The Forge of Constitutionalism: Rediscovering the Heritage of Resistance Against Political Power

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1.1 Constitutionalism: A Definition

The notion of «constitutionalism» identifies a political doctrine that first appeared in England during the 17th century, and quickly spread throughout North America and Western Europe, becoming the leading political doctrine of the three revolutions of the Modern Age.

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

As the historical analysis will show, the doctrine of constitutionalism places its roots in ancient political and philosophical thought, in which not only were the needs of limitation of political power present, but also, many of the legal tools developed by modern constitutionalism had been already proposed and discussed. Furthermore, a presentation of the features of this "ancient constitutionalism" allows a better construction of modern constitutionalism and sheds light on its connection to other theoretical premises as compared to those shaped in the Modern Age within the cultural and social environment of the bourgeoisie. This deeper historical approach, indeed, demonstrates the existing connections between the liberal doctrine of constitutionalism and the goals of popular movements, with their claims for political empowerment and social redemption. Generally, the traditional approach presents constitutionalism as the exclusive outcome of liberalism and – from the perspective of social classes – of the bourgeoisie. The traditional approach looks at the popular movements that took part in the revolutions and to the following developments as parentheses, inconsistencies, and breakages of continuity (Furet and Richet 1965). Here, I consider the democratic doctrines and the popular quests for equality and political participation as relevant factors in the building up and affirmation of constitutionalism. In other words, liberalism and democracy, although of different

theoretical origins and identified with different social classes, met in the age of the revolutions, leading to a combination, on the one side, of legal protections against political power and, on the other side, of social improvements in the field of equality and political participation (Bobbio 1995).

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

1.2 The Contribution of Ancient Constitutionalism

Even if western constitutionalism is a product of the Modern Age, it has deep roots in classical political thought. Scholars are used to speaking about an "**ancient constitutionalism**", different but strictly connected to modern western constitutionalism (McIlwain 1940).

Democracy in Athens

In the 4th century BC, under Pericles' leadership, the city of Athens experimented with a form of radical democracy, conceived in terms of equal participation in political life. In his famous speech on democracy, delivered in 431 BC and reported to us by Tucidide, Pericles described Athens democracy as follows:

» Our form of government does not imitate the laws of neighboring states. On the contrary, we are rather a model to others. Our form of government is called a democracy because its administration is in the hands, not of a few, but of the whole people. In the settling of private disputes, everyone is equal before the law. Election to public office is made on the basis of ability, not on the basis of membership in a particular class. No man

> is kept out of public office by the obscurity of his social standing because of his poverty, as long as he wishes to be of service to the state. And not only in our public life are we free and open, but a sense of freedom regulates our day-to-day life with each other. […]. In our private affairs, then, we are tolerant and avoid giving offense. But in public affairs, we take great care not to break laws because of the deep respect we have for them. We give obedience to the men who hold public office from year to year. And we pay special regard to those laws that are for the protection of the oppressed and to all the unwritten laws that we know bring disgrace upon the transgressor when they are broken.

Aristotle's doctrine on the best form of government ("Politeia")

The radical innovations brought by Pericles' democracy in an aristocratic society, and the imbalances related to the emergence of a democratic political method, inspired first reflections on the boundaries of political power. In **Aristotle's *Politika***, the question of the best form of government for the *Pòlis* is addressed in an original way. The philosopher, indeed, refuses monarchy – government by one man – as it could easily become a tyranny; he also refuses aristocracy – government by the richest part of society – since it could easily become an oligarchy; and also refuses democracy, which he conceives as government by the majority. Democracy, according to Aristotle, could lead to government of the popular class, and thus it would boost only the interests of the poorest of the society against the other social classes. As an alternative, he proposes instead, a **mixed form of government**, where all the social classes are represented and share powers through different institutions, which are closely linked to each other. He calls this perfect and balanced form of government "**Politeia**".

