

The Paradox of Constitutionalism

Constituent Power and Constitutional Form

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Constitutionalism's Post-Modern Opening

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The aim of this chapter is to examine in what ways and to what extent contemporary Western constitutionalism now stands removed from its origins in the liberal revolutions of the late eighteenth century. These original settlements forged a close link between constituent power and constitutional form as a means of establishing and maintaining the new political order of the state sought by the revolutionaries. Today, by contrast, with the explosion of globalization, the statal dimension of polity and constitutionalism is in such decline that the question of the location of constituent power and sovereignty can no longer be answered in this dimension. Rather, sovereignty has fragmented and is now re-articulated within a multilevel and polycentric order, where the relations among 'levels' of government has become much more decisive and crucial than the constitutional form of all and any particular levels—including the nation-state level.

We may in fact see the rise and the fall of the relation between constitutional form and constituent power as a parable of the fluctuating fortunes of the nationally and spatially-demarcated type of polity represented by the state. But when the new 'global' dimension of political organization arrived—and with it the era of interdependence, of fluid relations, and of the dominance of technology and communications—the national dimension of polity and its constitutional form did not disappear or exhaust their purpose. Rather, the national dimension of the polity and its constitutional form became re-inserted into a complex multilevel system of government,¹ or a 'multilevel constitutionalism' whose defining feature is precisely the lack of a mechanism that permits the *reductio ad unitatem* distinctive of nation-state constitutionalism (in which one state *equals* one polity, one political system, one law, one language, etc.). No single level—neither the divided global level (UN, WTO, IMF, etc.), nor the national, nor the sub-state level—may assume and perform in its entirety the task of ordering and unifying the

¹ Or, as is more common, multi-level governance: see, e.g., G. Marks, L. Hooghe, and K. Blank, 'European Integration from the 1980s: State-centric v. Multi-level Governance' (1996) 34 *J. of Common Market Studies* 341.

multiplicity of legal systems (*supra*-national, national, and *sub*-national) by hierarchical means and according to the traditional logic prevailing in the case of state-centred constitutionalism. In this polycentric world, the function of governing and law-making necessarily entails much more than a decision in accordance with constitutional norms. It requires frameworks of social integration and mutual involvement that are capable of overcoming the fragmentation of power, and so of responding to the pervasive demand for informed participation in all spheres and corners of decision-making that today constitutes the very essence of democracy.

So we may infer that democracy cannot be based on a 'world constitution'; such a thing does not exist, and probably never will. Instead, democracy must find its legitimation through heterarchical procedures of consensus-seeking, or so-called 'governance'. Very schematically, it may be suggested that the idea of 'network' sovereignty rather than 'hierarchical' sovereignty better captures the apparent contradiction between the new assertiveness of the distinct parts and the complex integrity of the whole. On the one hand, globalization entails enhanced awareness of cultural distinctiveness and an attendant spread and intensification of claims for participation as a primary means of identity expression. On the other, decision-taking and law-making in such a globalized context are possible only by integrating—by recomposing the fragments of power—and thus through action that is above all relational, and aimed at building consensus over regulatory purpose. In this tension between identity and interdependence we find the core paradox of post-modern constitutionalism. And that tension is apparent not only at the global sites of decision-making but also in the local contexts themselves.

This seems to be the main reason for the crisis of constituent power and constitutional form. From the nation-state point of view the new spatially-extended and multi-tiered constellation involves the escape of sovereignty both upwards towards the international and potentially global institutional dimension of power (i.e. the *supra*-national bodies and organizations) and downwards towards the local dimension of power (i.e. the *sub*-state, regional bodies and organizations). And this loss of state sovereignty, if we address the typical content of national constitutions, affects both fundamental rights and the form and structure of government. In the former case, this is on account of the increasing importance assumed by various international and supra-national charters for the protection of human rights. In the latter, it is reflected in the increasing importance accorded to 'governance', with its emphasis on private as well as public actors and its eschewal of command and control methods of ordering, in comparison to traditional 'government'.²

² On the contraposition of 'governance' and 'government', see the classic definitions in: R.A.W. Rhodes, 'The New Governance: Governing without Government' (1996) 44 *Political Studies* 652.

Constitutionalism and 'Radical Openness': Negri and Post-Modern Constitutional Theory

It is relatively easy for a constitutional law scholar to offer a précis of post-modern constitutional theories. It is relatively easy to connect these theories to the history of modern western constitutionalism so as to offer a reconstruction of so-called 'weak constitutionalism' or 'post-modern constitutionalism' and an assessment of how it may or may not be conducive to 'radical openness' in the field of the relations between political organization and constitution. It is very difficult, however, for the same scholar to deal with the particular challenge offered by Antonio Negri's thought, even though it is perhaps the best known, and for many the many the leading light of this new theoretical brand.³

The main reason for this difficulty lies in the fact that in setting out his constitutional theory or, rather, his theory of the relations between polity and constituent power, Negri never cites the constitutional scholars associated with the foundation and development of modern and post-modern theories of the constitution and of the constituent power.⁴ An even more extraordinary fact is that Negri never tries to give a 'positive' definition of constituent doctrine and of constitution, one that uses the terms in ways familiar from constitutional scholarship and its theoretical development over the two centuries of its modern history.

So although his overall critique recalls many well-known theses about the crisis of Western constitutional thought and of the idea of constituent power, it is hard to connect Negri's (and his collaborator Michael Hardt's) ideas to constitutionalism *tout court*, and especially to the authors that we may consider the founders of 'weak constitutionalism'. On the one hand, if we interpret 'radical openness' as the

³ I make reference to the following of Negri's works: A. Negri, *Guide. Cinque lezioni su impero e dintorni* (Milan: Raffaele Cortina Editore, 2003); A. Negri and M. Hardt, *Empire* (Cambridge, MA: Harvard University Press, 2000) (It. transl., *Impero*, Milan, BUR, 2003); A. Negri and M. Hardt, *Multitude: War and Democracy in the Age of Empire* (New York: Penguin Press, 2004); A. Negri, 'La crisi dello spazio politico' in A. Negri, *L'Europa e l'Impero* (Rome: Manifestolibri, 2003); A. Negri, *Marx Beyond Marx* (New York: Autonomedia, 1991); A. Negri, *Il potere costituente: saggio sulle alternative del moderno* (Milan: Sugar, 1992). I acknowledge the valuable work done by G. Martinico, doctoral student in constitutional law, Scuola Superiore di Studi Universitari e di Perfezionamento Sant'Anna, Pisa, in researching Negri's works and thought.

