

2. The Democratic and Social Constitutional State as the paradigm of the post-World War II European constitutional experience

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1. INTRODUCTION

Over the last two decades, the post-World War II European constitutional state has been subject to conceptualisations underestimating its political nature and democratic character. Several authors claim that the constitutions approved in that period were conceived at arm's length from popular sovereignty and that their main concern was taming rather than enabling democratic politics.¹ Contrary to US constitutionalism, for some the epitome of democratic constitutionalism, the post-World War II European constitutional experience is presented as a manifestation of international constitutionalism: a type of constraining constitutionalism grounded on universal constitutional rights that possess an authority superior to that of politics and, thus, can displace the outcomes of democratic decision-making.² In this account, preference for international standards over democratic input is explained with a reference to pre-war history, when Europeans experienced the most cataclysmic debacles of popular sovereignty.³ From this standpoint, the writing of post-World War II constitutions in Europe does not amount to a meaningful act of political

¹ See Christoph Möllers, ‘“We Are (Afraid) of the People”: Constituent Power in German Constitutionalism’, in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP, 2007) 87-105; Jan Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (YUP, 2013) and Alexander Somek, *The Cosmopolitan Constitution* (OUP, 2014).

² Jed Rubenfeld, ‘Unilateralism and Constitutionalism’ (2004) 79 NYULRev 1993-2000.

³ *ibid* 1995.

self-determination, but is presented as a more modest compulsory exercise, consisting in the recognition and adaptation of international standards to local social and political circumstances.⁴

This image of a constitutionalism deficient in popular support, obsessed with the risk of an authoritarian backsliding, and drawing its ultimate authority from a universal standard of justice has grown increasingly popular,⁵ so much so that it seems to have seduced even authors who in the past used to explain the authority of constitutions in the light of their higher political credentials.⁶ While similar characterisations may be apposite in qualifying more recent developments of the European constitutional state,⁷ their historical soundness may raise a few eyebrows.⁸

We owe it to Bruce Ackerman's legitimacy pathways theory⁹ to have revealed the extent to which such claims belittle the post-World War II European constitutional experience, and fail to appreciate its richness, notably the existence of meaningful manifestations of democratic (revolutionary, in his language) constitution-making. However, his contribution too comes with a few shortcomings. First, by emphasising the origins of constitutional orders for classification purposes, it exaggerates the importance of the genetic moment. Of course, no one may seriously deny that the making of a constitutional document is one of the key elements shaping the identity of the constitutional order.¹⁰ Yet, in Ackerman's theory political origins arise as the paramount defining factor, to the extent that not only the legitimacy but even the entire life cycle of a constitutional system seem already encoded in that

⁴ Somek (n 1) 85.

⁵ See, e.g., Michael Wilkinson, 'The Reconstitution of Postwar Europe: liberal excesses, democratic deficiencies', in Michael Dowdle and Michael Wilkinson (eds), *Constitutionalism beyond Liberalism* (CUP, 2017) 39 and Signe Rehling Larsen, 'Varieties of Constitutionalism in the European Union' (2021) 84 MLR 485.

⁶ Compare Maurizio Fioravanti, *Costituzione e popolo sovrano. La Costituzione italiana nella storia del costituzionalismo moderno* (il Mulino, 2004) 11-16 with Id., *Il cerchio e l'ellisse* (Laterza, 2020) 14.

⁷ Alexander Somek and Michael Wilkinson, 'Unpopular Sovereignty?' (2020) 83 MLR 955-978.

⁸ For a prescient critique of the tendency to downplay the political nature of post-World War II manifestations of constituent power see Mario Dogliani, 'Potere costituente e revisione costituzionale nella lotta per la costituzione' in Gustavo Zagrebelsky, Pier Paolo Portinaro and Jörg Luther (eds), *Il futuro della costituzione* (Einaudi, 1996) 274.

⁹ Bruce Ackerman, *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law* (HUP, 2019) 3-7.

¹⁰ In particular, the making of the constitution may nourish foundational myths which are key to the legal and political authority of the constitutional text, see Gustavo Zagrebelsky, 'Storia e costituzione' in Zagrebelsky, Portinaro, Luther (n 8) 48-49.

genetic moment. Second, and most important for the purposes of this chapter, Ackerman's overemphasis on origins seems to disregard that the legitimacy of a constitutional system may owe more to its goals¹¹ and its actual capacity to respond to societal concerns than to the authority of its authors or its genesis.¹² From this standpoint, Ackerman's neglect of the normative dimension of constitutions¹³ leads him to ascribe European constitutional orders to distinct origin-based legitimacy pathways, but it obscures the possibility to pinpoint themes, sensibilities and institutional solutions shared across the different categories which could provide alternative or concurring sources of legitimacy.

This chapter pursues precisely this line of argument. It argues that while it is necessary to distinguish the different political origins of European constitutional orders, it is also important to underline the commonalities between the constitutions and across the constitutional trajectories. From that perspective, the post-World War II European constitutional experience lends itself to be reconstructed in accordance with a predominant regulatory ideal, that of the democratic and social constitutional state (hereafter: DSCS). This alternative conceptualisation is developed in two steps. First, the European constitutional experience is presented as a manifestation of constitutional self-government, that is, the practice of a political community to lay down and hold itself to its own democratically authored or democratically reappropriated foundational commitments over time.¹⁴ Although the elective context of this theory is US constitutionalism, there are reasons to believe that it may capture also the type of higher lawmaking and constitutional politics conducted in at least some parts of Europe since the end of World War II. Second, to account for the normative dimension of the DSCS, its foundational commitments to democracy, constitutional rights, activist government and multilateralism are briefly examined. The chapter ends by observing that, regardless of the three legitimacy pathways, the DSCS has profoundly influenced European constitutional imagination and political life. Notwithstanding its relative success, holding to its foundational commitments has been revealed as increasingly difficult, owing to the decline of its constituent subjects and developments regarding global capitalism and European integration.

¹¹ Leon Duguit, *La concezione realista dello Stato* [1927] in Id., *Le trasformazioni dello Stato. Antologia di scritti* (G. Giappichelli Editore, 2003) 185.

¹² Zagrebelsky, 'Storia e costituzione' (n 10) 79.

¹³ Ackerman, *Revolutionary Constitutions* (n 9) 36.

¹⁴ Jed Rubenfeld, *Freedom and Time. A Theory of Constitutional Self-Government* (YUP, 2001).

2. THE DEMOCRATIC AND SOCIAL CONSTITUTIONAL STATE AS PARADIGM

2.1 Constitutional Self-Government in Europe

The period after the end of World War II is commonly described as a time of intense political, economic and social reconstruction.¹⁵ Aware of the fact that two world wars and a traumatic interwar period had left deep scars in all European countries, political elites viewed the rebuilding of European societies as one of the most pressing priorities. Intriguingly, efforts at healing social divisions and making a new beginning put great emphasis on the adoption of new national constitutions.¹⁶ Initially, the appeal of constitutions owed more to their political than to their legal qualities. Constitutions were the documents symbolising that new beginning, and were also one out of several tools that on a more practical level were employed to restore political consensus on state governing structures¹⁷ and foster social integration.¹⁸ This was particularly evident in countries like France, Italy and Germany, where the newly enacted constitutions reflected a drastic realignment of political parties, with the two dominant forces – Christian Democracy and the parties of the Left – marking clear distances with their pre-war views. But the same applies at the end of the 1970s to the transitions to democracy of Southern European countries (Greece, Portugal and Spain) and, more controversially, also to the regime changes in Central and Eastern Europe post-1989.¹⁹

But what are the characteristics of post-World War II European constitutional orders? And what type of constitutional frameworks were employed to promote social and political integration?