Cicero and the "Repubblica"

Throughout the centuries, Aristotle's theory influenced other philosophers and politicians. During the Roman Age, the most important of those was **Cicero**. As a member of the aristocracy, he fought against both the desire of the tribunes – representatives of the plebs – to acquire more power, and the attempts to confer all political power to one man. To this end, he proposed the same idea as Aristotle, i.e. a mixed and balanced form of government, that he called "**Repubblica**". This form of government, theorized by Cicero in *De Republica*, had its most significant historical expression in the institutional framework of the Roman Republic of the 2nd century BC. Here, the main features of the three traditional forms of government (monarchy, aristocracy and democracy) were present, being represented respectively by the consuls,

the Senate and the different kinds of legislative assemblies (De Martino 1974). Among the latter, notably, the Plebeian Council deserves a special mention, as it was the main popular assembly of the ancient Roman Republic, in charge of the election of the tribunes of the plebs. Cicero clearly explains the theoretical as well as the practical reasons for the preference accorded such a mixed form of government:

> The regal form of government is in my opinion much to be preferred of those three kinds. Nevertheless one which shall be well tempered and balanced out of all those three kinds of government, is better than that; yet there should be always something royal and pre-eminent in a government, at the same time that some power should be placed in the hands of the better class, and other things reserved for the judgment and will of the multitude. Now we are struck first with the great equability of such a constitution, without which a people cannot be free long; next with its stability. The three other kinds of government easily fall into the contrary extremes: as a tyrant grows out of a king; factions from the better class; and mobs and confusion from the people.

The political community as a social body

Several features of these doctrines are linked to specific elements of the cultural and political landscape of the Ancient Age: both Aristotle's and Cicero's doctrines are strictly connected to the historical and social conditions of their times and to their main political project, i.e. the need to achieve political peace and social stability (Rimoli 2011). According to them, this goal could only be reached as a result of a mixed form of government, in which all the powers are shared and divided. Furthermore, similar to the philosophy of the Ancient Age, the two philosophers based their theories on a specific interpretation of the social body. That is, the political community is comparable to a human body, in which all of its parts are connected, and no one part is more important than the other, regardless of the function performed by each. Such a general view of the political community is linked to a static and organicist interpretation that cannot be applicable to modern societies. Nonetheless, in these doctrines we can find the first assertions of the relevance of a **mixed government**, whence the modern doctrine of the separation of powers derives (Vile 1967).

A second contribution that ancient thought bequeathed to modern constitutionalism regards the idea of the boundaries of the law and political authority.

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The "higher law" as a natural bond to the law of men

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

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

The natural law in Christian political theory

In **Christian political theory**, developed throughout the years in which Christians were a persecuted minority, natural law, based on the will of God, represented the main constraint to the doctrine of unbounded sovereignty, which was expressed by leading political and legal thought in the age of the Roman Empire. Per Origen, a Christian theologian living in the 3rd century AD,

> As there are, then, generally two laws presented to us, the one being the law of nature, of which God would be the legislator, and the other being the written law of cities, it is a proper thing when the written law is not opposed to that of God, for the citizens not to abandon it under pretext of foreign customs; but when the law of nature, that is, the law of God, commands what is opposed to the written law, observe whether reason will not tell us to bid a long farewell to the written code, and to the desire of its legislators, and to give ourselves up to the legislator God, and to choose a life agreeable to His word, although in doing so it may be necessary to encounter

> dangers, and countless labours, and even death and dishonor. For when there are some laws in harmony with the will of God, which are opposed to others which are in force in cities, and when it is impracticable to please God (and those who administer laws of the kind referred to), it would be absurd to condemn those acts by means of which we may please the Creator of all things, and to select those by which we shall become displeasing to God, though we may satisfy unholy laws, and those who love them.

During the Middle Ages, this doctrine was kept alive and continued to be developed by many philosophers and Christian theologians – among whom were John of Salisbury and Thomas Aquinas – for whom it represented the consequence of their religious vision of political obligation, as well as a powerful tool of resistance against secular power and its attempts to reduce the political leverage and the liberties of the Christian Church (Troeltsch 1912).