⁴ Negri's indifference towards Italian scholars and scholarship in constitutional law is sincerely re-paid and returned by those Italian constitutionalists who do not cite Negri's works in their essays on constituent power, not only—obviously—the older sources (see, e.g., C. Mortati, *La Costituente* (Rome: Darsena, 1945); F. Pierandrei, 'Costituente (assemblea)' in *Novissimo Digesto Italiano* (Turin: UTET, vol. IV, 1959); P. Barile, 'Potere costituente' in *Novissimo Digesto Italiano*, (Turin: UTET, vol. XIII, 1966)); but also the most recent: see, e.g., M. Dogliani, 'Costituente (potere)' in *Digesto discipline pubblicistiche* (Turin: UTET, vol. IV, 1989); M. Dogliani, 'Potere costituente e revisione costituzionale' (1995) *Quaderni costituzionali* 7; A. Pizzorusso, *La Costituzione* (Turin: Einaudi, 1996); G. Palombella, *Costituzione e sovranità* (Bari: Dedalo, 1997); A. Pizzorusso, *La costituzione ferita* (Bari: Laterza, 1999); A. Pace, *Potere costituente, rigidità costituzionale, autovincoli legislativi* (Padua: CEDAM, 2nd edn., 2002).

assumption in the era of globalization of a definitive and irreparable separation between the constitution (both national and supranational) and the revolutionary force of the people (multitude) with the potential to affirm itself as constituent power, Negri's thought connects to a well-marked line of analysis, embracing both liberal and Marxist traditions, in locating constituent power exclusively in acts of revolution. On the other hand, his thought breaks with that tradition in its depiction of the constitution and constitutionalism of the so-called Empire of the post-modern age as a legal order of polity that is absolutely negative in quality and only functional to its own preservation, and also in its failure to define and characterize the new power that rises from the revolutionary multitude. Indeed, on this view, we may see Negri, to paraphrase Fukuyama,⁵ as the theorist of the 'end' of constitutionalism. This sense of paradox in Negri's work—of constitutionalism's latest incarnation also announcing its death—does not emerge in the work of these many other scholars whose thought, although subscribing to something like 'radical openness', continue to assert a 'weak' or 'post-modern' constitutionalism typical of the era of globalization—as something dispersed and disconnected from popular initiative rather than being entirely lost.⁶

In what follows I seek to set out the point of view of an Italian 'constitutional positivist' with regard to the question of 'radical openness' in constitutional theory and practice, with particular reference to Negri's thought on the ways in which the domain of the political, broadly conceived, need not be contained by the domain of the constitutional (or, rather, contained by Western thought about the constitution and constitutionalism). However, it is useful to preface the reconstruction (and deconstruction) of Negri's thought with a short reminder of some major themes in the *longue durée*⁷ of Western liberal constitutionalism.

Constituent Power and Constituted Power in Liberal Revolutions: the Conservative Role of Classic Constitutionalism

The birth of the idea of the 'constituent power' is closely connected with the experience of the French Revolution. In Great Britain and in France the liberal revolution had its origins in parliamentary bodies that, according to their method of legitimation and criteria of membership, were creatures of the *Ancien Régime*. For the most part, representation was based upon a doctrine of mandate or *cahiers*

⁵ The reference is to well-known essay of F. Fukuyama, *The End of History and Last Man*; It. transl. *La fine della storia e l'ultimo uomo* (Milan: Rizzoli, 2003), 21 ff.

⁶ See, among Italian constitutionalists, G. Zagrebelsky, *Il diritto mite* (Turin: Einaudi, 1992); G. Volpe, *Il costituzionalismo del novecento* (Bari: Laterza, 2000); P. Pinna, *La costituzione e la giustizia costituzionale* (Turin: Giappichelli, 1999); A. Spadaro, *Dai diritti 'individuali' ai 'diritti globali'. La giustizia distributiva internazionale nell'età della globalizzazione* (Rubbettino, Soveria Mannelli, 2005).

⁷ See F. Braudel, 'Storia e scienze sociali. La "lunga durata"' in F. Braudel, *Scritti sulla storia* (Milan: Il Saggiatore, 2nd edn., 1989), 57.

de doléance. Only in the course of long-term evolution (in the case of the British parliament) or abrupt transformation (in France, with the abolition of *cabiers de doléance* and the reception of Sieyès' theory of 'sovereignty of the nation'), did they become what we call modern representative assemblies subject to a broader framework of political responsibility.⁸

Indeed, from this point of view, only the constituent assembly that launched the US Constitution in Philadelphia properly meets the modern standard of representative legitimacy. By comparison, the distinction between constituent power and constituted power in France, as elaborated by Sieyès, retained a conservative (in a literal sense) bias.⁹ Its objective was not only to affirm the political role of the *Troisième État*, but also to ensure its alliance with the Crown in the revolutionary context, and so to protect the revolution from the opposite dangers of excessive democracy and the reactionary restoration of the feudal aristocracy.

The collective people are the main agent of this transformation. Through their act of 'representation', or elections, the people make a direct choice without the intermediation of parties or corporations or other third parties, and the resulting Assembly is thus 'representative' of the people. What is more, the freedom of the elected rather than the electors is what is truly essential to this 'organic' construction. Unfettered by the particular instructions of a special constituency, each member of the assembly is free to establish the agenda of the assembly and consequently to determine, by the vote, the 'general interest', which is nothing other than the will of the majority of the members of the Assembly. And that will of the majority, when objectified in the law of parliament, is in turn the only means through which the public power may enter in the private sphere of the individuals, establishing (but only in the name of the general interest) limits on the content of individual 'civil liberties' or 'fundamental rights' otherwise absolute.

In this sense, we can say that in liberal revolutionary thought there is an immediate and organic link between the (revolutionary) people, their representatives in the Assembly and the will of the nation-state; and that civil liberties or fundamental rights provide a wall that separates the 'private sphere', where power cannot enter, from the 'public sphere', where power conquers all. This distinction turns on the difference between a domain of human conduct characterized by equality of relations between individuals and one dependent upon an idea of supremacy, or absolute power, so posing a distinction in the structure of law which is the main basis of the division between private and public law.

