

In Keeping with the Spirit of the Albertine Statute—Constitutionalisation of the National Unification

Giuseppe Mecca

«Ciò che forma una costituzione è lo spirito, non la lettera»
(G. Arcoleo, Diritto costituzionale. Dottrina e storia, Napoli, 1904, 216).

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Abstract This chapter deals with the difficult process of constitutionalisation which characterised Italian Unification. Constitutionalisation is a long-term phenomenon which had the purpose of giving constitutional forms to the Nation. The promulgation of the Albertine Statute is more the start than the arrival of this phenomenon. The focus of this investigation is, therefore, to study the Constitution through its evolution paying particular attention to the process of legal integration

G. Mecca (✉)
University of Macerata, Filiano, PZ, Italy
e-mail: giuseppe.mecca@unimc.it

within the structures of the Albertine Statute and to the amendment mechanisms of the constitutional text. The preamble of the Albertine Statute speaks of «perpetual and irrevocable fundamental law». The word «perpetual» meant the prohibition of revoking constitutional concession, while the word «irrevocable» was intended as a pact between the Sovereign and the Nation. Over the years, very few were the changes to the letter of the Albertine Statute. The interpretation and the practice represented the most important mechanisms of constitutional change (implicit constitutional changes). A primary role was acknowledged to non-written norms. In this perspective, it may well be said that the Italian Constitution consisted in something more than the written text and dwelt in the spirit and not in the letter of the Albertine Statute.

1 Overview

Under the Albertine Statute speaking of constitution meant referring to the «fundamental law of the State» as well as to the act by which the sovereign limits himself transforming the absolute Monarchy into a constitutional government.¹ For the purpose of defining the Constitution, references to Gian Domenico Romagnosi did not go amiss, a jurist who had explained that through the word ‘Constitution’ one was referring both to a written text and to the legal order of the State.² In the commentary by Carlo Boncompagni, to the question: *what is the constitution?*, its pactional nature (an agreement among the various parties in society) was highlighted and the idea was reinforced, through the metaphor of the human body and natural sciences, according to which the constitution was a law that defined the skeleton of the State.³

By way of these examples, we may approximately say that the word ‘Constitution’ referred to a political organisation based on consociationalism

¹Cf. *Dizionario politico popolare*, ed. Pietro Trifone, introduction by Luca Serianni. Roma: Salerno, 1984, *ad vocem*: «oggi suona come la legge fondamentale di uno Stato; ma più comunemente equivale a costituzione, o, a meglio dire, alla carta costituzionale, ossia a quell’atto col quale un principe assoluto cangia la monarchia dispotica in monarchia temperata» (today it sounds like the fundamental law of a State, but it is more commonly equivalent to a constitution, or, to put it another way, to the constitutional charter, rather to that act with which an absolute prince changes the despotic monarchy into a moderate monarchy).

²The reference is contained in the *Dizionario politico nuovamente compilato ad uso della gioventù italiana*. Torino: Pompa, 1849. Cf. Romagnosi (1937).

³«Nelle società che hanno origine da una convenzione la Costituzione è il patto che fissa le condizioni della loro esistenza. Le azioni de’ soci sono coordinate secondo il patto sociale, onde concorrono tutte ad un effetto voluto da tutti. In quella società che è lo Stato, Costituzione è la legge secondo cui lo Stato esiste: mancando l’esistenza di quella legge lo Stato si sfascerebbe» (In societies which originate from a convention, the Constitution is the pact which fixes the conditions of their existence. The actions of the associates are coordinated according to the social pact so that they all contribute to an effect desired by all. In that society which is the State, the Constitution is the law according to which the State exists: lacking the existence of that law the State will come apart). Cf. Boncompagni (1880: UTET, 4–5).

(*pactum societatis*), but also to a normative act, to the subdivision of supreme powers within the State and to the idea of limitation/equilibrium of power, to the guarantee of liberties. These definitions recall the modern meaning of Constitution which, from mere empirical concept that described the political condition of a State, ever more took on a prescriptive meaning enriching itself with normative elements.⁴ The Italian language had no word indicating the normative layout of the State until the late Eighteenth century.⁵

Having said this, it is fruitless to wish to find the normative superiority of the Constitution, as expression of a positivistic concept, within the Italian experience of the liberal period.⁶ It is neither worth our while focussing attention on the normative text of the Albertine Statute to demonstrate its shortcomings and ambivalences. The perspective is rather that of verifying how the Albertine Statute was intended in the liberal era, that of the value attributed to the constitutional charter during the process of national unification, that of constitutional interpretation. It is a matter of reading the Albertine Statute through its evolution, considering contests and contrasts to keep the institutions in harmony with civil society. Specifically, the focus of this investigation is the *constitutionalisation*, understood on the one hand as the *process of legal integration within the structure of the Albertine Statute*, extended to all the pre-Unitary States following political Unification, which implies never-fully-successful attempts at developing representative institutions and parliamentarianism, at democratisation and consensus, while on the other the *mechanism of interpretation and amendability (revision) of the constitutional text* which leads to an integration without a written document as an act of a constituent power exercised by the people. In this respect literature talked about «weak constitutionalisation» as an original character and permanent feature of the Italian State, highlighting how from the very beginning the Italian constitutional development happened without breaks, without revolutions and in the name of continuity.⁷

⁴Regarding these aspects, see Stourzh (2007, 80–99). Please, also see the essays: *The origins and Transformation of the Concept of the Constitution* (3–37); *Conditions for Emergence and Effectiveness of Modern Constitutionalism* (41–87) and *The Concept of Constitution in Historical Perspective* (89–124) published in Grimm (2016). The author distinguishes between an empirical concept of Constitution and a concept of Constitution which, over time, becomes richer of normative elements. He concludes that the concept of constitution will never come to establish itself as a mere juridical dimension. Compare the thought of Comanducci (1990). The author identifies three models: *axiological model* where the word Constitution indicates the social order of natural phenomena; *descriptive model* where the word indicates the artificial order, the State structure and the balance of powers; the *normative model* where the constitution indicates the juridical norms expressed in documents or customary law. On the meaning and role of the Constitution in different periods, please see: Fioravanti (1999, 2007). Further bibliography in § 3.1.

⁵Mannori (2016). By the same author, please see also Mannori (2011).

⁶Fioravanti (2009).

⁷Cassese (2014, 329–335). The author, while observing the way in which Italy gave itself a constitution, speaks of constitutionalisation by evolution and of missed and/or imperfect revolution. He observes that the process of national unification changed itself from a “national-popular” movement to “monarchical-governmental movement. “Original character and permanent features” were firstly mentioned by Sbriccoli (2009, 591 ff).

If it is true that in Italy constitutionalisation has been a “downward process”, this can be partly explained with the culture of the liberal-moderate party concerned about avoiding excesses, favouring compromise and shunning big breaks and upheavals. It is extremely appropriate to underline how the promulgation of a written constitution constitutes only the first step of the slow and difficult process of constitutionalisation, made of progresses but also of reactions, standstills. The other phase is that of experimenting which led to an evolution of the meaning of the Statute in the light of the socio-cultural context.

In Italy, constitutionalisation of National unification is a long-term phenomenon, constituting the key feature for reading the *National Building*.⁸ Specifically, the Albertine Statute is a starting point more than an arrival point.⁹ From the moment when the sovereign grants the constitution, we realise that the normative act deriving from the granting is insufficient in itself, the constitutional law is simply an act which cannot be revoked, but the constitution in order to live must obtain consent and public opinion must believe in it.

2 Constitution, *Charte* and *Statuto*: Different Names for the Same Thing?

In the *Commento allo Statuto del Regno* (1909) by Francesco Racioppi and Ignazio Brunelli we read:

Sostanzialmente, Costituzione è il complesso delle *regole*, scritte o non scritte – leggi, usi, precedenti, consuetudini – che danno la fisionomia e il modo di essere politico di uno Stato, ossia determinano in qual modo la sovranità si esercita per mezzo degli organi varii che nel loro complesso costituiscono il governo, e quali sfere di diritti sono garantiti dalla sovranità ai cittadini singoli di fronte al governo medesimo. In breve, Costituzione sostanzialmente è il complesso delle regole che determinano l’ordinamento del governo e le libertà dei cittadini. Formalmente, invece, Costituzione è l’atto o documento scritto, che contiene le regole fondamentali dell’ordinamento politico.¹⁰

⁸On this aspect, interesting are the remarks by Manca (2014).

⁹Cf. Lacchè (2016b).

¹⁰«Substantially, Constitution is the whole gamut of written and non-written rules—statute laws, customs, legal precedents, customary law—which give the appearance and the way of looking political of a State, rather they determine in which way sovereignty exercises itself by way of various bodies which as a whole constitute the government, and which spheres of rights are guaranteed by sovereignty to individual citizens against the same government. In short, Constitution is substantially the whole of rules which determines the legal order of the government and liberties of citizens. Formally instead, Constitution is the act or written document, which contains the fundamental rules of the political order». Cf. Racioppi and Brunelli (1909a, 45).

The definition allows highlighting how, for historical reasons, the conviction that the Constitution had a life beyond the written text affirmed itself quickly. It was a matter of a vision already present in the thought of the primeval Italian constitutional doctrine.¹¹

The Commentary by Brunelli and Racioppi highlighted also that in the Italian experience the word ‘constitution’ was a synonym for Statute. It was indeed a matter of two words of Latin origin respectively deriving from the verbs *constituere* and *statuere*.¹² During the Ancien Regime with ‘constitution’ were generically indicated all the normative acts issued by the Sovereign.¹³ The word ‘statuto’ was directly linkable to the late medieval experience of the Italian Communes where the word indicated the whole of rules which regulated the life of the *civitas*.

