executive and the judiciary, to the legislative power. In France, the deep transformations engendered from the 1789 Revolution put parliament at the top of the institutional machinery. While representing the people, parliament expressed a principle of legitimacy entirely opposed to that of the *ancien régime*. Therefore, no other authority, be it the executive or the judiciary, could bind parliament, as well as no other act could override the law. While leaving the implementation of individual rights to the law, the Declaration of the Rights of Man and of the Citizen reflected the Enlightenment's philosophical presumption that the law, as expression of the general will, would not infringe the liberties of citizens, and, most importantly, would ensure their best protection.

On the other hand, the 1789 revolutionary thinking was affected by a deep suspicion for the *corps intermédiaires*, namely the associations and professional groups expressing the feudalism's legacy that during the *ancien régime* resisted the absolutist pretention of the kings. Accordingly, the 1791 *loi Le Chapelier* abolished these entities, with the result that nothing was left between the state and the individual, the former directly exerting its authority over the latter through an increasingly centralized administration.

The institutional model resulting from the 1789 Revolution exerted a strong influence on the rest of continental Europe. The German *Rechtstaat*, however, corresponded to a different version of the French rule of law. Given the persistent strength of the monarch, and the expansion of discretionary powers due to the precocious rise of the Welfare State under Bismarck, the executive was provided with an autonomous legitimacy concurring with that of parliament. Under the 1870 Constitution of the German Empire, the executive was in fact entrusted with law-making power within the limits of liberty and property, and statutory law was itself approved both from parliament and from the monarch. In these conditions, the rule of law was intended in a rather formal version, certainly weaker than the French type.

In spite of these differences, in both versions the rule of law resulted from parliament's ability in affirming itself over rival state's institutions. And the legislation, irrespective of whether it was conceived as the product of the *volonté générale* or of the state's will, was necessarily an abstract act, failing to comply with popular needs and with the rights of the individual. Dicey stressed that point, while noticing that "The *Habeas Corpus* Acts declare no principle and define no rights, but they are for practical purposes worth hundred constitutional articles guaranteeing individual liberty".[2] On the other hand, equality before the law, as recognized from the nineteenth century's European Constitutions, granted equal treatment of citizens only on formal grounds, thus putting the premises for measuring effective discriminations among themselves. In *Le Lys Rouge* (1894), the French novelist Anatole France pointed out "the majestic impartiality of the law preventing the rich as well as the poor from sleeping under the bridges and from begging in the streets".

2 Dicey (1959), at p. 199.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker

Social conflicts engendered from World War 1 further exasperated the distance between public power and citizens, paving the way to Fascism in most parts of continental Europe. Leaders of totalitarian parties exploited the incapability of liberal regimes in dealing with those conflicts, and theorists such as Carl Schmitt denounced the abstractedness and the formalism of the traditional legal order.

Totalitarian regimes aimed at abolishing whatever distance with citizens, to the point of conditioning their conscience. The 'concreteness' of these regimes consisted in encroaching upon the individual's realm. It is not by chance that Schmitt criticized Hobbes's admission that, while expressing admiration for the miraculous recoveries made from English kings, people were left free with their own beliefs[3]. Contrary to authoritarian regimes of the past, totalitarian states did not limit themselves to the repression of dissent. They needed active consent from the people, and managed to obtain it through massive interventions of the propaganda.

C. Post-totalitarian Constitutionalism

The Constituent Assemblies convened after the collapse of totalitarian regimes were confronted with the issue of how to reverse the premises of totalitarianism without returning to the old *Rechtstaat*. The 'concreteness' of the former vis-à-vis ordinary citizens, namely the public power's capability of blurring the public/private divide through interferences into the individual conscience, was of course the main threat to be avoided. But this was not a good reason for going back to the 'abstractedness' of the old parliamentarianism. Melting together the universal suffrage and the majority rule with the classical version of the separation of powers and the rule of law was thus felt inadequate for a post-totalitarian civilization. A 'just distance' was needed between public power and citizens, combining negative with positive constitutional devices and institutions.