On the basis of these general origins, we may identify three points of departure in the development of Western constitutional doctrine on the relations between revolution, constituent power, constitutional text, and its reform.

⁸ On the five necessary features of modern representative parliaments, see A. Barbera, *I parlamenti* (Bari: Laterza, 1999), 45–6.

⁹ See E.-J. Sieyès, *Qu'est-ce que le tiers état?* (1789); It. transl., *Che cosa è il terzo stato?* (Rome: Editori Riuniti, 1992), 67–8; see also the analysis of L. Jaume in ch. 4 of this volume.

The Distinction between Constituent Power and Constituted Power: the Problem of Constitutional Reform and Negri's *Empire*

The first point is located in the binary distinction between 'constituent power' (a power absolutely free in scope) and 'constituted power' (a power limited by the terms of the constitution).¹⁰ From the perspective of this original division, Western constitutionalism elaborated the thesis according to which, on the one hand, any particular constitutional assembly is an exceptional constitutional organ, capable of performing its constitutive function only one time for a single constitution; yet, on the other hand, constituent power more generally remains free in its goals and its forms inasmuch as it finds its legitimation and its validity in itself.¹¹

This starting point has also generated a political corollary: only a revolution,¹² or the earthquake generated by world war (for democratic constitutions), or a coup d'état (for authoritarian constitutions) or the proletarian revolution (for socialist constitutions) could justify the rise of constituent power and, consequently, of a constituent assembly. Accordingly, it is no surprise that the most recent seismic movement in European constitutionalism was precipitated by the demise of communist regimes in East Europe after the fall of the Berlin Wall.¹³

On the basis of these cases in the Western constitutional tradition the problem of constitutional reform is seen as one of overcoming the basic binary logic, of providing for continuity-in-change; the puzzle of amending the constitution consistently with the constitution. So German scholars, on the basis of Article 79 of the Basic Law, have elaborated the distinction between *Verfassungstextänderungen*, (i.e. the change in a constitutional norm carried out by means of constitutional rules as Article 79 prescribes) and *Verfassungsdurchbrechung* (i.e. the change of constitutional norms through means other than Article 79—that is to say, a constitutional violation).¹⁴ On the same basis, Italian scholars have elaborated the

¹⁰ From this point of view there is no difference whether the constitution is an 'instrument of government' (see, e.g., the French constitution of 1791) or a long constitution—a programmatic constitution conceived of as a 'project of society,' as in the Jacobin's project of constitution of 1793: this difference may be considered useful, if at all, only in consideration of the degree of 'openness' of the constitution.

¹¹ See M. Aini, *Dizionario costituzionale* (Bari: Laterza, 2000), 345ff.

¹² Whether the meaning ascribed to the word 'revolution' is the historical one, as in H. Arendt's *On Revolution* (It. trans. *Sulla Rivoluzione*, Milan, Comunità, 1983, 15ff), or whether it assumes the meaning of 'basic norm', as in H. Kelsen, *General Theory of Law and State* (It. trans., *Teoria generale del diritto e dello stato*, Milan, Comunità, Milano, 1952, 111ff), i.e. a norm whose validity cannot be explained by a higher norm.

¹³ On which see the contribution of U. Preuss in ch. 11 of this volume.

¹⁴ See K.H. Seifert and D. Hömig (eds.), *Grundgesetz* (Baden-Baden: Nomos, 1982), 350ff. According to German scholars, there is a third category of 'constitutional modification' which must be distinguished from *Verfassungsdurchbrechung*: the s.c. *Verfassungswandel*, i.e. the constitutional modification due to the shifting mode of execution and/or interpretation of the constitutional norms by legislator, courts, and administration as time goes by.

theory of the implied limits to constitutional reform, meaning that the textual mechanism for amending the constitution in Article 138 of the Italian Constitution cannot be used to deny the fundamental norms (*principi supremi*) propounded and protected by the constitutional text: in other words, beyond the formal limits, there are implicit substantive limits to constitutional reform.¹⁵

In Italy the problem of constitutional reform came to the surface in the years after 1990, when changes in the electoral system and in the configuration of parties ushered in the so-called transition from the 'First' to the 'Second' Republic,¹⁶ even if in formal terms the 1948 Constitution remained in force and largely unamended.¹⁷ Between 1984 and 1997 there were three unsuccessful attempts to modify the whole second part of the Constitution. They were pursued under the authority of a Parliamentary Commission, composed of members of the *Camera* and the *Senato* according to the number of seats held by each party in the Parliament. Given this bipartisan composition, we can speak from the point of view of the party system of a consensual route to constitutional reform with regard to the second part of the Constitution (i.e. Organization of the Republic). But in the second and the third of these attempts we can also see the shades of a *Verfassungsdurchbrechung*, on account of the very terms of the constitutional laws of 6 August 1993 n. 1 and 27 January 1997 n. 1 under whose authority these initiatives were taken.¹⁸ In providing for a *Commissione Bicamerale* with the task of elaborating a project of constitutional reform, both enabling measures sought to introduce *una tantum* modifications to the general procedure of constitutional reform provided for by Art. 138.¹⁹ A fourth and final failed attempt at constitutional reform of the whole second part of the Italian Constitution *did* faithfully follow the general Article 138 procedure and, unlike its abortive predecessors of 1993 and 1997, actually obtained Parliamentary approval in 2005. But owing to the lack of political consensus-building by the right-wing majority, left-wing parties obtained the signatures of enough electors to promote a constitutional referendum, held on June 2006, in which the reform was defeated.

In general, as the repeated failures to reform the institutional core of the Italian Constitution may indicate, except for some partial and limited modifications of the French, Spanish, and German Constitutions, Western constitutionalism has experienced in recent years the so-called 'paradox of the constitutional reform': the more a constitutional reform is necessary, the more the political system is unable

¹⁵ See Pace, above n. 4, 121ff.

¹⁶ See N. Bobbio, *Tra due repubbliche* (Rome: Donzelli, 1996) 101ff, esp. at 138.

¹⁷ The 1948 Constitution has been modified thirteen times and only in minor ways, except with regard to the amendment in 2001 of Title V, dedicated to the powers of regions and of local authorities (the so-called federal transformation of the regional state). This modification (n. 3/2001) was the first and only that amended an entire title of the Constitution of 1948, involving a substantial increase in the legislative and administrative powers of regions and local authorities.

¹⁸ See Pizzorusso, *La Costituzione*, above n. 4, 68, n. 15.