The "rule of law" in England

In the specific context of England, the claim for the intangibility of natural law merged into the quest for the **rule of law**, a doctrine defended by the jurists of the Middle Ages, aimed at establishing boundaries of the power of the king to legislate and govern. These boundaries were found in natural law and human reason, as well as in the customary law belonging to the historical tradition of the country (*lex terrae*). According to authors such as Bracton, the rule of law limits the political authority of the king to shape the law: in the administration of justice and in the enforcement of the law (*iurisdictio*), political power is bound by the rule of law, whereas the monarch keeps a wide authority in assuming the political choices of the kingdom (*gubernaculum*) (McIlwain).

Contractarianism

A third contribution to modern constitutionalism comes from the doctrine of **contractarianism**. As we will see in the next chapter, the idea that the state and its political institutions were born on the basis of a social compact among free men is a fundamental pillar of modern constitutionalism. This doctrine had already been introduced by several philosophers and politicians in the Ancient Age as well as in the Middle Ages. Also in this case, Christianity played a pivotal role in deepening such doctrine, because the idea of the contract had already been largely addressed in the Bible, exemplifying the foundation of the alliance between God and men.

The structure of contractarianism was also developed by the legal practice during the Middle Ages, through the affirmation of a new social and economic pattern, i.e. **feudalism**.

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In the feudal landscape, the contract was the typical model of setting the relationships among individuals and among communities, both in the realm of work and of production, as well as in political relationships. Focusing on political power, the feudal contract was based on a pact of submission and assistance between individuals, legitimizing the political authority of the lord over the people. In the practice of feudal law, moreover, the contract theory was applied by the courts as a means to resolve the disputes arising from the violation of agreements and mutual duties, as well as by groups and communities rebelling against the lord and claiming their independence (De Benedictis 2001). In European history, therefore, contractarianism was much more than a doctrine: it was a fundamental legal framework for the development of social and political relationships.

At the beginning of the Modern Age, feudal contractual practice and contractual theories of the Middle Ages – mainly based on a religious vision of the social compact – were rethought and canalized into **a modern doctrine of contractarianism, conceived as the very foundation of political obligation and state legitimacy**. The idea that political obligation follows and depends on a compact among individuals, in which the government finds the very reason of its existence and its boundaries, was an essential contribution to a theory of limited political power. It introduced indeed some of the basis of modern constitutionalism: **the idea of equality of men; the existence of a superior legal framework to be respected by the government; the need for a just government to rest upon the consent of the people**.

Furthermore, whereas the doctrine of natural law was mainly connected to religious beliefs and religious visions of the world, contractarianism allowed a definition of the boundaries of political power through a secular vision of the world (Gough 1957). In the Modern Age, where a vehement process of secularization took place [Hazard], this feature of contractarianism helped constitutionalism in defining the theoretical elements of its doctrine.

The origins of the right of resistance

In conclusion, although created via different paths, **jusnaturalism and contractarianism led to the affirmation of superior and intangible limits to the commands of the political power of men**. This also brought to a radical outcome: the theorization of a **right of resistance** against the political authorities, in the form of disobedience to unjust commands and norms, as well as in the form of rebellion

against the tyrant. As we will see in ► Sect. 1.4, the claims for a right of resistance were the ideological tools of minority groups, which allowed the continued existence and preservation of the tradition of constitutionalism throughout the centuries of absolutism (Buratti 2006).

1.3 The Foundation of the Nation State in the Modern Age

The spreading of the doctrine of absolute sovereignty in Europe

Despite such refined theories widespread within ancient and medieval political thought, the actual development of political structures followed divergent directions. In Western Europe, indeed, the Roman Imperial Age, the Middle Ages and the first centuries of the Modern Age were characterized by the development of a completely opposite doctrine about political obligation, based on the idea of **absolute sovereignty**. This doctrine supported the growth of the Empire and, later on, of national monarchies. Within the intellectual landscape of those centuries, only a minority of theorists and communities considered constitutionalism as a sound political doctrine.