While recognizing the principle of human dignity, the Constituent Assemblies affirmed their 'never more' with respect to totalitarianism, in correspondence with the 1949 Universal Declaration's Preamble. But that recognizance was also intended to surmount the atomistic conception of freedom that characterized post-1789 constitutionalism in large areas of the European continent. Emphasis was put on the relational dimension of individual identity, as demonstrated from the guarantee of freedom of association, which was not mentioned from the nineteenth century's charters, and the promotion of pluralism in the social, economic, cultural and religious spheres.

Such pluralism, in turn, acquired the significance of enriching the notion of democracy. Apart from the economic and social councils provided for by some Constitutions such as the French, Spanish and Italian ones, which have proved to be ineffective, I refer to less institutionalized but more successful mechanisms such as the advice and consent given by economic and social groups in relation to

3 C. Schmitt, 'Il Leviatano Nella Dottrina Dello Stato di Thomas Hobbes' (1938), in *Scritti su Thomas Hobbes*, a cura di C. Galli, Milano, Giuffrè 1986, at p. 106.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker

public policies. These are generally provided for by legislation as a necessary part of procedure but, in other cases, result from agreements between parties. Irrespective of its informality, the phenomenon of economic and voluntary enterprises taking over public functions previously carried out by elected authorities reflects economic and social pluralism, which is itself frequently affirmed as a constitutional principle.

Further democratic devices are intended to balance the excesses of a purely representative democracy, or to correct its failures through popular intervention. The referendum, usually considered the main instrument of direct democracy, does perform important functions in many European countries, although not necessarily that of counteracting parliamentary majority.

The establishment of a federal or regional state structure was common to almost all European countries where a purely representative democracy revealed its fragility with the advent of totalitarian regimes. It was considered an important tool for increasing and enhancing popular participation in public affairs, on the assumption that citizens are more likely to be aware of, and directly interested in, issues discussed at a local level than the country's general policies treated in the national assemblies. 'Lower-level politics', it is argued, improves participation that reduces the distance between citizens and those who exercise public power, and correspondingly enhances the accountability of the latter.

On the other hand, as the classical experience of the US and other countries fully demonstrates, a federal or regional state structure accomplishes the function of dividing public power along vertical lines, thus complementing that usually absolved from the separation of powers at the horizontal level. According to the framers of European Constituent Assemblies, such structure was therefore believed to correspond both to negative constitutionalism, in that it restricts power, and to positive constitutionalism, being viewed as a method of building power. It was likely to impede the formation of monolithic power through the diffusion of a pluralistic version of democracy.

The quest of a 'just distance' characterizing those Assemblies might also be demonstrated from the constitutional recognition of social rights, or, under the German Constitution, of the 'Social State' clause. An objection might be raised on the ground that such recognition put the premises for an unchecked expansion of public intervention in the economy, creating dependence of the individual from the state and abuses of discretionary powers. Contrary to the 'just distance' hypothesis, the positive side of constitutionalism would then prevail here over the negative. That objection presupposes the constitutional recognition of social rights as the necessary premise of the development of the Welfare State. That development instead took place irrespective of constitutional provisions, as the example of the UK suffices to demonstrate. Moreover, while recognizing social rights, and public interventions in the economic sphere, the European Constituent Assemblies not only reacted against the abstract pretention, typical of the nineteenth century's constitutionalism, of ignoring the substantial discriminations lying behind the principle of equality before the law, but were also pressed from the poverty then affecting large parts of society. The constitutionalization of social rights was connected with that of human dignity, not less than with the

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker

ideal of social justice, aiming at ensuring a minimum degree of social security for every citizen, not necessarily to be pursued through the creation of big government.

Finally, the 1957 Treaty of Rome, approved in a similar situation of poverty within the countries concerned, was expected inter alia to increase the general welfare through the opening of national markets. The Treaty's spirit was not alien to the Constitutions of those countries, providing free economic initiative and market competition. Tensions were likely to arise with the expansion of the state's role in providing social services, but diverse combinations would also be reached among the two according to various and largely unpredictable elements. In this view, the just distance between citizens and public power resulted from interactions deriving from pluralism, rather than being planned from the Constituent's will.

Independence of judges, both on functional and on institutional grounds, and the introduction of constitutional review of legislation were further features common to post-totalitarian Constitutions, including those of Southern Europe after the fall of fascist regimes in the 1970s, and of Eastern Europe after the fall of the Berlin wall twenty years later.