¹⁹ See Pizzorusso, *La Costituzione ferita*, above n. 4, 47ff.

to find the necessary consensus on the content of the reform.²⁰ In consequence, it is arguable that only an 'achievement (constitutional) reform' is nowadays possible:²¹ in this sense, a 'great reform' event can be successfully approved only if it is a sort of consolidation, a report of a transformation already realized by other (ordinary, not constitutional) means. And if we look at the one *successful* Italian experience of major reform of Part Two of the Constitution (i.e. the reform of Title V, which took place in 2001 only after Minister Bassanini, in 1997–8, had already introduced significant non-constitutional measures of federalization) or if we review the experience of the new and unratified European Constitutional Treaty (whose content is largely repetitive of the legal order acquired by the EU under the traditional framework of international Treaties)²² we find support for that hypothesis. It is a finding, moreover, that leads us to inquire about the continuing capacity of our political system to project the future of our political societies in institutional terms, a task which historically was a key function of Western constitutionalism.

The answer may be the following: the great reforms of our societies in the new era of globalization do not have a national (and consequently 'constitutional') dimension, but necessarily a global or *supra*-national dimension. So it has been for the most important political changes in the contemporary pan-European context that have had constitutional salience: for example, the creation of the Euro (a long-term project introduced by Maastricht Treaty of 1991 and implemented only in 2002), and enlargement of the EU to the post-Communist democracies of Central and Eastern Europe. In order to find a similar scale of transformation at a national dimension or level we can, of course, refer to the recent spate of British constitutional reform under Tony Blair's New Labour—including the introduction of legislative devolution, a domestic human rights catalogue, and reform of the unelected House of Lords. Tellingly, however, the United Kingdom does not have the kind of rigid and formal constitution that helps trigger the paradox of reform.

With regard to the question of constitutional reform, Negri's thought is not as revolutionary as it may at a first glance seem. If we examine a work such as *Il potere costituente*, we can say that the theory of constituent power here described is very much in line with the Western constitutional tradition, founded on a strict relationship between constituent power and political revolution.²³ In that essay of 1992, Negri described the political theory of modernity as a metaphysical

²⁰ On the so-called constitutional reform paradox, see N. Bobbio, 'Il paradosso della riforma' in J. Jacobelli (ed.), *Un'altra repubblica?* (Bari: Laterza, 1988), 20ff (the paradox is defined at 21).

²¹ The idea of an 'achievement' constitution is attributable to C. Mortati, *Le forme di governo* (Padua: Cedam, Padua, 1973), 393. With this definition (*costituzioni 'bilancio'*) Mortati explained the periodical constitutional reform typical of socialist countries owing to the Marxist doctrine according to which a constitutional reform marks the necessary and progressive adjustment of the formal constitution to the achievements reached in the social order.

²² See N. Walker, ch. 13 of this volume.

²³ See Negri, *Il potere costituente*, above n. 3, 346ff.

narrative and stressed the connection between revolution, constituent power, and crisis (defined not as an event but as a durable sequence of events), in so doing developing some critical intuitions already laid out in earlier work,²⁴ but still not fundamentally at odds with the classic liberal tradition. In that earlier work in fact, Negri analysed in constructive fashion the 'principle of constitution', referring to the creative capacity of struggle to produce a new structure that itself becomes the object of new struggles leading to further transformations;²⁵ according to him, the constituent power was nothing less than the collective capacity to make and remake the social and political structure.

More recently, however, Negri and Hardt's *Empire* makes the case for the intensifying crisis of national level constitutionalism. In the post-modern era, constituent power is the expression of an 'outside' which cannot exist within the post-modern space. After reading the first part of Negri's *Empire* we might indeed wonder who may assume the role of the constituent power in a context that refuses the classical linkage visions of 'people' and 'sovereignty' at a national level. This was a secular idea of power as territorial sovereignty, one that could not conceive of an authority whose source lies outside its own dynamic. In this sense, because of its internal source of energy, it was a kind of absolute power. Later, the concept of nation entered the picture to complete the parable of state sovereignty: 'In the framework of national sovereignty, territory and people are like two qualities of the same substance and governance is the sacral relation of this unity.'²⁶ These considerations can also be used to explain the rise of a more democratic sovereignty which frames the territory as the social space of the people and conducts the administration as a form of 'bio-politics' through the development of the idea of the welfare state. In the last analysis, through this evolution the sovereignty of 'high modernity' becomes a machinery whose ultimate aim is to define, and also confine and control, the possibility of freedom under capitalism.

But the process of globalization of capital causes the emergence of a new form of sovereignty which expresses itself in a power which overcomes all the national boundaries and old logics of power. In this sense, Negri and Hardt argue that globalization is not eroding sovereignty but transforming it into a system of diffuse national and *supra*-national institutions, in other words, a new 'Empire' that touches every aspect of modern life. For Negri and Hardt there are three causes of this shock. First, the development of nuclear technologies has changed the nature of war,²⁷ making it something 'unthinkable',²⁸ and, in combination with this, the influence of new forms of communication make sovereignty both 'limited' and at the same time 'de-territorialized'. Starting from this assumption, Negri says that 'the imperial sovereignty presents itself as nuclear territorialization

²⁴ Negri, *Marx beyond Marx*, above n. 3.

²⁵ Ibid. 56-7.

²⁶ Negri, 'La crisi dello spazio politico', above n. 3, at 21 (author's translation).

²⁷ In a rather different sense, see: M. Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Cambridge: Polity, 1999).