A possible way to conceive of the nature of the emerging constitutional orders is to regard them as instances of constitutional self-government, that

¹⁵ See, e.g., Tony Judt, *Postwar: A History of Europe since 1945* (Penguin, 2006) Chapter III.

¹⁶ Somek (n 1) 85.

¹⁷ Alan Milward, *The European Rescue of the Nation State* (Routledge, 2000) 24-25.

¹⁸ Dieter Grimm, *Constitutionalism. Past, Present and Future* (OUP, 2016) 143-144.

¹⁹ Admittedly, this process is less visible in countries like Great Britain, Ireland, Netherlands, Belgium, Sweden and Denmark where profound transformations in the relationships between state and society similar to those described below that took place with no or only small amendments to their fundamental norms. Particularly in countries developing an evolutionary type of constitutionalism, constitutional orders continued to be interpreted as unbroken traditions, see Rehling Larsen (n 5) 477.

is, projects of collective self-determination that extend in time.²⁰ Key to these collective experiences is the concept of commitment, an enduring normative determination made in the past to govern the future.²¹ In the perspective of constitutional self-government, political freedom as well as human freedom cannot be simply reduced to the expression of will in the present by an agent. Freedom is more accurately defined as an incessant interplay between living out self-given commitments and re-writing them.²² In this perspective, constitutional self-government refers to a type of politics through which a people struggle to memorialise, interpret and hold itself to its foundational commitments over time.²³ Accordingly, a people achieves self-government not by conforming governance to authoritative democratic will at any given time, but by *laying down* and *holding itself to* its own democratically authored foundational commitments over time.²⁴ This does not mean that commitments are irrevocable: a political community is always entitled to reject any part of the constitution whose commitments are no longer the people's own; its entrenched nature enables the creation of new constitutional commitments only when a people is ready to make a significant temporal commitment to them.²⁵

Arguably, constitutional self-government is a theory with some purchase also in the European context.²⁶ Both of its constitutive elements – the writing and the holding to commitments – may be viewed as part and parcel of the European post-World War II constitutional experience.²⁷ Contrary to the reductive conceptualisations of the latter identifying at its roots only a diminished form of constituent power, it can be argued that at both stages the degree of political participation was considerable and, probably, unprecedented.²⁸

²⁰ Rubinfeld, *Freedom and Time* (n 14) 14.

²¹ *ibid* 92.

²² *ibid* 143.

²³ *ibid* 163.

²⁴ *ibid* 168.

²⁵ *ibid* 175.

²⁶ Although Rubinfeld seems to exclude the possibility to apply it to the European context, see Rubinfeld, 'Unilateralism and Constitutionalism' (n 2) 1999-2006.

²⁷ Or at least of its predominant part, see above n 19. Assonances with the theory of constitutional self-government emerge, for instance, in Konrad Hesse, 'Concetto e caratteristiche della Costituzione' in Id., *L'unità della Costituzione. Scritti scelti di Konrad Hesse* (Editoriale Scientifica, 2014) 68.

²⁸ Arguably, the theory of constitutional self-government applies also to what Ackerman names 'elite constitutions', i.e. the constitutions resulting from the efforts of emerging political and social elites in the absence of a general popular mobilisation against declining old rulers, or from the imposition by external forces followed by the gradual acceptance by the society (Ackerman, *Revolutionary Constitutions* (n 9) 6). Although Rubinfeld seems adamant in denying this possibility (Rubinfeld, *Freedom and Time* (n 14) 13), in other parts of his work he acknowledges that constitutional

After the disasters of totalitarianism, broad was the perception that law had to recover its moral dimension, restore its authority and reinforce its capacity to unify society.²⁹ But responses to these concerns were not found by simply invoking the blessing of abstract universal values. In several countries active efforts in higher lawmaking were undertaken which led to the adoption of entrenched constitutions, and which may justify now the reference to constitutional self-government. Thus, far from being replaced by constitutional rights, after World War II constituent power was for the first time exercised on a large scale in Europe with full democratic credentials.³⁰ And far from resulting in a mere act of rational recognition of secular and historical truths, it provided a tangible manifestation of collective self-determination by national political communities.

Indeed, it is not by chance that the end of World War II for many constitutional orders coincided with the paradigm shift from state to popular sovereignty.³¹ This is registered in the preambles³² and opening provisions³³ of the newly enacted constitutions which, echoing the tradition of revolutionary constitutionalism, claimed to be authored by the people.³⁴ References to the people (or the nation) as the subject of political self-determination aimed at tapping

commitments are not simply willed but can be *made over time* (ibid 66). If this is so, it does not seem implausible that a commitment may *become* self-given gradually. In other words, commitments that originally were deficient in terms of democratic authorship could evolve in self-given commitments through repeated democratic practices of appropriation and elaboration.

²⁹ For a powerful expression of this idea, see Giuseppe Capograssi, 'Il diritto dopo la catastrofe' (1950) Jus 190-191.

³⁰ The increase of collective participation in the foundation of government is underlined by Chris Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (CUP, 2018) 154-156. Consider also that in a number of European countries (France, Greece, Italy) only in this period was the franchise extended to women, see by Barbara Pezzini, 'La qualità fondativa e fondante della cittadinanza politica femminile e dell'antifascismo: tra mitologia e attualità', in Fulvio Cortese, Corrado Caruso and Stefano Rossi, *Immaginare la Repubblica. Mito e attualità dell'Assemblea Costituente* (Franco Angeli, 2018) 343-346.

³¹ Vezio Crisafulli, 'La sovranità popolare nella Costituzione italiana (note preliminari)' in Id., *Stato, Popolo, Governo. Illusioni e delusioni costituzionali* (Giuffrè editore, 1985) 92-93 and 140. This shift can be viewed as the highest point of the crisis of the liberal state, increasingly unable to represent the social forces populating the industrial society, see Santi Romano, *Lo stato moderno e la sua crisi* [1909] (Giuffrè, 1969) and Duguitt (n 11) 192-206.

³² See, e.g., the preambles of the German Basic Law and the French and Spanish constitutions.

³³ See article 1 of the Italian Constitution.

³⁴ On the people as the subject of collective self-determination in revolutionary constitutionalism see Somek (n 1) 71. The essential role of the nation in modern law

into the spiritual potential and political dynamism of popular constituent power.³⁵ Yet, due to the massive failures of popular sovereignty in the interwar period, in the aftermath of World War II European peoples did not come out as obvious repositories of legitimate political power.³⁶ The main source of concern was a particular conception of sovereignty viewing the people as a unified pre-political self, conceived of in ethnic or culturally-thick bases. This notion had already been questioned in the interwar period as mystifying and dangerous.³⁷ Against the backdrop of World War II, a similar critique gained large resonance, making of the idea of an ethnically or culturally homogeneous people a castaway of modern political theory for quite a long time.³⁸ So, the dark legacy of nationalism definitely played a role in reconceptualising the people, but by no means did it foreclose the possibility of viewing it as the putative and symbolic source of authority for European constitutional orders.³⁹

The rehabilitation of the people was not confined to the symbolic dimension. As noted, in this period popular sovereignty reappears in the form of constituent power as an active and actual force of constitutional self-government.⁴⁰ To understand this key aspect, it is important to keep in mind that in many European countries the war had entirely wiped away state structures. Individuals had often been left to their own devices, but in that state of anomie they had the chance to rediscover political freedom.⁴¹ During the Resistance and later in the processes leading to the adoption of the new constitutions, political freedom was collectively exercised first in the organisation and activities of partisan groups, then in newly established political parties. Therefore, in the aftermath of World War II, national societies did not consist only of atom-

is highlighted in Claudio De Fiore, 'Le radici della nazione repubblicana. Fondamenti teorici e profili costituzionali' (2019) *Costituzionalismo.it* 52.