Independence of judges was ensured on functional grounds to the extent that judges were deemed exclusively subjected to the law, as resulting from its insertion in the whole legal system, and/or from its own *telos*, rather than in accordance with the parliamentary will. On structural grounds, judicial independence was granted through the establishment of institutions representing the judiciary as a collective body, entrusted with the tasks of the recruitment and career of judges, and of the judiciary's internal organization.

Constitutional review reflected a sophisticated version of the rule of law, overriding the myth of parliamentary sovereignty with the aim of ensuring effective protection of fundamental rights. While remaining at the centre of democratic life, Parliament was no more conceived as the exclusive, or even the highest, institution capable of granting fundamental rights. To the contrary, these rights should bind not only administrative bodies and the judiciary, but also statutory law. This shifting was particularly clear in Germany, where the formal conception of *Rechtsstaat* had been discredited from the Nazi regime, and supplanted by the longing for a substantive conception of legality. The pervasive influence of fundamental rights greatly reduced the practical significance of the principle of *Rechtsstaat* as a separate legal concept. Elements such as the requirement of legal certainty, or the ban on retroactive legislation, were closely linked to the effective protection of fundamental rights, helping to secure a stable legal environment where these rights could be enjoyed in security.[4]

In the original intent of the framers, the Italian Constitutional Court was instead closer to the Kelsenian model, grounded on the idea of submitting the

4 R. Groote, 'Rule of Law, Rechtsstaat and "Etat de Droit"', *in* C. Starck (Ed.), *Constitutionalism, Universalism and Democracy – a Comparative Analysis. The German Contributions to the Fifth World Congress of the International Association of Constitutional Law*, Baden-Baden, Nomos Verlagsgesellschaft 1999, p. 289-290.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker

legislation to a superior legal order. Contrary to the German and, later on, to the Spanish system, access before the Court was denied to individuals, and reserved to ordinary judges. Nevertheless, the jurisprudence of the Court soon demonstrated that its function consisted essentially in protecting fundamental rights.[5] My attempt was to demonstrate how reaction to totalitarian regimes led to combining together on new grounds negative with positive constitutionalism. The traditional combination between the rule of law and democracy was not abandoned, but rather inserted within the framework of the already mentioned principles and institutions, aimed at putting new limits to, and at the same time at providing further legitimacy for, the exertion of public power. Without that framework, the constitution would simply be superimposed on the other sources of law, as the highest expression of the state's will. In that case, the pre-totalitarian system would be changed only on formal grounds, and confirmed in its abstractedness, with the effect of leaving the ultimate ends of the national community at disposal of the state, the omnipotent sovereign of the continental tradition.

In the perspective of post-totalitarian constitutionalism, to the contrary, whatever subject, including the state, is prevented from determining the community's ultimate ends. These ends correspond to substantive principles enshrined in the constitution, and intended to endure irrespective of the contingent expressions of public powers, including political decisions of the majorities of a certain legislature. Public powers are rather asked to protect or to promote these principles, according to whether the prevalence is given to the negative or to the positive side of constitutionalism.

Given this combination on the one hand, and the contextual recognition of pluralism in the diverse spheres of life on the other, post-totalitarian constitutions are not expected to predict the social evolution of the respective countries, nor reflect the ambition of building an artificial order from above. Their principles are rather structured with the aim of orienting, and accompanying, social changes, on the assumption that the challenge of enduring through different generations distinguishes the constitution from ordinary legislation.

D. French and British Constitutional Developments

Where democracy resisted totalitarianism, the above quoted constitutional changes were perceived at least as unnecessary. Given the continuity of their traditions, countries such as the United Kingdom and France maintained the previous assessments between democracy and the rule of law. Nor did the 1946 Constitution of the Fourth French Republic contradict such assumptions. The Constitution framers' main objective consisted in granting stability to the executive vis-à-vis the parliamentary assembly, in light of the recurrent governmental crises affecting the functioning of the Third Republic. The subsequent failure of the 1946 Constitution paved the way to De Gaulle's grand design, centred on the pop-