In the minutes of the *Consiglio di Conferenza* (Council of Conference) there is no sign of the reasons which led to the denomination even though the hypothesis that the *nomen juris* had been proposed by Giovanetti was put forward.¹⁴ The choice of the denomination was not devoid of relevance if it is duly considered, as the above-mentioned commentary underlines, that the word ‘statute’ had its French corresponding word in the expression *charte constitutionnelle*.

In the France of 1814, the question was, indeed, the subject of careful discussion. Constitution called the revolutionary period back to mind in that act which came from people. The French monarchy wanted, on the contrary, to unequivocally underline that the new normative text was a direct derivation of monarchical power. Therefore, once completed the drawing of the text within the Council of the King, the Chancellor Charles Henri Dambray proposed to use the expression *Ordonnance de reformation*, while Antoine-François-Claude Ferrand suggested the expression *Acte constitutionnel*. The position of Jacques Claude Beugnot prevailed, who shunning both proposals suggested the term *Charte* to which the adjective *constitutionnelle* was coupled according to the decision of King Louis XVIII.¹⁵

¹¹Opposition between written text and material constitution will have more complete theoretical formulations in the very fortunate volume by Mortati (1998). The original text dates back to 1940.

¹²For a juridical and linguistic analysis of the meaning of the words ‘Constitution’, ‘Statute’ and ‘Brief’ see Bambi (1991).

¹³For example, in the Kingdom of Sardinia the sovereign, Vittorio Amedeo II, gathered in 5 volumes the royal decrees in force in the State entitling *Costituzioni piemontesi* (Piedmont Constitutions) the work of normative rearrangement. On this collection please see: Viora (1986).

¹⁴Cf. Ciaurro (1996, 44–45).

¹⁵On the point Rosanvallon (1994), Lacchè (2002) and Alvazzi del Frate (2013). «Le mot de Constitution, dit-il, suppose le concours pour établir un nouvel ordre des choses, entre le roi et les représentants, soit du peuple, soit du peuple et des grands; et il est bien évident que rien de tel ne se rencontre ici ... Puisqu’il s’agit d’une concession faite librement par un roi à ses sujets, le nom anciennement usité, celui consacré par l’histoire de plusieurs peuples et par la nôtre est celui de *Charte*» (The word Constitution, he says, supposes the cooperation—in order to establish a new order of things—between the king and the representatives both of the people and of the people and the great men; and it is very clear that nothing of this will be found here ... Since it is a matter of a concession made freely by a king to his subjects, the name anciently used, that name consecrated by the history of many people and by ours, is that of Charter). Cf. Beugnot (1866, t. II, 219).

If, in Italy as well, very probably the word Constitution was rejected because it was considered too ‘revolutionary’, the adjective ‘constitutional’ was instead associated with the government in order to indicate the way in which the monarchical power was shared with the people.¹⁶ The Statute, indeed, defined the constitutional government as that form of power exercising shared between Sovereign and Parliament where a connection between those ruled and rulers was guaranteed.¹⁷

3 Albertine Statute as Fundamental Law

The language of the Albertine Statute was archaic and ambiguous, the text was without organic connections. The constitution of Charles Albert contained eighty-one articles and three transitory regulations. The first twenty-three articles were mainly dedicated to the person of the King and to the institution of Regency. Art. 24-32 were gathered under the title *On rights and duties of the citizen*. Art. 33-64 concerned the Parliament and were respectively dedicated to the Senate, to the Chamber of Deputies and contained shared regulations for the functioning of both branches of Parliament. Art. 65-67 concerned Ministers; Art. 68-73 referred to the judicial power; the remaining part was general regulations.

The written constitution was bare and many rules had the taste of general principles rather than directly binding juridical norms.¹⁸ Consequently, the true game was played at the level of praxis and interpretation, of the perennial difficulty to bring the principles therein contained within the doctrinal borders of modern constitutionalism.¹⁹ Substantially it was a matter of extrapolating the effective limitations to the monarchical power from the text of the Constitution and enunciating rules which consented a real development of the parliamentary principle guaranteeing fundamental rights and liberties.

¹⁶On this aspect please see the remarks of Mannori who highlights how during the post-revolutionary period in Italy literature preferred to talk about «governi liberi» (free governments) rather than «governo costituzionale» (constitutional government). Cf. Mannori (2016, 120).

¹⁷Ragazzoni and Urbinati (2016).

¹⁸The Knight Des Ambrois noted: «L’urgenza, dice, non è di formulare una Costituzione che bisognerebbe dare dopo matura deliberazione, come conviene al bel paese e alla dignità del Governo, ma è indispensabile fissare principi» (Urgency, he says, is not that of formulating a Constitution which should be granted after mature deliberation, as befits the Bel paese and the dignity of its Government, but it is indispensable to fix principles). Cf. Minutes of the Consiglio di Conferenza (Council of Conference) of 3rd February in Ciaurro. *Lo statuto albertino illustrato dai lavori preparatori* cit., 115–116.

¹⁹Reference is to the classical volume by McIlwain (1998).

3.1 *The Albertine Statute by Means of Its Preamble*

The Albertine Statute was preceded by an ample preamble. The introductive formula «per la grazia di Dio» (by the grace of God) recalled the expression *Reges Dei gratia, reges Catholici* probably used for the first time by the Lombard Kings, then made his own by Charlemagne and, finally, after a long evolution become an expression of royal legitimism.²⁰ It was inserted in the preamble nearly to mark without any doubts that the constitution was an act of sovereignty of the King. Then, the list of the feudal and honorary titles of Savoy Sovereigns followed. The same expression «con la lealtà di Re e con l'affetto di padre» (with the loyalty of King and the love of Father), which precedes the manifestation of will directed to grant representative institutions more in tune with the new times and the interests of the Nation, is typical of the paternalistic vision of the State *d'ancien regime*. It is not difficult to find a certain lexical familiarity with the 1814 *Charte Constitutionnelle* in the Preamble of the Albertine Statute.²¹ The beginning of the Albertine Statute reproduces the magniloquent expressions of the French model. The formula «par la grace de Dieu» had its precedent besides in the *Charte* also in the *Déclaration de Saint-Ouen* by which the King rejected the text elaborated by the Senate (so-called senatorial constitution) and established the bases for a new Constitution with the Proclamation of 2 May 1814.

Following the Restoration, the French Monarchy had dedicated an obsessive care to the Preamble inaugurating a new form of constitutionalism.²² The Commissioner Beugnot summarised the new constitutional philosophy with the formula «to absorb the Revolution into the Monarchy».²³ In a project of Preamble drawn up by Louis de Fontanes, a free and monarchic constitution which kept all the prerogative of the Crown was already outlined.²⁴ Such a layout was restated in the definitive text.²⁵ In other words, the *Charte* was an act by the King who decided to self-limit his own powers maintaining free and monarchic institutions together.

²⁰Cf. Maranini (1926, 128).

²¹See Müßig (2016, 66–67).

²²On the model of the so-called granted constitutions inaugurated in Restoration Europe please see: Lacchè (2016c).

²³«absorber la Révolution dans la Monarchie» (to absorb the Revolution within the Monarchy). Cf. *Rapport de Beugnot au roi sur la forme de promulgation de la Charte*. In Rosanvallon, La Monarchie impossible. Les Chartes de 1814 et de 1830 cit.

²⁴The text «Projet de préambule de la Charte rédigé par Fontanes» in Rosanvallon, Pierre. *La Monarchie impossible*, cit. 243–245.

²⁵The Preamble of the 1814 *Charte constitutionnelle*: «[...] une Charte constitutionnelle était l'expression d'un besoin réel; [...] En même temps que nous reconnaissons qu'une constitution libre et monarchique devait remplir l'attente de l'Europe éclairée, nous avons dû nous souvenir aussi que notre premier devoir envers nos peuples était de conserver, pour leur propre intérêt, les droits et les prérogatives de notre couronne» (a constitutional Charter was the expression of a real need; [...] At the same time that we would acknowledge that a free and monarchic constitution should fill the expectation of Enlightened Europe, we should have remembered also that our first

Almost at the end of the preamble the Albertine Statute is defined «perpetual and irrevocable fundamental law». It is highly probable that, according to the king's will, also the expression «fundamental law» evoked the theories concerning the *lois fondamentales* typical of the French absolute monarchy.²⁶ «Perpetual» meant the oath (political and juridical obligation) taken by the King for himself and his successors, of not revoking the constitutional granting in any way.

The word «irrevocable» was, instead, intended in the meaning of a pact between the Sovereign and the Nation.²⁷ The idea of pact referred, above all, to the ancient conception which saw, in the *leges fundamentales*, a contract by which the relationships between sovereigns and parliamentary assemblies were regulated guaranteeing the succession to the throne. Moreover, such an idea allowed basing the State origins not so much on popular sovereignty, rather on a pact. In such a way, the State was based upon monarchy and people without having to go through a constituent assembly. In the background there were the positions of the French doctrinarians. In this sense the position of Constant was emblematic: according to him the constitution essentially had a political supremacy expressing the great pact between Monarchy and Nation.²⁸ In a letter sent to Minister Ricci, Antonio Costa

duty towards our people was to keep, for their own interest, the rights and the prerogatives of our crown).