³⁵ Costantino Mortati, *La Costituente*, in Id., *Raccolta di scritti* I (Giuffrè editore, 1972) 5.

³⁶ Fioravanti, *Costituzione e popolo* (n 6) 11, observing that in those constituent processes the people was both invoked and feared.

³⁷ See, e.g., Hans Kelsen, 'Essenza e valore della democrazia' in Id., *Democrazia* (il Mulino, 1995) 68.

³⁸ Rubinfeld, *Freedom and Time* (n 14) 147.

³⁹ Martin Loughlin, 'The Theory of Popular Sovereignty' (manuscript) 12-13.

⁴⁰ To be sure, not in all countries and not at the same degree. Compare Crisafulli (n 31) 98, with Ernst Forsthoff, *Lo stato della società industriale* [1971] (Giuffrè editore, 2011) 63, in which the absence of a political decision underpinning the German Basic Law was famously criticised.

⁴¹ Francesco Bilancia, 'Il principio democratico e l'uguaglianza. 1948-2018. L'attualità dei principi fondamentali della Costituzione dopo settant'anni' in Michele Della Morte, Francesco Raffaello De Martino and Laura Ronchetti (eds), *L'attualità dei principi fondamentali della Costituzione dopo settant'anni* (il Mulino, 2020) 20-21.

ised, traumatised and passive individuals unable to revive their polities.⁴² The political landscape was populated by the political parties participating in the Resistance movement and the returning governments in exile,⁴³ both endowed with an astonishing capacity of political mobilisation.⁴⁴ Reviving national political communities was not an impossible undertaking,⁴⁵ in that a sufficiently structured political society was already at work embodying a material conception of the people.⁴⁶ Precisely this material manifestation of the people is key to understanding the nature of the DSCS. References to the people or the sovereign nation in constitutional texts were meant to neither reinstate nor disguise the absence of a unitary and organic subject endowed with sovereignty in the constitutional orders in the making.⁴⁷ Under the shadow of the invocation of the people, real political forces assumed, expressed, shaped and sustained the political authority necessary to constitute a legal and political order.⁴⁸

Given their profoundly different aspirations, interests and political agendas, political parties qua constituent subjects learned in the field that constitutional politics was no longer the terrain for political struggles aimed at imposing their political agenda. Constitutions ceased to be instruments of government of the predominant social classes and turned into pacts stating the basic terms for their peaceful coexistence.⁴⁹ To write this type of constitution, ordinary political disagreements had to be bracketed and efforts directed towards choices of constitutional design commanding broad support in the political system and

⁴² Instead, this was the perception of the jurists of the previous generation, Giuseppe Capograssi, 'Dubbi sulla Costituzione' in Id., *Opere*, VI (Giuffrè editore, 1959) 107.

⁴³ Judt (n 15), 63-67. See also Fioravanti, *Costituzione e popolo* (n 6) 22.

⁴⁴ See Sandro Guerrieri, *Due costituenti e tre referendum. La nascita della Quarta repubblica francese* (Franco Angeli, 1998). For the Italian case, see Giovanni De Luna, *La Repubblica inquieta. L'Italia della Costituzione. 1946-1948* (Feltrinelli, 2017), 144-149.

⁴⁵ Capograssi, 'Il diritto' (n 29) 108, expressed this difficulty by asking whether the sand (the atomised society) could be constituted.

⁴⁶ Costantino Mortati, *Costituzione dello Stato (Dottrine generali e Costituzione della Repubblica Italiana)* in *Enciclopedia del Diritto*, XI, 1962, 161-165. A similar account may be less persuasive in the context of the transition to democracy of the countries of Central Eastern Europe. As noted by Ulrich Preuss, 'The Exercise of Constituent Power in Central and Eastern Europe' in Loughlin and Walker (n 1) 223-227, post-1989 revolutions could not rely on pre-constitutional cohesive political forces. This encouraged resort to nationalism and ethnocentrism as chief integrative vehicles, opening the door to apolitical constitutions conceived as a mere instrument of government for the ethnos.

⁴⁷ See Hesse (n 27) 65-68 and Mortati, *Costituzione* (n 46) 155-156.

⁴⁸ Mortati, *Costituzione* (n 46) 146.

⁴⁹ Gustavo Zagrebelsky, *La legge e la sua giustizia* (il Mulino, 2008) 133-135.

in the society at large.⁵⁰ This ethos of mutual recognition and compromise shaped post-World War II constitutional politics: constituent subjects strove to agree if not on a fundamental ideology,⁵¹ at least on a set of commitments and institutions contributing to social cohesion and enabling democratic political competition.⁵²

Constitutional politics played out in a consensual mode by political parties harbouring conflicting political aspirations resulted in *open constitutions*.⁵³ A first defining characteristic of these documents was their aspiration to govern, through democratic means, the social question.⁵⁴ This capacity to legitimate and contain conflicts, and to transform them from factors of disintegration into potential civic resources was created first of all by agreeing on a set of procedures and institutions establishing a relatively even-handed framework for the acting out of political and socio-economic conflicts.⁵⁵ The emerging constitutional culture, however, was by no means satisfied with a shared procedural framework enabling political competition. Open constitutions were not neutral constitutions, that is, they could not enable whatsoever political development resulting from majority rule.⁵⁶ Meaningful democratic competition presupposed the respect of a set of requirements concerning the enhancement of the persons and their equal participation to collective goods. Thus, to establish their authority, the constitutions ought to also include a range of substantive normative commitments.⁵⁷ The development of a substantive dimension in the constitution was not entirely original;⁵⁸ yet, in the context of entrenched constitutions, it entailed another profound modification of their

⁵⁰ Mario Dogliani, *Introduzione al diritto costituzionale* (il Mulino, 1994) 344.

⁵¹ Mortati, *Costituzione* (n 46) 8.

⁵² Grimm (n 18) 144.

⁵³ The distinction between open and closed constitutional systems emerges in Georges Burdeau, *La democrazia* [1956] (Edizioni Comunità, 1964). See also Valerio Onida, 'Le Costituzioni. I principi fondamentali della Costituzione italiana', in Giuliano Amato and Augusto Barbera (eds), *Manuale di diritto pubblico*, vol. I (il Mulino, 1997) 97-98 and Zagrebelsky, *La Legge* (n 49) 140-142.

⁵⁴ Roberto Bin, 'Che cos'è la Costituzione?' (2008) XXVII *Quaderni Costituzionali* 11.

⁵⁵ Martin Loughlin, 'The Silences of Constitutions' (2018) 16 *ICON* 925.

⁵⁶ Or, in other words, the constitution was neutral with regard to the different legitimate worldviews but was not neutral with regard to values, see Hesse (n 27) 62-63. See also Salvatore D'Albergo, *Costituzione ed organizzazione del potere nell'ordinamento italiano* (Giuffrè editore, 1991) 190.

⁵⁷ Loughlin, 'The Silences' (n 55) 925. See also Grimm (n 18) 149.