The role played by the Civil law legal system

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

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Legal Tools and Keywords: Legal Order, Sources of Law, Legal Systems

«Ubi societas ibi ius». This Latin formula easily explains the common awareness of the relationship existing between law and human societies. Whenever a group of men reaches a certain level of stability and organization, institutions and norms start to exist with the function of regulating the relationships among individuals, the development and protection of shared interests, and the continuity of the society itself. At a first level of knowledge, therefore, the **legal order** can be conceived as a set of institutions and norms regulating the structure and the rules of a stable group of men.

The legally binding norms in a legal order derive from **sources of law**. Sources of law are any acts or facts that the legal order acknowledges as valid forms of normative production. In complex societies, the law is produced by several sources of law: in the evolution of modern western law, the main sources of law acknowledged are enacted legislation, jurisprudence and customary law. This **pluralism of the source of law** implies an organization of the relationships among sources, in order to avoid normative conflicts. The set and the methods of organization of the sources of law take the name **legal system**.

In ancient societies, where tradition played a fundamental political role, **customary law** had the prominent position in a hierarchical organization of the sources of law (traditional or customary legal systems). With the development of more complex societies, the strength of customs in the legal systems has progressively diminished.

Jurisprudence (or case-law) is the set of decisions of the courts (judicial branch of a legal order) adopted for the solution of cases brought to their jurisdiction.

Enacted legislation means any written normative text which is created by a political body according to a procedure, and published in a public act.

Starting with the Modern Age, the legal orders of the states in the western world are organized according to two distinct legal systems. In the **Civil law legal system** the enacted legislation occupies the main role: the courts are bound by the enacted law, they only retain a power of interpretation of the norms.

In the **Common law legal system**, instead, the main source of law is the jurisprudence of the courts, according to the rule of the precedent (the respect of the previous decisions taken in similar cases by a superior court) (David and Jauffret-Spinosi 1993; Losano 2000).

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

Absolute sovereignty as a reaction to political and legal fragmentation in the Middle Ages

In order to react to this political and legal fragmentation, since the beginning of the Modern Age, the premises of the doctrine of absolute sovereignty were revitalized and stressed: political power was thought to be legitimized by God and granted by him to the king or to the emperor, his representative on Earth. The French philosopher Bodin is considered the main representative of this theoretical approach. The identification of the sovereign person with the features of divinity led to extremist popular visions, such as those attributing to the monarch a mystical and sacral value (Kantorowicz 1957). Accordingly, the political power of the sovereign was considered to be indivisible and illimitable. The theorists of absolute political power fought against all doctrines aimed at establishing boundaries to the power of the sovereign to legislate: from their perspective, the prince is «legibus solutus».

For their part, the sovereigns acted to abolish jurisdictional authority of the territorial lords, as well as to modify ancient legal traditions and privileges of the cities, communities, guilds and nobles, which were quite widespread in the medieval legal order.

The spreading of the Civil law legal system, with its rational and centralized hierarchical structure, fostered during the years the development of the modern nation state, the settlement of a centralized authority able to bind all the local powers existing in the fragmented legal order of the Middle Ages, as well as the progressive overcoming of the *jus commune*, at least as the main source of law. This last achievement occurred thanks to the acquisition by the monarch of the power to produce normative acts and introduce normative innovations:

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a radical change if compared with the medieval legal order, which conceived the law as customary and eternal, and the role of political authority as strictly limited to enforcing the law.