²⁶On “fundamental law” in Ancien Régime please see among the abundant bibliography: Lemaire (1907), Gough (1955), Thompson (1986), Höpfl (1986), Schmale (1987), Valensise (1988), Tomás y Valiente (1995), Coronas González (1995, 2011), Saint-Bonnet (2000), Vergne (2006), Mohnhaupt and Grimm (2008), Mohnhaupt (2014), Bambi (2012, 11–28). And finally also Tavilla (2016).

²⁷«Lo Statuto è un patto che lega il Principe ed il popolo sotto una determinata forma di Governo, e per conseguenza viene ad essere la legge fondamentale perpetua ed invariabile dello Stato, in modo che se il Principe tentasse di rivocarla, il popolo rimarrebbe sciolto da ogni dovere di sudditanza, e potrebbe con giusto titolo impedire l'esazione delle imposte, non che avrebbe il diritto d'insorgere contro il Governo. D'altronde il popolo non ha un dritto di immutare le basi fondamentali dello stato, né tanto meno quello di sovvertirle o distruggerlo. Coloro quindi che, con improvvido consiglio meditassero o tentassero di fondare sulle rovine di una dinastia regnante la repubblica, cospirerebbero ad un tempo e contro il popolo e contro il Re, comprometterebbero l'intera nazione per velleità di maggiori libertà, che sovente si risolvono in illusioni o sogni, seppure non menano un'anarchia e quindi al dispotismo» (The Statute is a pact which binds the Prince and the people under a determinate form of Government and consequently becomes the perpetual and invariable fundamental law of the State, so that if the Prince tried to revoke it, the people would remain free from every duty of subjection, and could, with every right, impede the collection of taxes, as well as they would have the right of rising up against the Government. However, the people have no right of changing the fundamental bases of the State, nor that of subverting or destroying them. Therefore those who, with short-sighted advice, meditated or attempted to found the republic on the ruins of a ruling dynasty, would conspire, at the same time, against the people and against the King, would compromise the whole nation because of fanciful ambitions of greater liberties, which often result in illusions or dreams, if they do not bring anarchy and therefore despotism). Cf. La Pegna (1871). Also, Vismara (1865).

²⁸Constant (1815). Cf. Fioravanti. *Costituzionalismo. percorsi della storia e tendenze attuali* cit., 38. Concerning the Albertine Statute, please see Fioravanti (2006).

noted that the Preamble little complied with the principles that regulated a constitutional government highlighting:

Uno Statuto rappresentativo, dovrebbe essere, anziché un ordinamento sovrano, il risultato di un patto tra Popolo e Re; e dovendo d'altronde servir di Legge fondamentale dello Stato; Legge che deve ammorzare ogni dissidio tra il Re ed il Popolo, parrebbe non tanto conveniente quanto importante *il consultare il Popolo sulle basi che dovrebbero adottarsi*. Epperò sarebbe assai proficua che venisse lo Statuto pubblicato, dichiarato meramente provvisorio; provvisorio; cioè nel senso non dell'effetto, ma del disposto, *per essere poi discusso da una Nazionale Assemblea*, che assumerebbe il titolo di Costituente. Che se una Costituente riuscisse impossibile ad ottenersi, lo Statuto domanda, per i tempi in cui fu pubblicato, di essere *riformato*.²⁹

The remarks of Antonio Costa neatly disputed the traditional idea which made the fundamental law of the State rest on the conventional moment of the *pactum* and therefore the idea which tied up the will of the Prince to a public contract because of mutual consent. Such was indeed the value that some important documents of the European political tradition assumed.³⁰ According to the Ligurian scholar, a representative constitution could not be defined a pact between People and King without having consulted the people on the fundamental rules to adopt. The same words «perpetual» and «irrevocable» were an anachronism with reference to the reason of the times in that they bound government action for a more or less long lapse of time. In such a context Costa asked to consider the Albertine statute as provisional and to convene an assembly for its reform.

In Subalpine tradition, the idea of the contract was however destined to survive in the institutional everyday life. The notion of pact which—as it has been recently underlined—did not come out of the Statute but it preceded it,³¹ was destined to be reaffirmed every time it was highlighted that the representative government was the fruit of the cooperation between King and Parliament by which the most important choices for the nation were made.

²⁹«A representative Statute should be, rather than a sovereign order, the result of a pact between People and King; and after all having to serve as Fundamental Law of the State; Law that must soften every tension between the King and the People, it would seem not just convenient rather important *to consult with the People about the foundations which should be laid down*. However, it would be much more fruitful that the issued Statute was declared merely temporary; temporary, that is in the sense not of its effect, rather of its provision, *in order to be then discussed by a National Assembly*, which would assume the title of Constituent Assembly. If it would be impossible to obtain a Constituent Assembly, the Statute requires, at the time in which it was issued, to be *reformed*». The letter is included in Ghisleri (1922, 7–8).

³⁰For example, among these documents beside the English *Magna Charta*, we would also include the *Joyeuse Entrée de Brabant* of 1356 considered then as one of the historical sources of the Belgian constitution of 1831; the *Pacta conventa* of 1573 with which the Polish Diet set limitations to the French king Henry of the House of Valois. For these examples please see cf. Tavilla, *Sovranità e leggi fondamentali* cit., 95–96.

³¹On the idea that the pact did not originate only from the Statute, see Ferrari Zumbini (2016, 40–47).

3.2 *Constitutional/Unconstitutional Law in Parliamentary Acts*

The expression “unconstitutional” was not unknown when the Albertine Statute was in force.³² While examining sources it is not difficult to find how during parliamentary sessions speakers raised questions of the unconstitutionality of statute laws and regulations without affirming a prominence of the Constitution over the other juridical norms for this reason.³³ Rather there was a certain coincidence between the meaning which the term ‘unconstitutional’ assumed within English public law and the expression used in Italian constitutional practice where ‘unconstitutional’ was generically intended «every incorrect constitutional behaviour».³⁴

Generally, validity of a juridical norm should be found in its most generic conformity to the sensitivity of public opinion. Therefore, a normative act or fact was considered unconstitutional whenever it was discordant with the spirit of the Constitution.

Cavour inaugurated this form of interpretation of the Albertine Statute. This was the most important legacy of the statesman to the constitutional theory of the liberal period. From 1850 every normative act was examined in the light not only of the

³²For an overall view of the main questions on the theme please see Miceli (1902).

³³Many examples taken from parliamentary acts are included in Ferrari Zumbini. *Tra norma e vita. Il mosaico costituzionale a Torino 1846–1849* cit. The author notes how the Statute norms were reference parameters which changed according to cultural and social awareness. Generally, in the Italian case there had been a constitutionalisation without a hierarchicalisation of norms. With reference to the relationship between hierarchicalisation and constitutionalisation Dieter Grimm noted: «The *hierchicalization* of legal norms does not by itself produce a *constituzionalization*». Cf. Dieter Grimm, *The origins and transformation of the Concept of the Constitution*. In *Constitutionalism* cit., 6.

³⁴In his renowned volume dedicated to English public law, Albert V. Dicey specified, referring to the concept of sovereignty of the Parliament, that in England no juridical distinction existed between Constitution and the other laws and that no power existed to nullify an Act of Parliament (86). Later the author clarified that «The expression “unconstitutional” has, as applied to a law, at least three different meanings varying according to the nature of the constitution with reference to which it is used: (1) *The expression, as applied to an English Act of Parliament, means simply that the Act in question, as, for instance, the Irish Church Act, 1869, is, in the opinion of the speaker, opposed to the spirit of the English constitution; it cannot mean that the Act is either a breach of law or is void.* (2) The expression, as applied to a law passed by the French Parliament, means that the law, e.g. extending the length of the President’s tenure of office, is opposed to the articles of the constitution. The expression does not necessarily mean that the law in question is void, for it is by no means certain that any French Court will refuse to enforce a law because it is unconstitutional. The word would probably, though not of necessity, be, when employed by a Frenchman, a term of censure. (3) The expression, as applied to an Act of Congress, means simply that the Act is one beyond the power of Congress, and is therefore void. The word does not, in this case, necessarily import any censure whatever. An American might, without any inconsistency, say that an Act of Congress was a good law, that is, a law calculated in his opinion to benefit the country, but that unfortunately it was “unconstitutional” that is to say, *ultra vires* and void». Cf. Dicey (1889). Appendix, Note V—The meaning of the “unconstitutional” law, 427–428. «The epithet *un-constitutional* is applied to breaches of conventions as well as of law, meaning that the public opinion condemns (or should condemn) the act». Cf. Wade and Phillips (1931, 8).

letter of the Constitution, but especially of its Spirit. This allowed keeping the legal order in constant harmony with public opinion.