⁵⁸ Earlier the Weimar Constitution had also attempted to prescribe principles of justice in the private domain, see Keith Ewing, 'Economic Rights' in Michel Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012) 1039-1041.

role. The constitution was no longer a *loi politique* restricted at the definition of the fundamental norms of the institutional architecture; it extended its remit to a broader range of social and economic fields in an attempt to shape areas that previously had been entirely left to the discretion of legislatures or, even more frequently, to the unbound decision of private actors.⁵⁹ The constitution expressed a transformative set of fundamental norms penetrating all the social relations situated within the state domain,⁶⁰ and exerting their effects primarily through the activity of legislatures and constitutional adjudicators.⁶¹

The writing of constitutional commitments, however, was merely the launching stage of constitutional self-government. In the mindset of European constitution-makers, holding to the commitments of the open constitution was perceived primarily as a political task.⁶² This reflected the tradition of both revolutionary and liberal constitutionalism, regarding constitutional principles as norms to be fleshed out by legislatures, as the expression of the sovereign people and the main agents of social transformation.⁶³ Moreover, a broader set of social actors was expected to contribute actively to realise and sustain constitutional commitments.⁶⁴ Noteworthy was the case of West Germany, where constitutional commitments were reappropriated and harnessed by civil society organisations to create a new mode of self-critical belonging (*Verfassungspatriotismus*).⁶⁵

However, only in a few constitutional orders was the political implementation of constitutional principles carried out as imagined.⁶⁶ In other countries,

⁵⁹ Emphasis on the substantive dimension of the constitution is evident, for instance, in the *Elfes* case (1957) 6 BVerfGE 32.

⁶⁰ Mortati, *La costituente* (n 35) 8-9.

⁶¹ The capacity of constitutional norms to question social relations and legal regimes inherited from previous liberal or authoritarian regimes is underlined by Giuseppe Dossetti, 'Funzioni e ordinamento dello Stato moderno' in Id., *Non abbiate paura dello Stato!* (a cura di Enzo Balboni) (Vita e Pensiero, 2014), 45-46 and 55. The use of constitutionalism as a tool for social engineering and state-driven change is explored by Michaela Hailbronner, 'Transformative Constitutionalism: not only in the global south' (2017) 65 *AmJCompL* 527-565.

⁶² Fioravanti, *Costituzione e popolo* (n 6) 15.

⁶³ Loughlin, 'The Silences' (n 55) 928-930.

⁶⁴ Zagrebelsky, 'Storia e costituzione' (n 10) 75.

⁶⁵ Jan Werner Müller, *Constitutional Patriotism* (PUP, 2007) 26-29. Indirectly, this practice contributed greatly to the ex post legitimisation of the Basic Law.

⁶⁶ Noteworthy in this regard is the case of France, witnessing in 1945-1946 intense social and economic legislative reforms, see Sandro Guerrieri, *Costituzioni allo specchio. La rinascita democratica in Francia e in Italia dopo la liberazione* (il Mulino, 2021) 36-38. This was also the case in Spanish and Czech constitutional transitions, see Francesco Biagi, *European Constitutional Courts and Transitions to Democracy* (CUP, 2020) 182-183.

the interest of political parties for constitutional politics was at best erratic, with the result of leaving *de facto* to constitutional adjudicators the task of holding to constitutional commitments on a more stable basis.⁶⁷ This came as a largely unpredicted development in that originally no meaningful contribution was expected in this regard from constitutional courts. To be sure, their appearance and their key role in expounding constitutional principles is one of the most salient features of the post-World War II European constitutional state. Yet, their postwar establishment remained surrounded by the considerable scepticism registered at their interwar debut and, notably, by the concern for their capacity to thwart much needed activist policies.⁶⁸ To be accepted, therefore, judicial review of legislation had to be adapted to the European legal culture. The most evident adjustment was organisational in nature: the enforcement of open-textured constitutional principles was not assigned to ordinary courts, but was entrusted to constitutional courts, *ad hoc* centralised bodies endowed with a certain degree of *ex ante* democratic legitimacy and better equipped to cope with the challenges emerging in the exercise of constitutional review in civil law legal systems.⁶⁹ Furthermore, their original design was essentially preservationist, their main functions being blocking the attempts to repeal constitutional norms and signalling to legislatures the need to switch on the higher lawmaking track if they really wanted to reconsider the commitments made by the people.⁷⁰

In hindsight, however, the rise of constitutional courts as major driving forces of constitutional self-government was encoded in the structure of post-World War II constitutions. As constitutions started to operate as higher order laws governing all legitimate fields of political activity,⁷¹ constitutional

⁶⁷ The Italian case is paradigmatic, see Fioravanti, *Costituzione e popolo* (n 6) 17-18.

⁶⁸ See Édouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis. L'expérience américaine du contrôle judiciaire de la constitutionnalité des lois* [1921] (Daloz, 2004), Hermann Heller, 'Rechtstaat or Dictatorship?' [1929] (1987) 16 *Economy and Society*, 131, Franz Neumann, 'Contro una legge sul controllo di costituzionalità delle leggi nel Reich' [1929], in Id., *Il diritto del lavoro fra democrazia e dittatura* (il Mulino, 1983) 65 and Harold Laski, *Parliamentary Government in England* (George Allen & Unwin Ltd, 1938), 367-374.

⁶⁹ Victor Ferreres Comella, *Constitutional Courts & Democratic Values* (YUP, 2009).

⁷⁰ The preservationist profile of judicial review of legislation is highlighted also in Bruce Ackerman, *We the People. Foundations* (HUP, 1991) 10. See also Louis Favoureu, 'Les décisions du Conseil constitutionnel dans l'affaire des nationalisations' (1982) *Revue du droit public et de la science politique en France et à l'étranger* 419.

⁷¹ The most celebrated affirmation of this pervasive role of the constitution is found in *Lüth* (7 BVerfGE 198 (1958)), the judgment in which the German Constitutional Court stated that the section on basic rights of the Basic Law establishes an objective

courts ended up filling controversial constitutional omissions or gaps.⁷² In several jurisdictions this process was triggered by seminal judgments acknowledging the binding character of constitutional norms and their actual capacity to displace incompatible legislation.⁷³ Once the prescriptive nature of constitutional norms was affirmed, constitutional courts contributed also to fleshing them out. Particularly in the initial phases of the transition to democracy, their activity consisted in the purification of the legal orders from the residues of the previous authoritarian experiences.⁷⁴ But also later and in the most accomplished constitutional systems constitutional courts had the opportunity to step in and update the meaning of constitutional principles in times of remarkable social and political transformation.⁷⁵

This activity was key to the success of constitutional transitions, particularly in those contexts in which the legislative articulation of constitutional commitments was lagging behind.⁷⁶ But also in periods of tension or disenchantment with politics, constitutional guardians emerged strengthened as significant constitutional players owing to their capacity to hold to and revive foundational constitutional commitments.⁷⁷ As a result, the legislative implementation of the open constitution was complemented with an additional adjudicative circuit led by constitutional courts. Therein the foundational constitutional commitments were subject to judicial interpretation, regenera-

order of values centred on human dignity exerting a ‘radiating effect’ in all spheres of public and private law.

⁷² Loughlin, ‘The Silences’ (n 55) 930.

⁷³ See, for instance, judgment n. 1/1956 of the Italian Constitutional Court, which also extended constitutional review to legislative acts adopted prior to the Constitution. In a similar vein, the Spanish Constitutional Tribunal in judgments n. 16 and 19/1982 affirming the prescriptive nature of all constitutional principles.

⁷⁴ Comella (n 69) 99-100.

⁷⁵ In this regard the role played by the German Constitutional Court in the unification process is emblematic. Owing to the failure of legislature of unified Germany to incorporate revolutionary achievements enshrined in the Unification Treaty, the Constitutional Court stepped in and integrated those principles within the framework of the Basic Law in judgments concerning expropriations, gender equality, abortion and housing, see S. Jaggi, ‘Revolutionary Reform in German Constitutional Law’ (2018) 41 *Hastings Intl & Compl Rev* 183-242.