The foundation of the nation state in modern Europe

The **state** – as a political and legal order spread over a vast territory, driven by a centralized political authority, and imposing a homogeneous law on people – started to appear in the 15th century, with the settlement of the monarchies in France, England, Spain and Portugal. The state-building process followed common routes in Europe, with lords becoming able to progressively centralize fundamental public functions, such as: maintaining armies and granting internal security; raising revenues; imposing regulations on commerce; organizing jurisdiction and granting the enforcement of its rulings (Hirschmann 1977; Poggi 1978).

However, it was only with the **Peace of Westphalia (1648)** that the form of the modern state was finally acknowledged. The Peace of Westphalia recognized the exclusive sovereignty of the state over its population. Within the boundaries of the state there could not stand authorities other than the state, such as that of the church or other political institutions (commons or lords of the feudal system). With the settlement of the modern state, European society was finally able to overcome the dramatic conflicts which exploded after the fall of the Roman Empire, further intensified by the religious schisms that occurred in the 16th century. State sovereignty of the Modern Age, indeed, differs from the doctrines of sovereignty spread during the Roman Age and in the Middle Ages because political authority is no longer justified on the basis of religious duty, but rather on the basis of a secular interpretation of the political community.

Transformations to the form of political obligation brought by Westphalia are easily understandable through the analyses of three basic elements of the modern state, which distinguish it from previous forms of political organization.

The basic elements of the modern state: territory, people, sovereignty

The first one is **territory**: while in the Middle Ages, political obligation was based on individual trust and fidelity, here the state boundaries identify the space in which the state's legal order is in force. The identification of the effectiveness of the legal order through the state boundaries meant not only the overcoming of the intersections among different belongings and fidelities, as common in the Middle Ages; it also meant a direction toward an equal application of law over the people (Di Martino 2010). The second element to be taken into consideration is the **people**: all the people living within the boundaries of the state are subject to state legal order;

territory and boundaries of the state identify the community of people, excluding from citizenship every person not belonging to the state. The third element is **sovereignty**: the modern state does not allow the recognition of other authorities within its boundaries and over its people; it claims the exclusive and legitimate use of force, the power to produce norms, to enforce them, to judge controversies and crimes. In the relationships with foreign states, each state is equally legitimated to stand, negotiate and join treaties. Due to the new principle of equality among the states, this is the beginning of the international law system, as we know it today.

Obviously, the concrete organisation of the absolute state and the structure of the *Ancien Régime* society were more complex than what was envisaged by the theoretical doctrines of absolutism: in some countries, the aristocracy was able to preserve portions of authority, and the judicial courts often played a role in constraint of the government. Furthermore, the monarchs had to deal with the first **parliaments** of the Modern Age – collective bodies representative of the different classes of the *Ancien Régime* society, where general political issues were debated and collection of the revenues approved (Hofmann 1974).

The modern state as a process of centralization and secularization of political power

However, compared to the political orders of the Middle Ages, such as the empire and the church, the modern state was able to overcome feudal and local peculiarities and privileges, centralizing the political power. Consequently, it began to build a centralized and organized administration; it overcame religious conflicts within the state, imposing on citizens a sole religious belief, and limiting the role of the church in politics.

The birth of modern international law

The state is "*superiorem non recognosens*" both on the internal side as well as in foreign relationships. It harbors an international law system of states equally entrusted with the power to bargain and sign treaties and any other kind of international agreements. It was the birth of the ***Jus Publicum Europeum*** (Schmitt 1950). This expression refers to the first embryo of global international law, founded on the concepts of sovereignty, formal equality of states and mutual acknowledgement. The states played a prominent role in the development of international law, which is mainly the outcome of the set of treaties and agreements between the states, aimed at regulating the relationships among each other. However, the relationships among the states also settle a transnational legal order made up of customary rules and common acknowledged principles (e.g. the *pacta sunt servanda* principle), which progressively build up the legal framework of international law and international relations.

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1.4 The Minority Paths of Constitutionalism in the Age of Absolute Sovereignty

In the first years of the Modern Age, ancient constitutionalism was resumed by those thinkers, landlords, minority groups and local communities who tried to oppose and resist the tremendous building of a new, absolutist theory of the foundation of political power (Wolzendorff 1916).