One of Cavour's first interventions in this respect took place on the occasion of the discussion of the Bill concerning the immovability of judges.³⁵ The Parliament asked itself if the constitutional principle according to which judges are immovable should be interpreted in the sense that immovability shall be calculated from their appointment date or rather from the promulgation of the Statute. Cavour was in favour of the first interpretation because it was more in tune with the new constitutional regime.³⁶

Examples can multiply. Think also of the discussion on the Bill for the tax on individuals and goods.³⁷ Deputy Farina accused the Cabinet of violating the most general principles proclaimed by the Statute. Cavour, minister of Finances, defended himself establishing that the new tax was perfectly in compliance with the Spirit of the Statute which imposed every citizen to contribute to the expenditure of the State proportionally to his own income.³⁸ The Parliament handled questions which dealt with central aspects of public finance. Thanks to the great ability of the speakers, budget questions were considered from a constitutional viewpoint so much as to become, in salient moments of national history, the place where to favour a greater political integration and to better develop constitutional rules. In such direction, can we also call an intervention in financial matters, as well, by Deputy Minghetti to mind. A Bill concerning stamp duties was accused of being contrary to the Spirit of the Constitution, also because some years before, a statute law of similar content had been rejected by the legislative assembly. During the parliamentary debate, Minghetti had the chance of clarifying the relationship among Constitution, public opinion and constitutional government: the true nature of the

³⁵Cavour (1863).

³⁶«Io rilevo al principio la questione chiarissima e al mio senso la prima interpretazione mi pare la più chiara, la più ovvia e la più conforme allo Spirito ed alla lettera dello Statuto» (I notice, at the beginning, a very clear matter and the first interpretation appears to me to be the most clear, the most obvious and the most consistent with the Spirit and the letter of the Statute). Cf. Cavour (1863, 150–151).

³⁷Cavour (1866).

³⁸«L'onorevole deputato Farina chiudeva il suo discorso quasi quasi tacciando il Ministero d'aver commesso un delitto di lesa Statuto nel proporre questa legge. Io in verità non so se abbia commesso così grave delitto; ma sicuramente non ne provo nessun rimorso. Io era anzi tutto pieno di rispetto per lo Statuto quando preparava e proponeva questa legge; ed aveva, come ho, l'intima convinzione, di essere con questa legge rimasto fedele e alla lettera, e ancora di più allo spirito dello Statuto medesimo, il quale vuole che le imposte siano ripartite secondo i mezzi che ha ciascuno per pagarle» (The honourable Deputy Farina closed his speech almost accusing the Ministry of having committed a crime of lese Statute in proposing this law. I, truly, do not know if I committed such a serious crime; but surely I feel no remorse. I was, first of all, full of respect for the Statute when I prepared and proposed this law; and I had, as I have, the innermost conviction, with this law, of having been faithful to both the letter and even more to the spirit of the same statute, which wants taxes to be shared according to the means that each one has for paying them). Cf. Cavour (1866, 210).

constitutional government was that of introducing legislative novelties while keeping the Constitution connected with popular feeling.³⁹

During the liberal period, was instead inexistent and/or irrelevant the category of constitutional law. The distinction between constitutional law and the others laws was formally introduced by Art. 12, Law of 9 December 1928 N° 2693, which formally sanctioned the institution of the Grand Council of Fascism. This legislative provision established the compulsory opinion of the Grand Council on every law proposal with a constitutional nature such as those dealing with the following matters: succession to the throne, attributions and prerogatives of the Crown; the composition and functioning of the Grand Council, of the Senate of the Kingdom and of the Deputies' Chamber; attribution and prerogatives of the Head of the Government, Prime Minister, Secretary of State; the faculty of the Executive power to issue juridical norms; trade union and corporative legal order; the relationship between State and Holy See; international treaties which involved variations to the territories of the State and its colonies, or rather the surrender to acquire territories.⁴⁰ This caused Italian doctrine to discuss, if this new law provision had triggered a new hierarchy among sources giving juridical prominence to the constitution and the constitutional laws over the other law sources. The difference was indeed at procedural level, in that it foresaw a heavier procedure, consisting in the advice of the Grand Council, for the approval of constitutional laws, and not really at the level of source hierarchy thanks to which an ordinary law could be declared void.⁴¹

4 Theories on Constitutional Revision

The Albertine Statute did not foresee a heavier procedure for constitutional revision.

The lack of an explicit legal provision generated no small measure of uncertainty, the reflections of the French jurists weighed upon the Italian debate. They

³⁹«l'indole del regime costituzionale sta in ciò appunto, che le riforme non si compiono e le novità non s'introducono, se non se quando siano maturate nella pubblica opinione, e che per conseguenza una medesima proposta la quale oggi non ha trovato favore nella Camera, può trovarlo un anno o cinque anni appresso quando la pubblica opinione vi sia preparata. Questo è il senso letterale delle parole dello Statuto; questo è lo spirito vero delle istituzioni costituzionali» (the nature of the constitutional regime rests in this indeed; that reforms are not made and novelties are not introduced, if they are not matured in the public opinion, and that consequently the same proposal which today did not find any favour in the Chamber of Deputies, can find it a year or five years later when public opinion is ready. This is the literal meaning of the words of the Statute; this is the true spirit of the constitutional institutions). Cf. *Atti Parlamentari. Resoconti: Discussione del progetto di legge sulla inefficacia giuridica degli atti non registrati*. Meeting of Thursday 21st May 1874, 3830.

⁴⁰Regarding the distinction between constitutional law and ordinary law: Saredo (1886), Ugo (1887), Id. (1888), Jona (1888), Miceli (1902), Liuzzi (1929), Ferraciu (1930, 1931), Sofia (1931), Agostino (1933). Cfr. Azzariti (1947).

⁴¹Cfr. Ferraciu. *Le leggi di carattere costituzionale* cit., 79 SS.

asked themselves, facing a normative gap, if the *Charte constitutionnelle* could be amended and, if so, about who the competent authority would be.⁴² While the 1814 Constitution was in force, the conviction that constitutional changes could come exclusively from the King affirmed itself. With the 1830 *Charte*, accepted by King Louis Philippe, the English model of parliamentary omnipotence was reinforced. Particularly, the issue was discussed with reference to the regency law (30 August 1842). On this occasion, Deputy Guizot pronounced the sentence, then become famous, according to which the distinction between constituent power and constituted power was like distinguishing between holiday power, and every day power.⁴³

As far as the Italian constitutional experience is specifically concerned, three different theories which followed one another and coexisted for all the duration of Kingdom of Italy were prefigured.⁴⁴

4.1 *Immutability of the Constitution and Constituent Power*

Above all, in an initial phase (two-year period 1848–49) the theory of the immutability of the Statute affirmed itself. The fear of a repealing of the constitutional grants generated an intransigent position. Such a theory was hermeneutically based on the words contained in the Preamble. According to this theoretical layout, the clause «perpetual and irrevocable law» was interpreted not only as the prohibition directed to the Sovereign of repealing the Constitution, but indicated also the absolute prohibition of amendability of the document.

This interpretation was enriched by further normative bases found in Art. 49, which required deputies and senators to take an oath of being faithful to the king

⁴²Cf. Barthélemy (1909).

⁴³For an accurate historical reconstruction please see: Rosanvallon (1985).

⁴⁴For a first overview of the theme: Carbone (1898). The author, by way of a comparative analysis of the main constitutions in force in the Nineteenth Century (United States of America, Switzerland, South American States: Mexico, Columbia, Argentina, etc., France, Belgium, The Low Countries, Luxemburg, Spain, Portugal, Denmark, Iceland, Sweden, Finland, Norway, Rumania, Serbia, Bulgaria, Greece, Austro-Hungarian Empire, Constitutions of the German area: Imperial Constitution of 16th April 1873, Bavaria, Saxony, Baden, Japan), singles out three different ways of proceeding to constitutional revision: the system of parliamentary omnipotence (Italian and English cases) that is constitutional revision by the constituted powers, the system of recurring to popular sovereignty for every constitutional amendment implies directly recurring to popular sovereignty (for example see the case of Switzerland, United States of America and Latin America) and a mixed system which, although not having recourse to popular sovereignty, admits the distinction between constitutional laws and ordinary laws and foresee heavier procedures for the revision. The author is favourable to the mixed system, that is, to the introduction among the Statute articles of a revision clause. In France, the question was the subject of comparative doctoral studies: Bousquet de Florian (1891), Borgeaud (1893), Arnoult (1896). For an initial reconstruction of the Italian case are also useful: Arangio-Ruiz (1895), Minguzzi (1900), Garello (1898), Racioppi and Brunelli (1909b). Among the literature please see Contini (1971, spec. 67–106).

and of being loyal to the Statute before they started exercising their functions, and in Art. 22 which required the monarch to faithfully respect the Statute of the Kingdom.⁴⁵ By the oath of faithfulness to the *Statuto*, sovereign and representative of the people committed themselves not to amend the letter of the constitution.

Consequently, the only tool for proceeding towards a formal revision of the constitutional text was to recur to the constituent power. This solution found a reference in the words of King Charles Albert who on the occasion of the opening of the second legislature made explicit reference to a constituent assembly which had the revision of the constitutional text as a duty.⁴⁶

The discourse of the sovereign was pronounced on 1 February 1849 in a very particular moment of the national history: the five days of Milan were just over, there had been the armistice of Salasco and the resurgence of the conflicts with Austria, while Venice resisted siege and in Rome the republic had been proclaimed. The Lombardy-Venetian people were going to hold universal-suffrage elections and they had voted for joining the Kingdom of Piedmont forcing the latter to convene a national assembly which had to proceed to revising the Statute.⁴⁷

Giuseppe Mazzini, moved to Milan in order to give his support to the patriots, sent a note to the Lombardy provisional Government highlighting his

⁴⁵Concerning the political oath and its constitutional value: Bonghi (1882), Luciani (1883), Semmola (1882), Bertolini (1883), Pierantoni (1883), Zanichelli (1890), Ugo (1900–1904), Di Jorio (1893), Guidi (1914), Pardo (1915), Gatta (1938).