⁷⁶ Emblematic of this phenomenon is the case law on the right to strike of the Spanish Constitutional Tribunal (judgment n. 11/1981) and the Italian Constitutional Court (judgments nn. 29/1960 and 290/1974). In both jurisdictions, absent legislative implementation of the newly inserted constitutional rights, it was left to constitutional courts to secure their effectiveness by either bringing into line with the constitution (Spain) or invalidating (Italy) pre-constitutional legislation constraining their exercise. An analysis of the referred judgments is offered by Biagi (n 66) 114-116 and 71-76.

⁷⁷ Justin Collings, *Democracy’s Guardians. A History of the German Federal Constitutional Court, 1951-2001* (OUP, 2015) chapters 3 and 4.

tion and enforcement.⁷⁸ These practices not only gained unimagined traction, but they entailed also a profound reconsideration of the role of constitutional adjudication: if at the beginning of the American constitutional experience judicial review of legislation appeared as an institutional substitute for the right of resistance,⁷⁹ in its more recent European rendering it could well be regarded as a deliberative manifestation of constitutional politics evoking or, in certain jurisdictions, even replacing the exercise of constituent power.⁸⁰

2.2 Foundational Commitments

Moving to the contents of the DSCS, both its aversive and aspirational profiles appear boldly defined.⁸¹ The post-World War II European constitutional experience was first of all characterised by a set of explicit repudiations. Predictably, the priority for the constituent subjects emerging successful from the defeat of Fascism and Nazism was to mark a clear break with totalitarianism and the authoritarian elements characterising the latest stages of the European liberal state.⁸² The repudiation of totalitarianism was already evident in the structure of the newly established constitutional state: the rejection of the organicist conception of the nation, the reappropriation of popular sovereignty by democratic political parties, their embrace of the open constitution were all elements contradicting the tenets of the previous constitutional orders. But also from a substantive perspective the rupture was radical: the new constitutional system made no mystery of rejecting the idea of the subordination of the individual to the state,⁸³ the characterisation of the people as a passive object of leadership entirely withdrawn into their private sphere,⁸⁴ the suppression of class struggle⁸⁵ and the complete absorption of social groups in a corporate state which, instead of promoting their equitable progress, forced on them the interest of a single class.⁸⁶

⁷⁸ See Sergio Bartole, *La Costituzione è di tutti* (il Mulino, 2012), 62-66 and Loughlin, 'The Silences' (n 55) 927.

⁷⁹ Somek (n 1) 58-60.

⁸⁰ The absorption of constituent power into the constitutional form of judicial review in the German constitutional experience is observed by Möllers (n 1) 96.

⁸¹ Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism' (2003) 1 *ICON* 299-300.

⁸² D'Albergo (n 56) 105.

⁸³ Capograssi, 'Il diritto' (n 29) 178-183.

⁸⁴ Franz Neumann, *The Rule of Law. Political Theory and the Legal System in Modern Society* [1935] (Berg Publishers, 1986) 289.

⁸⁵ *ibid* 290.

⁸⁶ Dossetti (n 61) 27-28.

But the disasters of the war brought disrepute not only to the last ranks of reckless politicians, but to an entire ruling class, viewed as indifferent if not even complicit in the rise of totalitarianism.⁸⁷ This gave to the resistance movement at least an implicit revolutionary inclination.⁸⁸ Particularly in countries in which new constitutional documents were approved, the perspective of a return to the liberal *status quo ante* was decisively turned down.⁸⁹ The discredit of declining political systems rapidly expanded to the constitutional orders that had favoured their fortunes. Soon, *laissez-faire* ideas came to be regarded as one of the factors contributing, alongside the war and totalitarianism, to the want, idleness, disease, squalor and ignorance characterising the industrial society.⁹⁰ Thus, the new constitutional systems could no longer be designed simply to protect the safety, liberty and property of the bourgeoisie. Their goal was promoting emancipation for all individuals or at least minimum standards of decency for the working classes.⁹¹ Thus, the legal and political order in the making could well protect economic freedom and property, but only insofar as the latter did not hinder the political pursuit of emancipation and economic security.⁹²

These ideas had already been central in two notable constitutional experiences of the interwar period which, at the moment of writing the new constitutional texts, turned into sources of inspiration for European constitution-makers. The constitution of the Weimar Republic was regarded as the most advanced attempt to break with the canons of liberal constitutionalism.⁹³ Explicit was its aspiration to foster processes of social transformation⁹⁴ as well as its ambition to legitimate and mediate social and political conflicts.⁹⁵

For all the admiration it continued to reap, the Weimar Constitution was also a source of warnings and the symbol of a failed constitutional state. Conversely, the constitutional order developed during the New Deal and consolidated during World War II in America bore the mark of success. After World War II, the appeal of American institutional and policy solutions was

⁸⁷ Judt (n 15) 63.

⁸⁸ *ibid* 64.

⁸⁹ In France, the restoration of the Third Republic was overwhelmingly rejected in the constitutional referendum of October 1945, see Guerrieri, *Costituzioni* (n 66) 33-34.

⁹⁰ William Beveridge, *Social Insurance and Allied Services* (H. M. Stationery Office, 1942) 6.

⁹¹ Somek (n 1) 155-156.

⁹² Franz Neumann, 'Il significato sociale dei diritti fondamentali nella costituzione di Weimar' [1930] in *Id* (n 68) 128.

⁹³ See, e.g., Costantino Mortati, *La costituzione di Weimar* [1946] (Giuffrè, 2019).

⁹⁴ Francesco Saitto, *Economia e stato costituzionale. Contributo allo studio della "Costituzione economica" in Germania* (Giuffrè editore, 2015) 28.

⁹⁵ Maurizio Fioravanti, 'Mortati a Weimar' in Mortati (n 93) xxi.

clearly supported by geo-political arguments, but their circulation was not the outcome of an imposition. New Deal constitutionalism became attractive essentially for its reputation: although the turn to activist government was common to many political regimes in the 1930s, the New Deal was one of the few in which this transition was effected without undermining democracy and capitalism.⁹⁶ It is well known that the task of codifying New Deal constitutional achievements remained unaccomplished.⁹⁷ Intriguingly, the latter would be fulfilled by post-World War II European constitution-makers, as a result of a transatlantic exchange encouraged by international law and post-World War II multilateral organisations.

Several texts drafted by the European resistance movements document the continuity between Weimar and New Deal ideas and the post-World War II European constitutional state. For instance, the programme of the *Conseil national de la Résistance* of 15 March 1944 included not only a call for immediate action against occupying powers, but also a programme of activist measures to establish a just social order. The latter required the restoration of democracy and civil freedoms, a set of economic reforms, ranging from the nationalisation of strategic business to the adoption of a national development plan, and a system of industrial relations and social security. At the end of the war, this mix of democratic reforms, civil and social rights and state interventionism inspired European constitution-makers. Changes were abundant also in terms of legislation, social practice and political discourse, to the point that it is not far-fetched to speak of a change of the constitutional grammar even if there were no changes to written constitutional norms.⁹⁸ Despite broad temporal and political variations, the newly established constitutional orders converged on a distinct form of political rule, restating, consolidating and adapting recurring themes of the 1930s to evolving national and socio-economic circumstances.

In this perspective, the DSCS can be described as revolving around a set of foundational commitments concerning democracy, constitutional rights, activist government and multilateralism. Each of these commitments entailed a profound transformation of the legal and political orders inherited from the liberal or totalitarian past. At the same time, each of them was also amenable to a variety of potential renderings, reflecting the plurality of political sensibilities existing among national constitution-makers. Reasons of space here preclude an in-depth analysis of each commitment, but for the purpose of this chapter a succinct illustration is sufficient to give a sense of a paradigm which

⁹⁶ Kiran Klaus Patel, *The New Deal. A Global History* (PUP, 2016) 3.