²⁸ A. Negri, 'La crisi', above n. 3, 23.

of the universal de-territorialization'.²⁹ The second factor of influence is the creation of a global market which makes the national currency lose its sovereign quality and causes 'a monetary deconstruction of national markets'.³⁰ The last factor is the flattened culture that the modern system of communication enables. Today, communication has turned its previous condition as a tool of the sovereign power on its head; it is now the real 'sovereign' master. In this context the defence of the national language and culture and the construction of an educational system are no longer national prerogatives. The crisis of modernity and the force of Empire casts its destructive spell on a sovereignty now defined as a 'decentred and deterritorializing apparatus of rule that progressively incorporates the entire global realm within its open expanding frontiers'.³¹

Unfortunately all the elements provided by Negri and Hardt do not help the reader to understand precisely what Empire consists of from a constitutional point of view. The authors give only a number of indirect hints. For Negri and Hardt there is no single institution, country, or place that is or could become the command centre of the new Empire: indeed, the very lack of a centre, and so of a periphery, is itself a key feature of Empire.³²

In place of bright definitional lines we find the sense of ambiguity which characterizes Negri's thought. There is the constituent actor (the *multitude*) and there is a constitution too, albeit not defined in a formal way. The constitution of the Empire, in fact, is a hybrid. A monarchic centre, an exclusive holder of the force, does not exist, but the other classical Polybian factors are present: the aristocracy is represented by the international financial forces while the democratic-republican element is represented as the power of control exercised by what remains of the states. But to return to the supposed holder of constituent power, what does Negri mean by the term 'multitude'? There are various definitions. The multitude is that part of mankind which becomes the key actor in its production and which creates and recreates itself in autonomous ways, building a new ontological reality through cooperation. It spreads through circulation and nomadism, and thanks to these factors it tries to take possession of territorial space. The multitude is also democratic power which combines freedom and labour in an open and dynamic fashion.³³ But the imperial order is forced to challenge this movement. The multitude wants to create a new order through its free movement, while the imperial order wants to divide and rule creating new forms of segmentation. What, then, is the aim of the multitude? 'Through overflowing national borders and confusing all fixed identities the

²⁹ A. Negri, 'La crisi', above n. 3, 24 (author's translation).

³⁰ Ibid.

³¹ Ibid.

³² In this sense 'Empire' and 'Imperialism' are not synonymous because of the absence of a centre and of frontiers: 'In contrast to imperialism, Empire establishes no territorial centre of power and does not rely on fixed boundaries or barriers . . . Empire manages hybrid identities, flexible hierarchies, and plural exchanges through modulating networks of command. The distinct national colours of the imperialist map of the world have merged and blended in the imperial global rainbow': see Hardt and Negri, *Empire*, above n. 3, xii-xiii.

³³ Negri, *Guide*, above n. 3.

multitude constitutes a new "earthly city" in opposition to the corrupt imperial city.³⁴

In their book of the same name,³⁵ Negri and Hardt offer a definitive understanding of the multitude as a revolutionary actor that cannot be identified with the 'people' or a class because it does not seek a social contract—with all such a contract implies in terms of compromise and mediation. Rather, it claims for itself a power of genuinely creative violence. If the constituent power is an announcement of the exodus from Empire, the goal of the multitude and the point of its creative power is to build a 'place' in the dust of the non-place of de-territorialized authority, and so, finally, a new order. But is it a new order without a constitution?

The Constitution as Higher Law and the Judicial Protection of Human Rights

A second point of departure in the evolution of Western constitutionalism, with particular reference to the North American legal culture and tradition, was the affirmation of the idea of the constitution as 'higher law' (or, as European scholars of the twentieth century prefer, a norm hierarchically superior to legislation) and the 'discovery' of judicial review of legislation. Closely associated with this is the development through constitutional adjudication of individual and collective fundamental rights—not only civil liberties but also social and political rights and even third and fourth generation rights.³⁶ But the significance in the development of fundamental rights as positive rights of the institutionalization of judicial review of legislation³⁷ should not blind us to the development of the crisis of constitutionalism of the second part of the twentieth century.

This crisis has two faces. The first is due to political pluralism, and to the consequent lack of the necessary conceptual and ideological unity to bind the constituent assemblies of the inter-war years and the constitutional texts they produced. With the organic conception of the people under increasing threat—most evidently in the Weimar Constitution but also in the Austrian Constitution of 1920 and the Spanish Constitution of 1931—scholars began to theorize the distinction between the constitution as an 'act' and the constitution as a 'process'.³⁸ The influence of the continuous flow of social struggle on constitutional structures

³⁴ Hardt and Negri, *Empire*, above n. 3, 413.

³⁵ Hardt and Negri, *Multitude*, above n. 3.

³⁶ Following the theory of the 'generations' of rights developed by N. Bobbio, *L'età dei diritti* (Turin: Einaudi, 1990), 14ff.

³⁷ See A. Pizzorusso, 'I sistemi di giustizia costituzionale: dai modelli alla prassi' (1982) *Quaderni Costituzionali* 521; M. Cappelletti, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato* (Milan: Giuffrè, 1968).

³⁸ See A. Spadaro, 'Dalla costituzione come "atto" (puntuale nel tempo) alla costituzione come "processo storico"' (1998) *Quaderni costituzionali* 343.

and debate, and in particular the transformation of political conflict—formerly relegated to the social sphere and ‘unknown’ to the institutions of constitutional order—into parliamentary conflict,³⁹ are the historical cornerstones of the new constitutional doctrines of writers such as Smend⁴⁰ and Heller,⁴¹ and, some time later, Mortati.⁴² The state, through constituent power, is no longer the organic projection of the people, but becomes ‘the constitutional space of the political struggle’.⁴³ Furthermore, with the demise of organic theory and the discovery of political and ideological pluralism in Western constitutionalism, political parties rather than the ‘people’ or the ‘multitude’ become the key actors of the constitutional and political arena. An identity-based conception of democracy was born,⁴⁴ one whose constitutional openness lay in the recognition and reconciliation of diversity.

The second factor in the crisis of modern constitutionalism only became evident many years later, in the last decades of Hobsbawm’s ‘short twentieth century’.⁴⁵ In the constitutions ‘born of the Resistance’,⁴⁶ the integration of struggling political parties was a democratic process of *self*-integration. The constitutional text, especially where a long and detailed text, becomes the blueprint for a new society in which each political party could participate and with which each political force could identify. But the obstinate gap between the ‘material constitution’ and the formal document called Constitution creates its own sense of constitutional crisis. Indeed we can say, with Dogliani and Heller,⁴⁷ that these two conceptions of the constitution may never completely coincide. The material constitution tracks social reality and responds to the programmes and wills of political parties. As a process, it is always the expression of a dynamic, one that cannot be ‘established’ or even projected in final form in the way that a constitutional text, in its very expressive logic, is bound to claim.

We can recognize this crisis particularly in the constitutional adjudication of fundamental rights. The constitutional culture of the European democracies of

³⁹ The most fascinating description of this evolution, invoking the image of political parties as ‘armies’ that face each other in the assembly, is that of E. Canetti, *Massa e potere* (Milan: Mondadori, 1960), 224–6.