⁴⁶«Riguardo agli ordini interni, dovrà essere nostra cura di svolgere le istituzioni che possediamo, metterle in armonia perfetta col genio, coi bisogni del secolo, e proseguire alacramente quell'assunto che verrà compiuto dall'Assemblea Costituente del Regno dell'Alta Italia» (With regard to the internal orders, we will take care of developing the institutions that we have, of perfectly tuning them with the genius and the needs of the century, and of readily following that assumption which will be made by the Constituent Assembly of the Kingdom of Northern Italy). Cf. Monti (1938).

⁴⁷Lombardy provisional Government of 12th May 1848 convened the plebiscite using the formula: «Noi sottoscritti, obbedendo alla suprema necessità che l'Italia intiera sia liberata dallo straniero, e all'intento principale di continuare la guerra della indipendenza colla maggiore efficacia possibile, come Longobardi in nome e per l'intercessione di queste provincie, e come Italiani per l'interesse di tutta la Nazione, votiamo fin d'ora l'immediata fusione delle provincie Lombarde cogli Stati Sardi, sempreché, sulle basi del suffragio universale, sia convocata negli anzidetti paesi e in tutti gli altri aderenti a tale fusione una comune Assemblea costituente, la quale discuta e stabilisca le basi e le forme d'una nuova Monarchia costituzionale colla dinastia di Savoia» (We, the undersigned, obeying the supreme necessity that the whole of Italy be freed from foreign occupation and with the main aim of continuing the war of independence with the utmost possible efficaciousness, as Lombards in name and for the intercession of these provinces, and as Italians for the interest of the whole Nation, we vote, from now on, the immediate merging of the Lombard provinces with the Sardinian States, on condition that, on the basis of universal suffrage, a common constituent assembly is convened in the abovesaid countries and in all others adhering to such a merging. The common constituent assembly shall debate and establish the bases and the forms of a new constitutional Monarchy with the dynasty of Savoy). Cf. *Le assemblee del Risorgimento: atti raccolti e pubblicati per deliberazione della Camera dei Deputati*. Roma: Tipografia della Camera dei Deputati. 1911. Vol. 1: Piemonte, Lombardia, Bologna, Modena, Parma, 217. Diffusely deals with these aspects Mongiano (2003, see especially 152–171)

disappointment for having called universal-suffrage elections which offered the choice of unifying with the monarchy of Charles Albert or of keeping a separate government.⁴⁸ Popular consultation was carried on anyway and the Lombardy people voted for the relative joining together which was approved by the Chamber of Deputies on 28 June 1848.⁴⁹

⁴⁸«il vostro decreto del 12 (...) sanziona quei provvedimenti fatali, e chiama i cittadini non preparati a decidere in un subito le sorti del paese con un metodo illegale, illiberale, indecoroso, architettato al trionfo esclusivo di un'opinione sull'altra. Il metodo dei registri è illegale. Perché viola, per autorità vostra, il programma ch'era condizione della vostra politica in faccia al paese; perché invola la più vitale, la più decisiva fra le questioni all'*Assemblea Costituente*. Illiberale, perché sopprime la discussione, base indispensabile al voto, cancella un diritto inalienabile del cittadino; e sostituisce all'espressione pubblica e motivata della coscienza del paese il mutismo e la servilità dell'Impero. Indecoroso, perché affrettato; perché tende a trasmutare ciò che potrebb'esser prova d'affetto sentito e di maturato convincimento in dedizione di codardi impauriti; (...) Architettato al trionfo esclusivo d'un'opinione sull'altra, perché coglie a imporsi il momento in cui quell'opinione ha preparato in tutti i modi e con tutti gli artifici il terreno; e perché voi non vi limitate neppure a chiedere al popolo se intenda o no procedere immediatamente a una decisione, ma escludete dai vostri registri una soluzione al problema, e ne sopprimete qualunque espressione» (your decree of 12th (...) sanctions those fatal provisions and calls citizens not prepared to promptly decide the fate of the country with an illegal, illiberal, indecorous method designed for the exclusive triumph of one opinion over the others. The method of the registers is illegal. Because it violates, in agreement with your authority, the programme which was the condition of your politics before the country; because it steals the most vital, the most decisive matters among those of the constituent assembly. Illiberal, because it suppresses discussion, indispensable basis to the vote, it cancels an inalienable right of the citizen; and replaces the public and motivated expression of the conscience of the country with dumbness and servility to the Empire. Indecorous, because rushed; because it tends to transform that which could be evidence of heart-felt affection and matured conviction into devotion of frightened cowards; (...) Planned for the exclusive triumph of one opinion over the other, because it seizes, in order to impose itself, the moment in which that opinion prepared the ground in every way and with all its stratagems; and because you do not limit yourselves not even to ask the people if they want or not to immediately proceed to a decision, but you exclude a solution to the issue from your registers, and suppress any expression of it). Cf. Mazzini (2011). On Mazzini's ideas about the constituent assembly please see Falco (1952). Also, see Recchia and Urbinati (2009).

⁴⁹On 15th June 1848 in Parliament a Bill presented by the Government was discussed concerning the Unification of Lombardy with the Venetian Provinces of Padua, Vicenza, Treviso and Rovigo. During the discussion the Government presented an amendment which affirmed: «L'assemblea costituente non ha altro mandato che quello di discutere le basi e la forma della monarchia. Ogni altro suo atto legislativo è nullo di pien diritto. La sede del potere esecutivo non può quindi essere variata che per legge del Parlamento» (The constituent assembly has no other mandate than that of debating the bases and the form of monarchy. Every other legislative act of it is nil by full right. The seat of the executive power therefore can be changed only by parliamentary law). Cf. *Le assemblee del Risorgimento: atti raccolti e pubblicati per deliberazione della Camera dei Deputati* cit., 219. During the discussion the reporting Deputy Rattazzi made the audience note how the formulation by the Government transformed the constituent assembly into a consultative assembly («Orbene, si dichiara che l'Assemblea Costituente non ha altro mandato tranne che quello di discutere. Così, mentre il voto dei Lombardi e dei Veneti, e quello che noi pure abbiamo espresso, portava che l'Assemblea costituente dovesse *stabilire*; il Ministro, il quale aveva e l'uno e l'altro sott'occhio, dopo di avere maturamente esaminato ogni cosa, vorrebbe che l'Assemblea costituente venisse circoscritta a discutere, ed assumere così il carattere di una semplice assemblea

The idea of a constituent power spread from the territories of Lombardy-Venetia to all the Italian peninsula. The debate which initially was directed at organising those freed territories forced the most important characters to measure themselves with the ideologies at the base of the constituent power. Distinctions between moderates and democrats were outlined in a clearer way.⁵⁰ The group of moderates sustained the monarchical-representative form and a unification under the aegis of a Monarch, at most reaching an idea of confederal assembly. Within this group there was, for example, Vincenzo Gioberti who ever since his *Primato civile e morale degli italiani* (1843) proposed a monarchical federalism of a neo-Guelph orientation, that is a confederation of States with the Pope as its head, and in September 1848 in Turin took part in the constitution of the *Società per la confederazione italiana* (Society for the Italian confederation) which had the programme of favouring a federal pact in Italy.⁵¹ The Society deemed the summons of a constituent assembly which established the forms and norms of the Confederation of the Italian States opportune and for this purpose nominated a commission for the drawing up of a Bill on the electoral law and of a model of federal act. These Bills were read, modified and approved during the public meeting which was held at the national theatre on 27 October 1848 under the presidency of Mamiani and they were sent together with an *Indirizzo ai Principi e ai Parlamenti italiani*. Another supporter of a confederation was Antonio Rosmini who intervened on the merging of Piedmont with the provinces of Lombardy-Venetia by way of a series of articles published in *Il Risorgimento* and afterwards, collected under the title of *La Costituente del Regno dell'Alta Italia*.⁵²

The group of the democrats considered, instead, the Lombard war from a national viewpoint to be solved by recurring to a constituent assembly elected by universal suffrage which would have drawn up the pact among all individuals of the

consultiva» (Well, the constituent assembly is declared to have the sole mandate of discussing. So, while the vote of the inhabitants of Lombardy and Venetia, and that which we as well expressed, established that the Constituent Assembly should decide; the Minister, who had both in front of him, after having maturely examined everything, would like the constituent assembly to confine itself to discussion, assuming in such a way the character of a simple consultative assembly)). Cf. *Le assemblee del Risorgimento* cit. 222. Therefore the Assembly reputed the introduction of further limitations to the constituent Assembly besides those already indicated in the formula of the Lombardy vote. The Chamber approved the law of unification which accepted the convening of a constituent assembly in «conformità del voto emesso dal popolo lombardo» (in compliance with the vote issued by the people of Lombardy). Mongiano (2003) and Ferrari Zumbini (2016, 321–333).

⁵⁰Cf. Prestandrea (1881, 131). Moreover, the author distinguished between Constitution granted by the Monarch and popular constitution and noted that the revision procedure should necessarily be different because of the different nature of the document. Please add: Del Balzo (1904).

⁵¹Coppi (1860, 440–446), Zama (1946), Oddo (1979).