The resistance of aristocracy against centralized monarchies. The English Magna Charta

In many countries, aristocracy resisted the attempts to affirm a centralized monarchy through the imposition of charters of rights: compacts drafted in the typical form of a feudal pact, in which the aristocrats accepted the king as legitimate and the king, on his part, confirmed privileges, immunities and rights of the lords. In all of these charters, the pacts were granted through the codification of the right of resistance, allowing aristocrats to resist, rebel and remove the sovereign in case of violations of the charter. The English ***Magna Charta Libertatum* (1215 AD)** – which was adopted several centuries before, as I will explain in the following chapter – was assumed to be the pattern for such documents. These charters are hardly comparable to modern constitutions and modern bills of rights: they were only aimed at protecting privileges of social classes rather than individual rights, and their structure is more easily comparable to compacts between lords and vassals typical of the feudal system (Brunner 1968); but at the same time, they contributed to the settlement of the conception of individual rights as constraints to the political power of the monarchs.

The resistance of religious minorities

Opposition to the modern pattern of political sovereignty was also carried on by the religious minorities persecuted by the monarchs all over Europe. According to the main leading authors of these groups (Hotman, Theodore of Beza, Calvin), political power derived from a compact with the people. Therefore, in any case in which the government becomes unjust and oppressive, the people should always have the power to resist the tyrant and to remove or kill him. At the same time, these authors refused the binding authority of Roman law, since it was considered to be the source of the absolutist doctrine of sovereignty. A sound political system, instead, should had been based on a system of constraints over the power of the monarch, consisting of the traditional institutions of the country and of other innovative institutions entrusted with competences to check the monarch's powers (Zancarini 2001).

The Dutch insurgency at the end of the 16th century

The insurgency of the United Provinces of the Netherlands against the Habsburg Empire (1581–1588) was the occasion for the consolidation of these doctrines – supported by the

Calvinist religion spread in those territories – and for the settlement of the Republic, an institutional organization setting a first form of power-sharing (Clerici 2004). Dutch painting of the 17th century clearly shows the link between the modern society of the merchant class and the constitutional organization of powers.

Machiavelli's celebration of the Roman Republic

Also, during the Italian Renaissance we can find elements of political thought with strong connections to ancient constitutionalism: though far from the premises of modern constitutionalism, Machiavelli, in his *Discourses upon Tito Livio* (1513–1519), magnified the institutional structure of the Roman Republic, and most of all, the role played by the tribunes, who were described as a fundamental tool of check and resistance against the absolute power of the Senate (Skinner 1978).

The doctrine of resistance against political power as the forge of modern constitutionalism

This broad set of theories, claims and episodes of political fights contributed to shaping **the doctrine of resistance against political power**. Clearly, during the Middle Ages and the Modern Age, these doctrines were still a minority and were largely scattered if compared to the widespread absolute sovereignty theory. Nevertheless, this minority circulation of the ancient constitutionalism doctrine granted its survival and its recall at the moment of the growth of the insurgencies against the absolute power of the monarchs. The tradition of the right of resistance was the forge in which ancient constitutionalism and modern political philosophy merged. The theoretical justification of the claims of resistance to political obligation played the roles of incubator and catalyst of modern constitutionalism.

Comprehension Check and Tasks

1. What are the doctrines that contributed to the development of the idea of "higher law" in ancient constitutionalism? (► Sect. 1.2)
2. What is the role played by the Civil law legal system in the evolution of the doctrine of sovereignty? (► Sect. 1.3)
3. Define the notion of "source of law" (► Sect. 1.3)
4. Why is the Peace of Westphalia recognized as a turning point in the development of the modern state? (► Sect. 1.3)
5. What were the antagonists of absolute sovereigns in the beginning of the Modern Age? (► Sect. 1.4)

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Achievements: Constitutionalism in the Age of the Modern Revolutions