⁴⁰ See R. Smend, *Verfassung und Verfassungsrecht* (1928); It. trans., *Costituzione e diritto costituzionale* (Milan: Giuffrè, 1988), esp. 215ff.

⁴¹ See H. Heller, *Staatslehre* (1934); It. trans., *Dottrina dello Stato* (Naples: ESI, 1988), 387ff.

⁴² See C. Mortati, *La Costituzione in senso materiale* (Milan: Giuffrè, 1998), 115ff.

⁴³ See P. Pinna, *Diritto costituzionale della Sardegna* (Turin: Giappichelli, 2003), 5 (author’s translation).

⁴⁴ See G. Leibholz, *Die Repräsentation in der Demokratie* (3rd edn., 1973); It. trans., *La rappresentazione nella democrazia* (Milan: Giuffrè, 1989), 161ff.

⁴⁵ E. Hobsbawm, *The Age of Extremes: The Short Twentieth Century, 1914–1991* (Harmondsworth: Penguin, 1994).

⁴⁶ As Mortati called the post-Second World War Italian, French, and German Constitutions: see Mortati, *Le forme di governo*, above n. 21, 222ff. We may now add to them the Constitutions of Spain, Portugal; and Greece promulgated during the 1970s.

⁴⁷ See M. Dogliani, *Introduzione al diritto costituzionale* (Bologna: Il Mulino, 1994), 315ff; Heller, above n. 41.

the second part of the twentieth century was challenged when courts discovered that they could not ground their decisions concerning adjudication of individual rights on the basis of a sure and certain hierarchy of constitutional provisions directly assumed from the constitutional text. In Italy, for example, only a few people criticized the Constitutional Court's decisions when they declared statutes enacted during the Fascist regime to be invalid as being inconsistent with the constitutional text. But when the Constitutional Court's decisions struck down a statute-law enacted only a few months before that decision, the Court was seen to interfere directly with the political agenda, and the most vociferous critics of the decisions were the very political parties who enacted the law now struck down as inconsistent with the constitution.⁴⁸

As Mario Dogliani has written, in this way we have undergone a crisis of the constitutional norms *magis ut valeant*—as a system of norms directly binding the political actors located within the same polity and institutional arena as the enforcing court itself.⁴⁹ On this view, the constitution is no longer a legal document offering a certain framework of values and principles translated into a hierarchically ordered system of positive provisions on which courts (and political actors) can found their decisions. Rather, in order to perform their task, courts must develop different techniques of argumentation, and must found their decisions on balancing tests or on neutral (in the sense of not interfering with partisan political agendas) constitutional principles, with particular reference to rationality of means (e.g. reasonableness, *Verhältnismäßigkeit*, proportionality) or apparently bipartisan constitutional 'values' such the protection of environment or the protection of the right to one's health.⁵⁰

Therefore, in this phase of the evolution of constitutionalism, its 'openness' lies not only in the growing tension between the material and formal constitution resulting from the shift of focus from a text and single act to a continuing process, but also in its pliability and permeability at the level of specific doctrine—in the quality of its norms as 'open provisions' that require integration through the political process.⁵¹ This may seem to be an invitation to constitutional relativism, but it contains its own rationale and system integrity, and in turn questions conceptions of the constitution as a closed system of provisions whose only operational requirement is to be 'executed' by the political authorities and the courts.⁵²

⁴⁸ See V. Crisafulli, 'La Corte Costituzionale ha vent'anni' in N. Occhiocupo (ed.), *La Corte costituzionale tra norma giuridica e realtà sociale* (Bologna: Il Mulino, 1978), 69.

⁴⁹ See M. Dogliani, *Interpretazioni della costituzione* (Milan: Angeli, 1982), 29ff.

⁵⁰ See C. Mezzanotte, *Corte costituzionale e legittimazione politica* (Rome: Venezia, 1984), esp. 140ff.

⁵¹ For reference to the works of Esposito, Treves, and Elia to which such conceptions may be ascribed, see Dogliani, above n. 49, 75ff.

⁵² See, e.g., C. Mortati, 'Appunti per uno studio sui rimedi giurisdizionali contro comportamenti omissivi del legislatore' in Mortati, *Raccolta di scritti* (Milan: Giuffrè, 1972), vol. 3, 925ff; E. García de Enterría, *La Constitución como norma y el Tribunal Constitucional* (Madrid: Civitas, 1982), 95ff.

This new 'openness' in Western, and in particular European constitutionalism, is well described by Zagrebelsky.⁵³ For him, the mildness and softness of the constitution is explicable in terms of its determination to express the aspiration of living together—to arrange the cohabitation of principles and values, which, if conceived in an absolutist way, would be irreconcilable. In order to lend concreteness to these sentiments, we must re-introduce two distinctions that twentieth-century Western constitutionalism sought to elide: the separation between the law meant as the narrow legal rule 'posited' by the legislator and human rights as inherent in individuals—and the separation between the law and justice, the latter conceived of as an aspiration based on the reconciliation of deep principles of political morality. The 'openness' in post-modern constitutionalism may be intended, according to Spadaro,⁵⁴ as precisely the re-awakening and re-sensitization of the legal/political system to a superior human aspiration to justice, one that challenges the closure of a positivist legal/political system in which justice is reduced to formal legality. Not relativism, but reasonableness and proportionality, is the *leitmotif* of post-modern constitutionalism.

Under the banner of post-modern constitutionalism the rule of law—both statutory law and judge-made law—may only be a matter of contingent and occasional law. It may be the 'instrumental' law of the subjects that prevails from time to time and from one political context to another in the legislative process—its measure simply that of majority rule.⁵⁵ Or it may be the judge-made rule of law constructed out of the situationally specific balance among contrasting constitutional values and interests, and so by definition *sui generis* and not valid as a precedent for future cases. In this way 'weak constitutionalism' is born.

The Tension between Universal Aspiration and National—Territorial Identity

The third central point of the evolution of Western constitutionalism resides in the tension between the universalism acquired from the rationalism of the Enlightenment and the myth of the sovereignty of the particular nation and its attendant territorial concept of political identity. It is interesting to observe that for the French revolutionaries this tension was *not* in fact understood or presented as a tension: the Declaration of 26 August 1789 had the double function of affirming the identity of 'a' people—the French people—and providing, at the same time, a universal paradigm capable of offering a beacon of light for the many peoples of the world still oppressed by absolutism. In this sense, for the

⁵³ See Zagrebelsky, above n. 6.