⁵²Articles appeared respectively in *Il Risorgimento* of 1st July 1848; *Il Risorgimento* of 2nd July 1848; *Il Risorgimento* of 6th July 1848; *Il Risorgimento* of 8th July 1848; *Il Risorgimento* of 11th July 1848; *Il Risorgimento* of 13th July 1848; *Il Risorgimento* of 17th July 1848; *Il Risorgimento* of 20th July 1848; *Il Risorgimento* of 27 July 1848; *Il Risorgimento* of 27th July 1848; *Il Risorgimento* of 1st August 1848; *Il Risorgimento* of 5th August 1848.

dawning nation.⁵³ Also Giulio Pisani, in a small volume dedicated to Giuseppe Montanelli, favoured the idea of a constituent power as the only tool for Italian independence.⁵⁴ Mazzini's press contributed to spread the ideas of a constituent assembly with a popular base.⁵⁵ An important educative mission was attributed to journalism: to form a public opinion alert and informed.

The binomial "revision of the constitution" and "constituent power" heightened the tones of the political debate. On the one hand, the limits of constitutionalism by means of monarchical granting were highlighted, while on the other, the necessity of a sovereign power for a full legitimisation was underlined.⁵⁶ The end of the war with the Austrian victory made the idea of a constituent assembly which was able to modify the Albertine Statute doze off again.

4.2 *Omnipotence of Parliament*

It was the legal doctrine which better corresponded to the feeling of the time.⁵⁷ Parliamentary omnipotence, otherwise called Parliamentary sovereignty, acknowledged, to the legislative body, the power of modifying the letter of the constitution, of abrogating its principles, of waiving them or interpreting them by way of the ordinary legislative activity; rather, by way of the constitutional practice. This theory, borrowed with appropriate adjustments from the English juridical doctrine, had the advantage of sterilising the issue concerning the constituent power as *summa potestatis* attributed to the people, and at the same time guaranteed the possibility of adapting the constitutional text to the changing and inevitable necessities of the real life, without reducing the Constitution to the written document. Consequently, it was impossible to distinguish between constituent powers

⁵³«una rivoluzione nazionale può iniziare da chicchessia; ma non può compiersi che da un'Assemblea nazionale. E quest'assemblea non può uscire legittima ed efficace che dall'elezione popolare: eletta da governi o da Stati, non potrebbe rappresentare che il vecchio principio, più o meno modificato, di smembramento, contro il quale il paese s'agita e s'agiterà ... L'assemblea costituzionale non può dunque essere che costituente» (a National revolution can start from anybody; but it can be completed only by a National Assembly. And this assembly may come out as legitimate and effective only by popular election: elected by governments or States, it could only represent the old principle, more or less modified, of dismembering, against which the country protests and will protest ... The constitutional assembly therefore can only be constituent). Mazzini (2011, 623).

⁵⁴Pisani (1849).

⁵⁵Particularly see *L'Italia del popolo* which appeared for the first time in Milan from 20th May to 3rd August 1848. The title remained the same, coming out in various critical moments of Italian national life, like in Rome during the Roman Republic and then in Lausanne, Lugano and Genoa. Mazzini's press see: Ravenna (1967), Scirocco (2004, 353–394). Bruni (2007). Della Peruta (1847), Pau (2015).

⁵⁶Cf. Bianchi-Giovini (1849).

⁵⁷Cf. Racioppi and Brunialti (1909).

and constituted powers, between ordinary sovereignty and extraordinary sovereignty; rather, a sole and unique sovereignty existed.⁵⁸

Such a layout was inaugurated by the well-renowned article by Camillo Cavour published in *Il Risorgimento* where voice was raised against those who criticised the expression ‘irrevocable’ as if in such a way a system of absolute immutability was established. He clarified that such a layout ran contrary to common sense, society’s needs and also to the most common constitutional theories, affirming that «the word ‘irrevocable’, as used in the Preamble of the Statute, is only literally applicable to the new and great principles proclaimed by it, and to the important fact of a pact destined to indissolubly link the people and the King. However, this does not mean that the particular conditions of the pact were not susceptible to progressive improvements operated with the common agreement of the two contracting parties: the King, with the help of the nation, in the future will always be able to introduce, within them, all the changes which will be indicated by experience and reason of the time period».⁵⁹

Little knowing the English parliamentary system, it was deemed convenient to imitate it. From here, according to the model of the *King in Parliament*, the body competent for the constitutional revision was considered to be the Parliament, to be understood indeed as the Monarch together with the Senate and the Chamber of Deputies. The normative base was found in Art. 3 of the Albertine Statute according to which the King and the two Chambers collectively exercised the legislative power.

The revision procedure was that briefly required for the promulgation of ordinary statute laws. The legislative initiative jointly belonged to the Sovereign and the Chambers (Art. 10). The bills should be firstly examined, then discussed and approved. Over time three different modalities for the examination of a bill developed: *Offices system*, *three-readings system* and *committees system*. Discussions were public and were carried on article by article (Art. 55). In the case that a bill was rejected, it could not be proposed again in the same parliamentary

⁵⁸On these aspects, I refer to my contribution: Mecca (2016a, 159–214).

⁵⁹«La parola irrevocabile, come è impiegata nel preambolo dello Statuto, è solo applicabile letteralmente ai nuovi e grandi principi proclamati da esso, ed al gran fatto di un patto destinato a stringere in modo indissolubile il popolo ed il Re. Ma ciò non vuol dire che le condizioni particolari del patto non siano suscettibili di progressivi miglioramenti operati di comune accordo tra le parti contraenti: il Re, col concorso della nazione, potrà sempre nell’avvenire introdurre in esse tutti i cambiamenti, che saranno indicati dall’esperienza e dalla ragione dei tempi» (The word ‘irrevocable’, as it is used in the preamble of the Statute, is only literally applicable to the new and great principles proclaimed by it, and to the great fact of a pact destined to indissolubly bind the people and the King. However, this does not mean that the particular conditions of the pact are not susceptible of progressive improvements operated by mutual consent of the contracting parties: the King, with the nation’s aid, will always be able in the future to introduce all the changes in them, which will be indicated by experience and the reason of the times). *Il Risorgimento. Giornale quotidiano*, A. I, 10th March 1848.

session (Art. 56). The procedure concluded with the royal approval and promulgation (Art. 7).⁶⁰

The above mentioned theory was not just useful to neutralise the constituent power in the hands of the people, but it was also functional to legitimise the representative government.⁶¹ Supporters of parliamentary omnipotence were aware of the novelties introduced by the Albertine Statute and were also alert to the immaturity of the new institutions which needed consent and legitimisation. In the initial imprinting the cohabitation between monarchical principle and representative principle was affirmed in that they were considered genetic elements: the nation was jointly represented by the Monarch and the Parliament. Practice was entrusted with the duty of better defining the relationships between the two constitutional bodies.

4.3 *Intermediate Theory*

After almost forty years from the entering into force of the Albertine Statute, the Italian juridical doctrine, the constant changes made in the constitutional text having been acknowledged—on the matter please see *infra* § 6—made the effort of singling out some corrections for the theory of parliamentary omnipotence.

Among the jurists the strengthened conviction that more things should be done in order that the distinction between Constitution and ordinary statute law be more clear cut.⁶² At the same time the theory according to which the Omnipotence of Parliament should necessarily meet some juridical limits for the purpose of avoiding the risk of a despotic government of the majority made inroads as well.

Along this direction, the difference between the English constitutional system and the Italian one was above all noted. Indeed, Italy based the form of its government on a written constitution which was missing in Britain. Moreover, as in England the law established that Parliamentary activity will find its limitations in the general law, fruit of constitutional centuries-old experience, in the same way in Italy the legislative function was limited by the juridical principles proclaimed by the Statute and, however, by the triadic nature of the legislative power subdivided between the King and the two branches of Parliament.⁶³

⁶⁰On procedural aspects, please see: Broglio (1865), Mancini and Galeotti (1887), Donati (1914). Cf. Dickmann (2007).

⁶¹Please refer once more to my contribution: Mecca (2016a).

⁶²Cf. Carbone (1898, 117).

⁶³Marchi (1921). The author noted: «Che del resto, in genere, la funzione legislativa esser stretta da limiti risulta da quel complesso di principii che si affermano, qui come altrove, coll'affermarsi dello Stato libero moderno: il movimento storico che portò alla proclamazione delle Carte Costituzionali, alla attuazione dei principii dei poteri, alla distribuzione delle competenze fra i diversi organi costituzionali, l'enumerazione in tali Carte dei diritti fondamentali di libertà ebbero, tutte, per scopo di porre, in definitiva, dei limiti all'arbitrio degli organi dello Stato nell'esercizio delle diverse funzioni, quella legislativa compresa. Fu una tendenza codesta che, rispondendo ad

On these aspects, Santi Romano, jurist with great talents and a pronounced sensitivity, entered into the merits of the question singling out the legal, not just moral, limits to Parliamentary sovereignty with more precision.⁶⁴ First of all, the author warned that the boundaries of the legislative power were constituted by internal limits deriving from the same layout of powers and that it was impossible to single out external limits to the legislative power, like for example a syndicate on the legitimacy of the statute law to be attributed to the judges, both in the case of it being shaped as a control of constitutionality spread among all judges, and in the case of it being shaped as a control of constitutionality concentrated in the hands of special judges designated to perform this duty.⁶⁵

Santi Romano singled out *absolute limits* to Parliamentary sovereignty, like for example the prohibition of usurping the prerogatives of the other powers or the prohibition of derogating from international commitments by way of legislative acts, and *relative limits* which allowed the Parliament to modify the constitutional norms only on particular conditions. Such conditions were: the necessity understood as living law, thanks to which at legislative level a dichotomy between law and life was cancelled; the derogation from Statute for the purpose of acknowledging a *constitutional custom* that already modified the constitutional letter in fact; *integrative statute law*, phenomenon which was halfway between the mechanism of text amendability and constitutional interpretation, which broadened the cases of implementation of the Albertine Statute. The author noted that the written constitution has its base in a non-written law, which directly emanates from social forces.⁶⁶ From this assumption came the fact that customs played a primary role in public law.