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2.1 Triggering the Constitutional Experience

In the first chapter, I introduced the theoretical roots of the doctrine of constitutionalism, and their mutual overlap and cross-fertilization paths. The revolutions of the Modern Age in Europe and North America (England 1689, North America 1776, France 1789) were the occasions for deepening the claims of constitutionalism, for linking this doctrine to other compelling social and political claims, and for establishing a legal framework consistent with all of them. Therefore, **the three revolutions of the Modern Age represent the foundation of the western constitutional experience**, boosting the transformation of political structures and the adoption of written constitutions and declarations of rights.

Although originating from the common tradition of constitutionalism, national experiences gave shape to different constructions, mainly influenced by the perceived idea of state and of sovereignty, as conceived by the respective national cultural contexts. In the actual transposition in legally binding constitutional norms, the common principles and leading ideas of separation of powers and individual rights **were forced to bargain with political needs and social structures, undertaking diverging paths**.

Moreover, constitutionalism – which in the first Modern Age was the main factor of legitimation of the revolution of state and society – starting with the bourgeois revolutions, was exposed to methods of constraints of its revolutionary power. Revolutionary constitutions of the Modern Age are the contact point between the ideological and revolutionary push of constitutionalism and the necessity of conservation of the legal order founded on the constitution (Berman 2006). This paradox is still open and problematic for contemporary legal studies (Holmes 1988).

2.2 The Origins of English Constitutionalism, Between Political Struggle and Legal Structure

Society and institutions in England

England was the first country where the modern doctrine of constitutionalism appeared and took concrete form.

The early success and circulation of constitutionalism was possible because of the lasting existence of some important social and institutional features. Firstly, the ongoing conflict between the Crown and the aristocracy represented the main deterrent to the potential growth of the monarchical powers.

Secondly, the economic growth of a young bourgeoisie, with values and economic interests opposed to the absolutist ones, affirmed its willingness to see its liberties wholly acknowledged. Thirdly, the existence of an institution such as Parliament, in which the bourgeoisie and the aristocracy were represented, was a counterweight to the king's authority, and it enabled the two social classes to share power with the king in proposing legislation and granting tax revenues. Fourthly, the Common law legal system and the role played by the courts was central in setting the boundaries of the political power of the king through the settlement of general principles of Common law, granting individual rights against the government.

The Common law legal system

The role played by the **Common law legal system** must be contextualized within a more general process of separation from the Roman legal tradition and from the sources of the European *ius commune* of the Middle Ages. In the beginning of the Middle Ages, this process brought England to the development of a peculiar legal practice based more on local customs than on Roman code and its constructions by the jurists. Moreover, the process also fostered the consolidation – as a legal tradition of the country – of the English rule of law, and the development of a pluralistic system of administration of justice. The spreading of jurisdictional power to the feudal local courts further strengthened the local resistance against the monarch's claims for a centralized political power throughout the Middle Ages.

Aristocratic resistance: the Magna Charta Libertatum

However, beginning with the 13th century, we witness the growth of the absolute monarchy, aimed at removing the ancient feudal social structures, and especially the ancient privileges and immunities of aristocracy, with its traditional power of administrating justice in local courts. The endemic conflict between the Crown and the aristocracy was overcome through the adoption of the famous *Magna Charta Libertatum* of 1215: a document in which the monarch formally assumed the commitment of respecting special guarantees for aristocrats. At the same time, however, in those years the English monarchs achieved the goal of leaving the aristocracy out of the power of administrating justice. The settlement of the counts of common low implied a consistent centralization in the administration of Justice.

The Common law legal system as a means to counterweight the centralization of political power

Eventually, as the monarchy strengthened, the Common law legal system began to consolidate, and quickly became a means to counterweight the peril of centralization of political power in the king's hands. The courts were indeed committed to applying common principles to the entire kingdom, removing the legal particularism inevitably linked to political fragmentation