⁹⁷ Regret for that decision and for its current implications is expressed by Ackerman, *Revolutionary Constitutions* (n 9) 397-403.

⁹⁸ This applies in particular to Great Britain, Netherlands, Belgium and the Scandinavian countries.

may explain the legitimacy of European constitutional orders alongside the legitimacy pathways theory.

Democracy was the constitutional commitment more coherent with the underlying structure of the open constitution. Grounded on full enfranchisement and the recognition of political parties as the main political actors in the democratic scene, it entailed a constitutional order enabling democratic competition and, as a reflection, open to the pursuit of a broad range of conflicting policy goals including socio-economic ones.⁹⁹ In imagining the organisation of government, broad was the support among constitution-makers of the idea of a political process structured in terms of circularity between institutions and society.¹⁰⁰ Yet, important disagreements existed on the preferable institutional setting.¹⁰¹ The crux of democracy was that, on the one hand, it was meant to secure representation of disparate social and political groups, on the other its ambitious goals required strong government and coherent political direction, hence the constant temptation to overcome divisions and elude discussion and deliberation.¹⁰² Thus, it is no wonder that at the origins of the DSCS, the constitutional debate on democracy oscillated ceaselessly between nostalgia and diffidence in strong government.¹⁰³

By and large, parliaments were viewed as the most adequate institutions to legitimise and mediate social and political conflicts.¹⁰⁴ Yet, their prominence varied depending on the priority assigned in each constitutional order. In those in which the accommodation of opposing interests was more pressing, consociational parliamentary arrangements were established.¹⁰⁵ In other countries the incapacity of this model to ensure political accountability and sufficient stability in the direction of government¹⁰⁶ increased the popularity of majori-

⁹⁹ Only the most extreme forms of collectivism and *laissez-faire* were discarded, see Marco Benvenuti, 'Democrazia e potere economico' *Rivista AIC* 3/2018, 6. See also the *Investment Aid I* case (1954) 4 BVerfGE 7, in which the German Constitutional Court declared that the Basic Law did not ordain the nature and structure of the economic system, but laid down only a framework of core protections and principles.

¹⁰⁰ Nadia Urbinati, *Representative Democracy: Principles and Genealogies* (UCP, 2008) 24.

¹⁰¹ The most spectacular was probably the one expressed against parliamentary government by De Gaulle in his second Bayeux speech of 1946.

¹⁰² Burdeau (n 53) 49.

¹⁰³ *ibid* 129.

¹⁰⁴ Somek (n 1) 89.

¹⁰⁵ Kelsen (n 37) 68-69.

¹⁰⁶ Costantino Mortati, 'Commento all'art. 1', in Giuseppe Branca (ed), *Commentario della Costituzione* (Zanichelli, 1975) 30.

tarian conceptions of parliamentary government or semi-presidential systems, in which the role of government against parliament was strengthened.¹⁰⁷

Enthusiasm for political participation did not entail a starry-eyed commitment to democracy. Constitution-makers retained vivid memories of the interwar period and, notably, of the hijacking of liberal parliaments by illiberal political forces.¹⁰⁸ The DSCS reflected this awareness in two ways. First, the risk of abuse of democratic prerogatives and institutions justified close surveillance at the fringes of the political arena, particularly in the countries more exposed to the danger of an authoritarian drift.¹⁰⁹ Second, the risk of unconstrained democratic decision-making inspired the imposition of constitutional constraints on legislative activity.

A key role in this regard was played by *constitutional rights*, the second foundational commitment of the DSCS. In the long catalogues in which they were codified, the need to redress recent historical wrongs perpetrated by totalitarianism was certainly pressing. It was especially in opposition to this type of human degradation that post-World War II constitutions were expected to restore the authority of law and reinforce its capacity to unify society.¹¹⁰ Their entrenched nature and their radiating effects were instrumental to both the purification of the legal order and the regeneration of individuals, social and political bodies.¹¹¹ In this perspective, the person was regarded as an end in herself and reinstated at the centre of the legal and political order.¹¹²

But in the aftermath of World War II, the idea of restoring the centrality of the person was inseparable from ongoing social and political developments and demands of social transformation.¹¹³ As noted, concern for the actual material conditions of the citizen had defined both the Weimar and New Deal constitutional experiences. After the war, the same notion inspired Catholic, Socialist and Communist constitution-makers, with the result that the person put at the centre of the new constitutional orders was the individual situated in the context of the industrial society.¹¹⁴

Two were the main consequences of this material approach to human dignity. First, the right to work replaced the right to property as the foundation

¹⁰⁷ Neumann, *Rule of Law* (n 84), 272.

¹⁰⁸ Contributing to the appeal of militant democracy was also the Cold War, namely the need to counter the communist threat.

¹⁰⁹ Jan Werner Müller, 'Militant Democracy' in Rosenfeld and Sajó (n 58) 1253.

¹¹⁰ Capograssi, 'Il diritto' (n 29) 190-191.

¹¹¹ Dossetti (n 61) 55.

¹¹² See *Microcensus Case* (1969) 27 BVerfGE 1. See also Capograssi, 'Il diritto' (n 29) 197-199.

¹¹³ See Paolo Ridola, *Il principio libertà nello stato costituzionale. I diritti fondamentali in prospettiva storico-comparativa* (G. Giappichelli Editore, 2018) 250-251.

¹¹⁴ Burdeau (n 53) 25-26.

of the constitutional and social order.¹¹⁵ Inherent in this conceptual move was not only the repudiation of the priority assigned to property and capital in *laissez-faire* constitutionalism.¹¹⁶ Constitutional references to work qualified also in positive terms the transformative aspiration of the DSCS with the promise of a social order in which work would contribute to the realisation of human personality¹¹⁷ and lay down the foundations of a social state based on solidarity.¹¹⁸

Second, the reality of mutual interdependence of the industrial society, in place of fictitious individual independence,¹¹⁹ became the baseline for any discussion on liberty.¹²⁰ This more communitarian approach did not contradict the newly acquired centrality of the person, for her conceptual priority in respect of government ought not to be confused with an absolutist understanding of her rights and freedoms.¹²¹ The turn to interdependence affected the nature of constitutional rights first of all by transforming liberal into democratic freedom.¹²² In this perspective, constitutional rights were no longer to be seen in opposition to state domination, but entailed the participation of the individual in the power of the state.¹²³ But this move presupposed another far-reaching transformation rooted in constitutional developments of the interwar period. Constitutional rights started to be conceived of as principles amenable to balancing.¹²⁴ The very idea of balancing was an offspring of sociological jurisprudence¹²⁵ and of

¹¹⁵ See in particular articles 1 and 4 of the Italian Constitution. See also Costantino Mortati, 'Il lavoro nella costituzione' (1954) *I Diritto del lavoro* 149.

¹¹⁶ Mortati, 'Commento' (n 106) 12.

¹¹⁷ Mortati, 'Il lavoro' (n 115) 152. In similar terms also the *Pharmacy Case* (1958) 7 BVerfGE 377, in which the German Constitutional Court stated: 'art. 12 guarantees the individual more than just the freedom to engage independently in a trade. To be sure, the basic right aims at the protection of economically meaningful work, but it also views work as a "vocation". Work in this sense is seen in terms of its relationship to the human personality as a whole: it is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence, through which that person simultaneously contributes to the total social product ...'.

¹¹⁸ Pietro Costa, 'Cittadinanza sociale e diritto del lavoro nell'Italia repubblicana' (2009) *XXIII Lavoro e Diritto* 45.