Generally, the attempt of the legal doctrine between the Nineteenth and the Twentieth centuries was that of distinguishing within the Statute between essential and/or fundamental norms and contingent or accessory norms, in such a way narrowing the absolute prohibition of constitutional revision to the sole first group of norms. This layout, however, only moved the question from the possibility of

un bisogno della coscienza giuridica popolare, doveva portare a non dovere più riconoscere in nessun organo costituzionale una sovranità della stessa natura di quella dei Re assoluti, una *legibus absoluta potestas*» (However, generally, the fact that the legislative function is bound by limitations comes out by that whole of principles which are affirmed, here as everywhere else with the affirmation of the modern free State: the historical movement which led to the proclamation of the Constitutional Charters, to the implementation of the principles of the powers, to the distribution of competences among the different constitutional bodies, the enumeration in such Charters of the fundamental rights of liberties had, them all, the purpose of definitely setting limitations to the discretionary power of the State bodies while exercising their different functions, the legislative one included. This was a trend which answering a need of the popular juridical conscience should lead to no more having to recognise a sovereignty of that same nature as the absolute Kings, a *legibus absoluta potestas*, in any constitutional body) (17–18).

⁶⁴Romano (1950a, 179–200). The article is published for the first time in *Archivio di diritto pubblico* 1902.

⁶⁵Romano (1950a, 188).

⁶⁶Romano (1950a, 198).

modifying the text to the often ephemeral attempt of classifying norms into primary and secondary. Doctrinal positions in the late Nineteenth century were many.⁶⁷ A common feature of these theories can be found in the intangibility of the representative government upon which the whole constitutional structure inaugurated by the Albertine Statute rested. In this sense the position expressed by Livio Minguzzi is exemplifying. He declared that the limit of parliamentary omnipotence lies within the same nature of the institution. Indeed, the Parliament being a body of the State, if the power of modifying the form of the State were attributed to it, it would mean acknowledging, to a sole body, the power to change the whole organism to which it belongs.⁶⁸ Minguzzi remarked once again how also in England Parliamentary omnipotence met a limit in the Crown. Indeed, the Parliament could never have acted against the royal prerogatives, in that monarchy had the power of approving the statute laws.

5 Flexibility and Elasticity of the Constitution in the Legal Debate

In this context, the Italian constitutional doctrine speaks of ‘flexibility’ and/or ‘elasticity’ of the Albertine Statute.

As is known, according to James Bryce’s theory the Constitutions could be classified as rigid or flexible. Bryce denied any usefulness to the distinction between written and unwritten constitutions because «in all written Constitutions there is and must be, as we shall presently see, an element of unwritten usage, while in the so-called unwritten ones the tendency to treat the written record of custom or precedent as practically binding is strong, and makes that record almost equivalent

⁶⁷Cf. Borsi (2009).

⁶⁸Minguzzi (1899). «Conseguentemente quella dell’onnipotenza parlamentare è un’espressione erronea e pericolosa; la quale viene usata, perché esprime energicamente, anzi iperbolicamente, il potere del Parlamento, ma che dovrebbe essere bandita dalla scienza. Maggiormente viziata intrinsecamente è quella che il Parlamento sia una costituente perpetua» (Consequently that of parliamentary omnipotence is an erroneous and dangerous expression; which is used, because it, energetically rather hyperbolically, expresses the power of the Parliament, but which should be banished by science. That which the Parliament is a perpetual constituent is more intrinsically flawed) (103–104). The author reached the conclusion that «nei governi costituzionali l’attività del Parlamento nella sua più ampia estensione ha per suo limite la forma politica dello Stato» (in constitutional governments the activity of Parliament, in its widest extension, has the political form of the State as its limitation) (105); «Il Parlamento italiano, per servirci di un esempio, può riformare liberamente come crede la costituzione del regno, ma che sempre costituzione del regno rimanga» (The Italian Parliament, in order to use an example, can freely reform, as it wishes, the constitution of the kingdom, but on condition that it forever remains the constitution of the kingdom) (106).

to a formally enacted law, not to add the Unwritten Constitutions». ⁶⁹ Specifically, the English jurist explained that «The Statutory Constitutions become developed by interpretation and fringed with decisions and enlarged or warped by custom, so that after a time the letter of their text no longer conveys their full effect». ⁷⁰ Also, Bryce noted that «Excluding despotically governed countries, such as Russia, Turkey and Montenegro, there are now only these in Europe, those of the United Kingdom, of Hungary—an ancient and very interesting Constitution, presenting remarkable analogies to that of England—and of Italy, whose Constitution, though originally set forth in one document, has been so changed by legislation as to seem now properly referable to the flexible type. Elsewhere in Europe, all Constitutions would appear to be rigid». ⁷¹ Definitely, the distinction between flexible and rigid Constitutions was in a formal method (or special revision procedure) of amending the constitution.

The Italian legal doctrine accepted Bryce's classification only at the beginning of the twentieth century, as a result of the constitutional changes introduced by the Fascist regime.

In particular, Teodosio Marchi analysed the flexibility of the Albertine Statute in two important essays: *Lo Statuto albertino ed il suo sviluppo storico* (1926) and *Sul carattere rigido o flessibile della Costituzione italiana* (1938).

In the first work, the author recognised two different merits of the Albertine Statute: the first, being a 'written constitution' and the second being a 'flexible constitution'. According to Marchi, the Albertine Statute could adapt continuously without violent tremors because it is similar to a centuries-old tree which keeps its trunk and changes leaves each new spring («può continuamente adattarsi, senza scosse violente, al graduale, perenne mutarsi della coscienza giuridica, quasi albero secolare, che, mantenendo saldo il suo tronco, si spoglia, via via, di rami inutili e secchi per rinverdirsi al soffio di ogni nuova primavera»). ⁷²

In his second essay (*Sul carattere rigido o flessibile della Costituzione italiana*), Teodosio Marchi reaffirmed that in the Subalpine experience there was no distinction between ordinary law and constitutional law, but the constitutional changes occur by means of the ordinary law. ⁷³ Furthermore, he affirmed that even in flexible constitutions there was a principle unmodifiable and that was the form of Government. ⁷⁴

⁶⁹Bryce (1905, 6). In the preface to the Italian edition, Alessandro Pace noted how in Bryce's thought the prominence of the constitution and the constitutional rigidity were two faces of the same coin. He then specified that the prominence of constitution is a relational concept: it exists when the Constitution imposes respect of its provisions to the legislator. Cf. Pace (1998, XXVI).

⁷⁰Bryce (1905).

⁷¹Bryce (1905, 11–12).

⁷²Marchi (1926, spec. 188).

⁷³Marchi (1938).

⁷⁴Marchi (1938, 327): «in tutte le Costituzioni, monarchiche o repubblicane, per quanto flessibili esse siano, un principio esiste che, se non proclamato in modo esplicito, vi è sempre implicitamente contenuto, il quale riconosce la rigidità, la intangibilità, di ciò che costituisce l'essenza

Without knowing Bryce's theory well, Luigi Rossi preferred, however, to talk of *L'elasticità dello Statuto Albertino* (1939), meaning the ability of the Albertine Statute to adapt to the circumstances, because its formulas, summarising characteristics and generic, leave an enormous margin for development and their integration through special constitutional laws, various customs and interpretations («alle variabili necessità dei tempi e delle circostanze, perchè le sue formule, sintetiche e generiche, lasciano largo margine al loro sviluppo e alla loro integrazione mediante leggi costituzionali particolari, consuetudini e interpretazioni varie»).⁷⁵ Elasticity of the Statute also meant reconciling two opposites: the stability of the basic principles with the ability of transformation and change in special provisions. The author recognised that the issue of elasticity had something to do with flexibility, but they could not be equated.⁷⁶ The elasticity of the Constitution consisted not in the competence of Parliament to amend the constitution, but in the wide field reserved for the customary law to be understood in a broad sense, also, including *usus fori*, the *consuetudo parlamenti* and all sources not covered by the law. In flexible types of Constitutions, indeed, there was a variety of sources, there was not a primary source, a precise and reliable law; but there was a set of several different rules, which were intersected, made up, or deleted, according to the circumstances. Staying with Rossi, the characteristics of elasticity is useful in overcoming the distinction between flexible constitution and rigid constitution and surmounting the difficulties of this classification.

From these essays, the Albertine Statute was universally considered a flexible and an elastic Constitution meaning that the text could be innovated by ordinary law or the text could be changed without formal amendments. This debate was so pervasive that it even continued under the Italian Republican Constitution (1948). For example, by discussing the nature of the Albertine Statute, Alessandro Pace denied the logical assumption that only rigid constitutions do provide a special proceeding to amend the Constitutional text. Finally, in the evaluation of a Constitutional character the constitutional interpretation plays an important role.⁷⁷

stessa della forma speciale di Governo» (in every Constitution, monarchic or republican, no matter how flexible they are, a principle exists that, if it is not proclaimed explicitly, it is always implicitly contained in them, which recognises the rigidity, the intangibility of that which constitutes the same essence of the special form of Government).