⁵⁴ See A. Spadaro, *Contributo per una teoria della costituzione. I. Tra democrazia relativista e assolutismo etico* (Milan: Giuffrè, 1994), 288ff, esp. 318.

⁵⁵ See Zagrebelsky, above n. 6, 129.

revolutionaries of 1789; constitutional 'openness' was quite simply the political endorsement of the revolutionary promise for all the peoples of the world.

Many decades passed before constitutionalism again experienced such an acute tension between the particular and the universal. This happened with the definitive crisis of legal nationalism⁵⁶ of the first half of the twentieth century, and the coming of the Universal Declaration of Human Rights in 1948 followed by a spate of other universal charters; the related UN Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights of 1966, together with many other regional declarations such as the European Convention of Human Rights (1951), the Nice Charter of EU Rights (2000), the African Charter on Human and People's Rights (1981), the Asian Human Rights Charter (1998), and the Inter-American Convention on Human Rights (1969). These documents have introduced a new dimension in the definition and protection of human rights, and at the same time provided a concrete manifestation of the global dimension of constitutionalism—one that is no longer 'national' or 'western' but transnational and intercultural.⁵⁷

We may focus on two aspects of this phenomenon. On one hand, we may conceive of a constitutionalism without a constitution, i.e. without a global political authority or sovereignty—not the UN nor the WTO, not the IMF nor the World Bank (nor, indeed, in Negri's Empire, the United States)—that matches the new authority of rights.⁵⁸ On the other hand, national courts nevertheless have to confront this new phenomenon, since many of these supranational charters are not simply political documents. Rather, they establish international courts capable of adjudicating on the rights affirmed in their respective charters. Even in its national setting, therefore, constitutionalism becomes ever less national and ever more supranational, or better, transnational and intercultural. As the relations between national courts and international or supranational courts shift from indifference and conflict towards mutual interest and collaboration, the authority of rights becomes 'evident'⁵⁹ and justiciable.⁶⁰

So a new separation and a new distinction is emerging as one of the main features of post-modern constitutionalism: between the global affirmation of

⁵⁶ See P. Carrozza, 'Nazione' in *Digesto IV edizione, discipline pubblicistiche* (Turin: UTET, vol. X, 1994), 126ff, esp. 146ff. See also C. de Fiores, *Nazione e costituzione* (Turin: Giappichelli, 2005), 371ff.

⁵⁷ A. Spadaro, *Dai diritti "individuali" ai doveri "globali"* (Soveria Mannelli: Rubettino, 2005), 40ff.

⁵⁸ In the meaning given to these terms by G. Palombella, *L'autorità dei diritti* (Bari: Laterza, 2002), 11ff.

⁵⁹ See P. Carrozza, 'Tradizioni costituzionali comuni, margine di apprezzamento e rapporti tra Corte di Giustizia C.E. e Corte Europea dei Diritti dell'Uomo. Quale Europa dei diritti?' in P. Falzea, A. Spadaro, and L. Ventura (eds.), *La Corte costituzionale e le Corti d'Europa* (Turin: Giappichelli, 2003), 567.

⁶⁰ The Italian Constitutional Court has, e.g., often affirmed the existence of 'supreme principles' which cannot be denied even if Parliament follows the correct procedure of constitutional reform (Art. 138 It. Const.): for a list of these principles see, e.g., Constitutional Court, Decision 1146, 29.12.1988, in *Il Foro Italiano*, 1988, I, col. 5565.

adjudication of fundamental rights (ever more transnational and intercultural), and the absence of any political authority (or sovereignty or constitution) possessing comparable global and transnational authoritative scope. In this sense, we may infer that the development in the effectiveness of fundamental human rights is due more to courts—both national and international—than to global political initiative.⁶¹ There exists a global, or more often regional, integration through law,⁶² which post-modern constitutionalists often overlook as they attend instead to the crisis of national political and constitutional powers.

Elements of a Post-modern Theory of the Constitution: Constitutionalism as Procedure

Post-modern constitutionalists agree on one central element of the post-modern configuration as the key factor in the crisis of traditional Western constitutionalism: that in the era of globalization the political space is no longer a national-state space; it is a global space.⁶³

In the face of globalization of the economy, of communications, and of technology, the constituted power (or sovereignty) appears fragmented across national constitutions and a number of global and regional *supra*-national authorities: the crisis of modern, organic constitutionalism is in fact the legal flipside of the (political) crisis of the national state as the principal and typical species of polity. And for these fragmented powers 'civil society' seems not to fit the description of Negri's multitude or indeed any national community, but the multinational corporations and the virtual communities of the remote technologies which dominate our lives. Indeed, in its pervasiveness the new information technology, according to Volpe,⁶⁴ may even seem equipped to replace constitutionalism in giving order to our practices of living together.

Because of globalization's profound consequences for the territorial dimension of the economy and of the society, the image more frequently adopted in order to describe this crisis is that of the nation-state—with its rigid constitutions comprising fundamental rights and the separation of the organs of government—besieged and pressurized by supranational and subnational sovereignties or levels of

⁶¹ This separation is well described by Pizzorusso in terms of the opposition between 'political' sources of law (i.e. that enacted by parliaments and, generally speaking, other political authorities, whatever their territorial dimension), and 'cultural' sources of law (i.e. the law founded on rationality as may be that of courts and judges, etc.): see A. Pizzorusso, *Sistemi giuridici comparati* (Milan: Giuffrè, 1998).

⁶² See, e.g., M. Cappelletti, M. Seccombe, and J. Weiler, *Integration through law. Europe and American Federal Experience* (Berlin: de Gruyter, 1986), 3 vols.; L. Azzena, *L'integrazione attraverso i diritti. Dal cittadino italiano al cittadino europeo* (Turin: Giappichelli, 1998), esp. 93ff; M. Carabia and J. Weiler, *L'Italia in Europa* (Bologna: Il Mulino, 2000).