¹¹⁹ Bilancia (n 41) 18-28.

¹²⁰ Somek (n 1) 125.

¹²¹ Marta Cartabia, 'La fabbrica della Costituente: Giuseppe Dossetti e la finalizzazione delle libertà' (2017) *XXXVII Quaderni Costituzionali* 478.

¹²² Burdeau (n 53) 17.

¹²³ Kelsen (n 37) 50-52.

¹²⁴ Robert Alexy, *A Theory of Constitutional Rights* (OUP, 2010).

¹²⁵ Jacco Bomhoff, *Balancing Constitutional Rights. The Origins and Meanings of Postwar Legal Discourse* (CUP, 2013) 64.

the New Deal constitutional culture.¹²⁶ In particular, justice Harlan's dissenting opinion in *Lochner* and its reworking in *Carolene Products Company*¹²⁷ could be viewed as reference points:¹²⁸ freedom of contract was not an absolute right and safety and welfare restraints, unless 'plainly and palpably in excess of legislative power', were entirely justified. The DSCS embraced in full a similar perspective as the one more aligned with contemporary human experience¹²⁹ and more coherent with the structure of the open constitution.¹³⁰ Indeed, a constitution institutionalising social and political conflicts could not endorse an absolutist conception of constitutional rights, but implied a certain degree of relativity of their contents.¹³¹

Besides reflecting the interdependence of the industrial society, the reshaping of property rights by legislative acts approved by democratically elected legislatures was also a consequence of the commitment of the DSCS to *activist government*, that is, the state-driven pursuit of the goals of economic prosperity, full employment and social justice.¹³² It was in particular through activist economic and social policies that the DSCS was to make real its most far-reaching transformative aspirations. The emancipation of the person from all types of oppression and economic insecurity required a broad range of active measures aimed at economic growth and the reform of social structures.¹³³ Consequently, governmental intervention extended to virtually every social domain, so that any individual or collective behaviour with economic implications could be subject if not to the regulation, at least to a certain

¹²⁶ Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (CUP, 2013) 37-41.

¹²⁷ *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

¹²⁸ Lorraine Weinrib, 'The Postwar Paradigm and American Exceptionalism', in S. Choudry (ed), *The Migration of Constitutional Ideas* (CUP, 2006) 88.

¹²⁹ *Cartabia* (n 121) 481.

¹³⁰ See the *Life Imprisonment Case* (1977) (45 BverfGE187) in which the German Constitutional Court affirmed: 'this freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather that of a person related to and bound by the community. In the light of this community-boundedness, personal liberty cannot be "unlimited in principle". The individual must accept those limits on freedom of action that the legislature deems necessary in the interest of the community's social life; yet the autonomy of the individual also has to be protected.' A similar idea was expressed by the Italian Constitution ever since its first ruling, see judgment n. 1/1956.

¹³¹ *D'Albergo* (n 56) 219-220.

¹³² See Antonio La Spina and Giandomenico Majone, *Lo stato regolatore* (il Mulino, 2000) 15 and Pierre Rosanvallon, 'The Development of Keynesianism in France' in Peter Hall, *The Political Power of Economic Ideas. Keynesianism across Nations* (PUP, 1989) 187.

¹³³ *Burdeau* (n 53) 56-58.

degree of conditioning by state authorities.¹³⁴ In many countries, Keynesian theories became particularly influential in the design and conduct of economic policies. Accordingly, the stabilisation of the economy was pursued through the counter-cyclical management of demand,¹³⁵ while the modernisation of national economies was fostered through industrial policies including indicative planning and the nationalisation of big business in strategic economic sectors.¹³⁶ The notable exception defying this Keynesian wave was West Germany,¹³⁷ where for roughly two decades budgetary policy, monetary policy and the modernisation of the economy remained the preserve of ordoliberal economic thinking.¹³⁸

Redistributive mechanisms pursuing greater economic and social equality completed the commitment to activist government of the DSCS. Welfare structures inherited from the interwar period were consolidated and expanded to make provision of social goods more comprehensive and generous.¹³⁹ Increased government expenditures required higher tax revenues, generated through progressive tax systems in which the tax base was expanded in accordance with the notion of ability to pay.¹⁴⁰

Multilateralism was the last of the foundational commitments inspiring the DSCS. After the end of the World War II broad was the awareness of the insufficiency of national sovereignty in coping with the challenges of the industrial society.¹⁴¹ This was reflected in crucial changes in international relations, with the shift from an international law of coexistence to an international law of

¹³⁴ *ibid* 70.

¹³⁵ This implied that in times of economic recession, governments were expected to boost aggregate demand for goods through increases of public expenditures or lowered taxation, even at the cost of incurring budget deficits and inflation. In case of aggregate demand exceeding supply, governments were expected to run a budget surplus and restrictive monetary policy. See Peter Hall, 'Introduction', in *Id.* (n 132) 6-7.

¹³⁶ James Foreman-Peck, 'European Industrial Policies in the Post-War Boom: "Planning the economic miracle"' in Christian Grabas and Alexander Nützenadel (eds), *Industrial Policy in Europe after 1945: Wealth, Power and Economic Development in the Cold War* (Palgrave Macmillan, 2014) 33.

¹³⁷ Christopher S. Allen, 'The Underdevelopment of Keynesianism in the Federal Republic of Germany' in Hall (n 132) 263.

¹³⁸ Alfred Müller-Armack, 'Economia sociale di mercato', in Francesco Forte and Flavio Felice (eds), *Il liberalismo delle regole. Genesi ed eredità dell'economia sociale di mercato* (Rubbettino, 2016) 56.

¹³⁹ Claus Offe, 'The European Model of "Social" Capitalism: Can it survive European integration?' (2003) 11 *Political Philosophy* 448-453.

¹⁴⁰ Franco Gallo, *Le ragioni del fisco: etica e giustizia nella tassazione* (il Mulino, 2007) 83-87.

¹⁴¹ Forsthoﬀ (n 40) 190-191.

cooperation.¹⁴² The latter expanded its remit to domains historically thought to be of purely domestic concern, extended its effects also to individuals and encouraged the pursuit of common goals, to a large extent modelled on the basis of New Deal themes.¹⁴³ This new international order, symbolised by the Universal Declaration on Human Rights and operationalised by the Bretton Woods Accords, did not overlook the persisting importance of the states and their constitutional orders as repositories of political legitimacy and governmental capacity. The pursuit of international goals of cooperation continued to rely on state structures, assisted in their activities by a variety of global and regional organisations.¹⁴⁴ It was this type of synergic interaction that constitution-makers had in mind in committing to multilateralism.¹⁴⁵ As the spread of multilateral cooperation appeared ineluctable,¹⁴⁶ less clear were the ways through which multilateral organisations could assist nation-states.¹⁴⁷ This uncertainty would soon become a matter of contention within national political communities.¹⁴⁸ What could be taken for granted was that the openness of the constitution could not legitimate policy solutions and institutional arrangements contradicting the other foundational commitments of the DSCS.¹⁴⁹ Thus, international treaties were not to be used as devices to effect internal social changes or circumvent constitutional provisions established to govern matters of domestic concern. In other words, multilateral cooperation was conceived of as enhancing the social and political project enshrined in national constitutions.¹⁵⁰ Multilateral treaties, therefore, could well be approved to lock-in the commitments to democracy or constitutional rights of the DSCS, or to encourage the completion of the transition to a democratic constitutional

¹⁴² Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens and Sons, 1964) 58.

¹⁴³ Anne Marie Burley, 'Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State', in John Ruggie (ed), *Multilateralism Matters* (Columbia University Press, 1993) 126-128. See also Samuel Moyn, *Not Enough. Human Rights in an Unequal World* (HUP, 2018) 44.