5 On this *see* A. Pizzorusso, 'Constitutional Review and Legislation in Italy', *in* C. Landfried (Ed.), *Constitutional Review and Legislation*, Baden-Baden, Nomos Verlagsgesellschaft 1988, p. 109 et seq.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker

ular election of the head of the state, which was accomplished from the 1958 Constitution of the Fifth Republic together with the 1962 revision of Article 6. While finally ensuring a longstanding request for governmental stability, these developments occurred on the ground of positive constitutionalism. Even the establishment of the *Conseil Constitutionnel* under the 1958 Constitution was not intended to remove the 1789 tradition, according to which judges had no right to set aside the legislative will of parliament. The main original function of the *Conseil* consisted simply in ascertaining whether statutory law exceeded the fields reserved to parliament from Article 34, thus encroaching on the governmental power of regulation. The judicial features of the *Conseil*'s activity resulted rather from the development of its jurisprudence since a creative decision of 1971 on freedom of association, followed from the 1974 constitutional revision enabling parliamentary minority to apply before the court. Nonetheless, the *Conseil*'s review concerned the constitutionality of statutes before their promulgation, thus maintaining an objective character which only indirectly might affect the rights of citizens. Only the 2008 constitutional reform entrusted the *Conseil* with the task of invalidating the legislation in force.

In the last decades, the traditionally low independence of the judiciary was in France progressively strengthened, partly because of the increasing role played from courts in the resolution of conflicts, including political corruption, and partly because of the ECHR's legal instruments safeguarding judicial independence.[6]

Finally, a long process of regionalization was accelerated by the 2003 constitutional reform, enhancing both the administrative and financial autonomy of regions. The reform appears instead far stricter in admitting their legislative autonomy, being subordinated on the recurrence of particular local conditions. This solution reveals reluctance to abandon the traditional reference of the Republic's indivisibility to the exclusive belonging of the legislation to the central authority of the state, be it Bodin's king or Rousseau's assembly. It is worth noticing that, under the Italian and the Spanish Constitution, the indivisibility principle is interpreted as merely forbidding territorial secession, without contradicting the contextual constitutional recognition of large legislative powers, respectively, to the *Regioni* and to the *Communidades autonomas*.

In spite of well-known legal, cultural and historical diversities, British constitutional developments in recent years reveal certain similarities with the French situation. In both cases these developments occur, first, on the grounds of the organization of the judiciary and of regionalization. Secondly, they appear responding to common needs and pressures, as the expansion of the judicial function, the quest of a firmer protection of fundamental rights, the demand of self-determination arising from territorial communities, the increasing interactions with the ECHR and the EU law. Thirdly, the constitutional changes that these

6 L. Heuschling, 'Why Should Judges Be Independent? Reflections on Coke, Montesquieu and the French Tradition of Judicial Dependence', *in* K.S. Ziegler, D. Baranger & A.W. Bradley (Eds.), *Constitutionalism and the Role of Parliaments*, Oxford and Portland, Hart Publishing 2007, p. 217 et seq.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker

developments have produced, or are likely to produce tend to combine a sophisticated version of the rule of law with a pluralistic conception of democracy, namely negative with positive constitutionalism, in correspondence with the already mentioned perspective.

E. Tentative Conclusions

The hypothesis that longstanding democracies are reaching solutions experimented in post-totalitarian countries, or at least mirrored in their respective charters, is only apparently paradoxical. While pressure for change affecting the latter resulted abruptly from the reaction to the abhorrence of the past, and was concentrated in a single constitutional moment, the process of constitutional reform within the former depends on the awareness of the current inadequacy of deeply held traditions, needing much time to be accomplished.

A further comparison might be proposed with regard to the respective contexts and purposes of these constitutional transformations. While reconstructing the historical context of post-totalitarian countries, I attempted to demonstrate that the main constitutional changes vis-à-vis the traditional democracy/rule of law balance reflected the quest of a 'just distance' between public power and citizens. I have then given a brief account of the elements, namely the emergence of multi-level governance, the expansion of the judiciary, and the new dimensions of rights, that more recently led to adopt similarly inspired solutions in mature democracies. Even in these cases, a new combination of negative with positive constitutionalism is at stake, to the extent that the distance between citizens and public power is likely to be better focused. Why, then, the solutions appear affected from intrinsic fragility irrespective of the place where they are taken? The answer should be given against the background of the increasing uncertainty of our time, and of the related challenges to constitutionalism.