⁶³ See Volpe, above n. 6, 238ff.
⁶⁴ Ibid. 249ff. See also R.A. Dahl, *A Preface to Economic Democracy* (Berkeley: University of California Press, 1985).

government. That is to say, the state is challenged both by a process of transnationalization, so that the most important political decisions are made at international or supranational level, and at the same time by a process of decentralization, owing to which substate (whether regions, *comunidades autonomas*, *Länder*, etc.) and local authorities are laying claim against the state for their right to self-government and self-determination.⁶⁵

But the 'openness' of post-modern constitutionalism cannot just be defined in negative or cautionary terms, as awareness of the decline of classical constitutionalism as the means to order society. We must also try to offer a positive answer to the crisis of post-modern constitutionalism. A first answer is given by the theories of those who support the idea, following Schumpeter,⁶⁶ Dahl,⁶⁷ and Habermas,⁶⁸ that a constitution may contain only 'procedural' norms (i.e. techniques for a communicative and relational decision-making): for Volpe, for example, the consequence of the decline of the constitution as founding and legitimating a basis of social coexistence characterized by a hard and unchangeable nucleus of substantial values, can only be the acceptance and formalization of a procedural idea of constitution.⁶⁹

A second answer is given by the theories of so-called 'multilevel constitutionalism' or 'multilevel government',⁷⁰ according to which there is a complementarity among the three levels of governments (European, national, regional) to which three different 'societies' and three different 'citizenships' correspond, so forming an integrated legal system. This is an optimistic conception, one ultimately grounded in federal or quasi-federal ideas that dismiss as anachronistic the unitary constitution with undivided legislative, executive, and judicial powers. The federal assumption of Pernice and his followers also recalls Elazar's thought about the 'matrix' model of sovereignty⁷¹ in his well-known federal vision for the post-modern era.⁷² The matrix model is founded on the idea that in the federal government that Elazar describes, there is no centre within the levels nor hierarchy between them, but only relations of collaboration; 'network (or reticular) sovereignty' most aptly describes this new or emergent world order.

All Europeans live in systems of multilevel government articulated across three or more sites. Italians, for example, live in a five level government, in which there are: three 'legislators' (EU, the national parliament and/or government, the

⁶⁵ See, e.g., A. Pizzorusso, 'Ipotesi di attenuazione della dimensione statale del diritto' in Pizzorusso, *Comparazione giuridica e sistema delle fonti del diritto* (Turin: Giappichelli, 2005), 11.

⁶⁶ See J. A. Schumpeter, *Capitalism, Socialism and Democracy* (London: Allen & Unwin, 1942), ch. 22 (in which the author sets out his procedural theory of democracy).

⁶⁷ See the short but clear exposition in R. Dahl, 'La democrazia procedurale' (1979) *Rivista italiana di scienza politica* 3.

⁶⁸ J. Habermas, *Morale, diritto, politica* (Turin: Einaudi, 1992), esp. 81ff.

⁶⁹ See Volpe, above n. 6, 258.

⁷⁰ See, e.g., I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution—Making Revisited?' (1999) 36 *Common Market Law Review* 703.

⁷¹ See D. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987); It. trans. *Idee e forme del federalismo* (Milan: Mondadori, 1998), 28–33.

⁷² *Ibid.* 215ff.

regional council); five 'executives' (the European Commission, the nation-state executive with its Premier, the regional Governor with its government, the President of the *Provincia* with its *Giunta*, the *Sindaco* with its *Giunta*); and two judicial powers (European and state courts, although state courts are also European judges); five orders of taxing power; and, finally, five orders of constitutions (the European, the national, the regional *Statuto*—unlike the German system, the Italian legal system constitution does not use the term 'constitution' to indicate the regional fundamental norms—as well as a *Statuto* of the *Provincia*, and a *Statuto* of the local municipality or *Comune*).

In a recent essay, I sought to maintain that the functioning of this complicated system may be explained using the Kelsenian theory of *Kompetenz-Kompetenz*: the basic units of the system remain the national states, who have *Kompetenz-Kompetenz*, but they (whether through their constitutions or the democratic will of their governments and/or parliaments signalled in a treaty) delegated a lot of their 'original' (in a historic sense) power both towards the top (to EU or other supranational authorities) and towards the bottom (to regional and local authorities).⁷³ The relations among these 'levels' is not, or at least no longer, hierarchical, but one of mutual demarcation based on *Kompetenz*. It is founded on the enumeration of the legislative powers of the different levels or on the German model of 'executive federalism', where the governing axis is the horizontal separation of powers according to which one level has the legislative and/or regulative powers while another level has executive and administrative powers.

From a static point of view each level has its own 'constitution', and often its own catalogue of rights, and it is certainly true that there does not exist a constitution of the whole system. But from a dynamic point of view a constitution of this multilevel government resides in the rules of relations among the levels, and these rules must be inspired, on one hand, by the logic of cooperation of conventional international law (unanimity in the constitutive phase, majority or market rules in the operating phase) and, on the other hand, by the logic of integration, so that each level may participate in the decisions of the immediately higher level, through a system of informal conferences or formal organic participation in constitutional institutions of the upper level (as in state representation in central federal bodies).⁷⁴

The weak point of this construction remains the question of fundamental rights. When we have a multiplicity of Charters of Rights (from Universal Declaration to the *Statuto* of a singular Italian municipality) we may reconstruct

⁷³ P. Carrozza, 'Sistema delle fonti e forma di governo europea' in P. Bianchi, E. Catelani, and E. Rossi (eds.), *Le 'nuove' fonti comunitarie* (Padua: Cedam, 2005), 255.

⁷⁴ See H. Wechsler, 'The Political Safeguards of Federalism: the Role of the States in the Composition and Selection of the National Government' in A. MacMahon (ed.), *Federalism: Mature and Emergent* (New York: Doubleday, 1962), 97; J.H. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980), 17ff.

the relations among these charters and declarations either as a hierarchical one (i.e. founding on 'autonomy' or self-government the lower levels may seek to develop quite distinctive charters, but the upper levels will still tend to prevail even if only by promulgating very general provisions, or standards)⁷⁵ or as a communicative and heterarchical one (i.e. differentiation may exist but mutual coherence is retained due to the intercultural sensibility and transnational aim of the interpreter). The weakness lies in the fact that history—not only the history of the United States with its so-called 'incorporation' of rights against states in the federal Bill of Rights but European history too—tells us that as integration increases the upper catalogue tends more and more to prevail over the lower catalogues. To allow a different history to be written in the future is one of the main tasks of post-modern constitutionalism.

⁷⁵ Owing to this requirement, for some the Universal Declaration of 1948 appears 'grey and anodyne': see A. Cassese, *I diritti umani nel mondo contemporaneo* (Bari: Laterza, 1988), 40ff.

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