¹⁴⁴ Somek (n 1) 157.

¹⁴⁵ De Fiores, 'Le radici' (n 34) 78-80.

¹⁴⁶ Pietro Faraguna, 'Costituzione senza confini? Principi e fonti costituzionali tra sistema sovranazionale e diritto internazionale' in Cortese, Caruso, Rossi (n 30) 72.

¹⁴⁷ *Id.*, 81.

¹⁴⁸ This emerged in the debates in the Italian Parliament for the ratification of the European Coal and Steel Community and the NATO, on which see respectively Sergio Bartole, *Interpretazioni e trasformazioni della Costituzione repubblicana* (il Mulino, 2004) 276-288, and Claudio De Fiores, 'Il principio internazionalista' in Della Morte, De Martino, Ronchetti (n 41) 217-220.

¹⁴⁹ Faraguna (n 146) 94-95.

¹⁵⁰ RobertKehoane, StephenMacedo and AndrewMoravcsik, 'Democracy-Enhancing Multilateralism' (2009) 63 IO 1.

order.¹⁵¹ More controversially, international trade regimes could be agreed upon to establish peaceful relationships between countries on the Kantian assumption that peoples that trade do not wage into war against each other.¹⁵² But certainly multilateral cooperation could not be conducted to weaken the DSCS or hijack national constitutional structures towards alternative commitments.

3. HOLDING TO THE DEMOCRATIC AND SOCIAL CONSTITUTIONAL STATE?

This chapter has shown that the post-World War II European constitutional experience can be conceptualised in terms of constitutional self-government. Since the end of the war and in successive waves, broad coalitions of national political parties have written constitutional documents enshrining a set of commitments destined to inspire future political life and transform the legal orders inherited from previous liberal or authoritarian constitutional experiences. Owing to the authority of the founding constitution-makers and their inherent substantive value, those commitments shaped to a remarkable extent national legal and political orders. But their contents were not defined once and for all; they were made over time. Next generations of political actors, civil society organisations and constitutional interpreters held in a variety of ways to those commitments and by doing so they contributed to sustain, defend, adapt and even re-imagine the DSCS, a distinctive form of political rule and a peculiar type of constitutional state.

Yet, for all of its merits, the DSCS should be preserved from generalisations and idealisations. Generalisations would be analytically inaccurate, in particular for all the countries that retain an evolutionary type of constitutionalism. Moreover, also the experiences falling under the category of post-World War II constitutions exhibit important departures from the model. In this regard the case of France is noteworthy: if the developments surrounding the adoption of the 1946 constitution largely correspond with those observed at the inception of the open constitutions, the process ushering in the Fifth Republic is clearly a far cry from the consensual type of constitutional politics normally sustaining them.¹⁵³

Several reasons militate also against the idealisation of DSCS. First, the shaping capacity of post-World War II constitutions has grown over time and

¹⁵¹ Andrew Moravcsik, 'The Origins of Human Rights Regimes' (2000) 54 IO 217.

¹⁵² De Fiores, 'Il principio' (n 148) 226-227.

¹⁵³ For a recent reconstruction, see Ackerman, *Revolutionary Constitutions* (n 9) chapter 8.

in certain constitutional systems was significantly delayed. Here, it is important to remember that, in particular during the most acute phases of the Cold War, key aspects of the newly established constitutions were deliberately kept frozen and only later rediscovered.¹⁵⁴ But besides the pathological cases, it is important to note that the constitutions themselves conceived of the transition towards a new social, political and legal order in conflictual terms. As seen, to be accomplished their constitutional commitments required significant legal and political mobilisation. And the open institutional framework they had established offered several opportunities for conservative political forces to resist change through democratic means, a circumstance which explains why for a considerable time transformative constitutional commitments could coexist with structures of social and legal power with dubious constitutional credentials.¹⁵⁵

Second, also in countries in which the experience of constitutional implementation was less tormented, the performance of the new constitution may appear disappointing if contrasted with the model delineated in this chapter. For instance, only occasionally has the dream of a society that in all its components holds to constitutional commitments and contributes to the process of constitutional interpretation become a reality.¹⁵⁶ As observed, practices of constitutional politics encountered variable support in contemporary societies, and also the expertise-based constitutional culture favoured by constitutional adjudicators and the legal community at large have left at least part of the potential of constitutional commitments unexpressed.¹⁵⁷

Third, the DSCS has shaped European legal and political life, giving birth to a social model of unprecedented success in terms of general welfare and political consensus.¹⁵⁸ A similar positive assessment does not condone the fact that also the DSCS had its own downsides. This is not the place to develop an in-depth critique, but to name just a few of its shortcomings, it can simply be a reminder that democracy was rather soon overshadowed by impressive and, at times, self-referential bureaucratic apparatuses, only in part justified by the commitment to activist government.¹⁵⁹ That depending on the jurisdictions and circumstances, the implementation and enforcement of constitutional

¹⁵⁴ Livio Paladin, *Per una storia costituzionale dell'Italia repubblicana* (il Mulino, 2004) 73.

¹⁵⁵ D'Albergo (n 56) 169-170.

¹⁵⁶ Michaela Hailbronner, *Traditions and Transformation. The Rise of German Constitutionalism* (OUP, 2015) 84.

¹⁵⁷ *ibid* 172.

¹⁵⁸ Jean Fourastié, *Les Trente Glorieuses ou la Revolution invisible* (Fayard, 1979).

¹⁵⁹ Ralf Dahrendorf, *The Modern Social Conflict – An Essay on the Politics of Liberty* (Weidenfeld and Nicolson, 1988) 166-167.

rights were variable. That work for many individuals was far from offering chances of emancipation.¹⁶⁰ That the welfare state maintained a gender-biased structure, in which all-too-often women could benefit from social entitlements only through their husband's prerogatives.¹⁶¹ That in the modernisation of the economy, environmental concerns were rarely taken into account. And, finally, that for all the talk of multilateralism, European countries persisted in exploitative practices vis-à-vis former colonies, developing countries and their citizens.

Be that as it may, after its foundation and consolidation, the DSCS confronted its own coming-of-age crisis. Part of the trouble could be imputed to the decline of its constituent subjects and their incapacity to sustain and reinvigorate the foundational commitments.¹⁶² But the weakening of the DSCS was not just a matter of fatigue or excessive gratification of its bearers. Due to global transformations of capitalist structures, by the end of the 1970s the appeal of activist government was everywhere on the wane. In Western Europe this global phenomenon manifested itself in a paradoxical form.¹⁶³ On the one hand, the DSCS retained its predominant influence on European constitutional imagination, to the extent that its foundational commitments would be employed, although out of context and in a highly stylised form, to promote a controversial process of constitutionalisation of European institutions. On the other hand, the original structures embodying the DSCS would be increasingly regarded as the target of processes of neoliberal transformation, which in the meantime had become the driving factor of the European integration project.¹⁶⁴

¹⁶⁰ Luca Nogler, 'Dal "principio lavorista" al Diritto costituzionale sull'attività umana: primo abbozzo', in Della Morte, De Martino, Ronchetti (n 41) 149-156.

¹⁶¹ Moyn (n 143) 43.

¹⁶² Fioravanti (n 6) 8.

¹⁶³ Marco Dani and Agustín Menéndez, 'European Constitutional Imagination: A Whig Interpretation of the Process of European Integration?' iCourts Working Paper Series, No. 243, 2021, IMAGINE Paper No. 17.

¹⁶⁴ Chris Bickerton, *European Integration. From Nation-States to Member States* (OUP, 2012) 131-136.