⁷⁵Rossi (1940, spec. 27–28).

⁷⁶Rossi (1940, 35).

⁷⁷It is difficult to summarise the Italian debate on the matter. For an overview please see Pace (1996). The author demonstrates the reasons for the historical mistake directed at identifying the causes of rigidity of the constitution in having foreseen, in the same constitution, a special procedure of constitutional revision. Pace's reflection had among its merits that of clarifying the concept of constitutional prominence and the essential characteristics of a fundamental law. Among those studies that move along that path, please see: Varela Suanzes (1994), Blanco Valdés (1997), Bignami (1997), Soddu (2003), Lanchester (2011). Finally, Ferrari Zumbini (2011) and Id., *Tra norma e vita* cit. The author speaks of mobility of the Statute due to three requisites: elasticity, flexibility and ductility.

6 Interpreting the Constitution: Letter of Statute, Customs and Practice

The category “flexible constitution” was acknowledged late, even though it had extraordinary fortune and circulation.⁷⁸ Early on, jurists talked generically about interpretation in compliance with the spirit of the Constitution, changes, waivers or abrogation of the Statute.

Changes of the letter of the Albertine Statute were very few.⁷⁹ Among these, there was the article dedicated to the flag: the Constitution established the azure colour among the characteristics of the ensign, however after the Lombardy-Venetian war the Parliament approves a statute law which acknowledge the tricolour with the coat of arms of the Savoy family as a flag. A further example can be statute law N° 665 of 1912 with which Art. 50 of the Statute which prescribed no retribution or allowance for exercising the role of parliamentarian.⁸⁰

For the purpose of better understanding the Italian experience, attention must, however, not be paid not the changes of the letter, rather to the so-called tacit changes, that is to those changes of the meaning of the constitution without changing the written text for this reason. In other words, the interpretation and the practice represented the most important mechanism of constitutional change.⁸¹ In this context a primary role was acknowledge to non-written norms.⁸²

⁷⁸About “flexibility” Miceli (1898) talked for the first time. Cfr. Colombo (2003, 131).

⁷⁹For a thorough examination of the (implicit and explicit) changes of the letter of the Statute please see Arangio-Ruiz (1913, 466–467). For a comparison between letter of the Statute and text integrated with customs and practices, it is very useful the *Attachment A* to the volume by Ferrari Zumbini. *Tra norma e vita* cit.

⁸⁰For an overview of the matter without any pretension of exhaustiveness, please see: Montalcini (1935, 371), Chimienti (1915), Arcoleo (1913), De Dominicis (1913), Brunelli and Racioppi (1909), Malvezzi (1905), Trespioli (1900), Piscel (1897), Zanichelli (1887), Brunialti (1882), De Mauro (1882), Linati (1882), Castagna (1865), Casanova (1859), Peverelli (1849). Cf. Musso (2000), Mola (1988).

⁸¹Arangio-Ruiz explicitly spoke of tacit (implicit) changes. Cfr. Arangio-Ruiz, *Istituzioni di diritto costituzionale italiano* cit. For a theoretical framework see Voigt (1999).

⁸²Cfr. Longo (1892). Custom is legal norm when it occurs two assumptions: *diuturnitas* and *opinio juris ac necessitatis*. Ranelletti clarified the importance of customs in the Italian legal order: «Il sistema legislativo del nostro diritto pubblico, per la sua formazione recente e senza tradizioni nazionali e imitato da altri popoli con un procedimento precipitoso, anzi abborracciato, è incompleto e difforme dalle tendenze dello spirito nazionale; e d'altronde non tutto in esso si può regolare con leggi, poiché molte materie mal si prestano ad essere contenute nella rigidità della formula legislativa; (...) supplisce bene la consuetudine, che ha maggiore flessibilità per adattarsi alla varietà delle condizioni di fatto e tenere il dovuto conto dell'interesse pubblico» (the legislative system of our public law, for its formation which is recent and without national tradition and inspired by the law of other people with an overly hasty rather patchy procedure, is incomplete and dissimilar to the trends of the national spirit; and therefore not everything in it can be regulated with laws, since many matters are badly suited to being contained within the rigidity of the legislative formula; (...) customary law which has greater flexibility in adapting itself to the variety of the factual conditions and to rightly consider public interest compensates well). Cfr. Ranelletti (1913).

Italian writers justified this importance adopting the following reasons: the lack of a century-old tradition of doctrinal and legislative elaborations, the laconicism of the constitutional text, and finally the greater adaptability of customary law to the changeable practical needs. Scholars considered customary law as an autonomous, spontaneous and unintentional juridical source. The foundation of unwritten juridical norms was to be found in real and fundamental needs of constitutional life.⁸³ That which characterised customary law compared to other constitutional norms was the predominance of the political element, since certain relationships between State bodies, because of their complexity and changeability, are better suited to be regulated by the flexibility of customary law rather than the rigour and stability of written norms. Moreover, starting from Santi Romano's reflection, doctrine associated constitutional customary law with the so-called «correttezza costituzionale» (constitutional fairness), which only partially coincided with the English conventions of constitution.⁸⁴ The rules of «correttezza costituzionale» (constitutional fairness) were rules relating mainly to custom and political morality from which constitutional bodies should draw inspiration. These rules could not be classified among juridical norms and could not be confused with customary law, affirming themselves immediately and without expiry of time.⁸⁵ They often represented the first step toward a juridification of the same rules.⁸⁶

All the unwritten rules greatly contributed to the evolution of the Constitution. In particular, the «tacit changes» intervened on the document at least in a twofold way: they implemented/developed the written document and corrected eventual mistakes.

This is the case in which, through constitutional practice and interpretation, principles and rules, not explicitly considered by the constitution were set. These rules essentially derived from the long and uninterrupted practice and were based

Another author in relation to the Italian public law distinguished three types of customs: interpretative, rescinding and innovative. Cfr. Ferraciu (1913), Id. (1919), Id. (1921). Si veda, inoltre, Girola (1934). In 1909, for the first time in Italy, Romano debated the issue of constitutional conventions. Next to the customs, Romano identified a complex of flexible and folding rules regulating the very delicate relationship between the powers and the political conduct. Cfr. Romano (1950c). The author debated, also, the relationship between law and morality. Cfr. Romano (1947). It is noted, in fact, that «le norme di correttezza bene spesso si applicano a rapporti, che, per la posizione eminente degli organi costituzionali cui si riferiscono, per gli alti interessi di natura pubblica che sono destinati a tutelare, per l'indole eminentemente politica della materia che essi concernono, risultano assolutamente inidonei a venir regolati dal diritto, sia pure per mezzo di norme consuetudinarie» (appropriateness rules often apply to relationships, which, for the prominent position of the constitutional bodies to which they refer, for the high interests of public nature which they are destined to protect, for the eminently political nature of the matter which they are concerned with, result absolutely unsuitable for being regulated by law, even if by way of customary laws) (96). Cfr. Biscaretti di Ruffia (1939). Please see also Caristia (1953). Finally, for a wider reflection please see Avril (1997).

⁸³Ferraciu (1919, 28).

⁸⁴Romano (1950c).

⁸⁵Ferraciu (1919, 34–35).

⁸⁶Biscaretti di Ruffia (1939, 96).

on the tacit agreement of constitutional bodies. A disavowal of these norms constituted, in fact, a systematic violation of the spirit of the constitution.

The main example is that of a primordial development of representative government in the form of parliamentary government. The Albertine Statute established the role of Deputies in only three articles: Art. 65—The King appoints and dismisses (removes) his Deputies; Art. 66—Deputies have no right to vote in Parliament; Art. 67—Deputies are responsible.

The letter of the Statute granted the King the absolute right of appointing the Cabinet; customary practice, instead, had established that the Prime Minister won the double confidence of the King and the Chamber of Deputies.⁸⁷ Italian scholars found the foundation of the rules concerning the representative government in customary law.⁸⁸

More often non-written rules, interpretations and practices intervened in the letter of the Statute in order to soften its rigour, favouring in such a way a better functioning of the constitutional system.

The most evident example was constituted by Art. 53 of the Albertine Statute which required an absolute majority of members for parliamentary meetings and decisions. The difficulty in reaching the legal number produced the development of the practice according to which senators and deputies who were absent for a just cause, bishops and public officials who were busy in the exercise of their own functions, were not counted for purpose of the decision.⁸⁹ Moreover, it was the same Cavour who, intervening against Deputy Moia, who deprecated certain parliamentary practices, recollected the distinction between decisions and discussions and highlighted how the practice was not contrary neither to the letter nor to the Spirit of the Statute.

7 National Unification by Constitutionalisation

The historical and legislative events which led to national Unification are well known.⁹⁰ The statute law of 25 April 1859 conferred, to the Sardinian Government for the duration of the war, all legislative and executive powers and the faculty of doing, under ministerial responsibility by way of simple royal decrees, all the acts necessary for the defence of the homeland.⁹¹ On the basis of such law, extraordinary magistratures were instituted in almost all the Italian Provinces and States

⁸⁷About the origins of the confidence vote procedure see Rossi (2001).

⁸⁸For an analysis of the different theories on the matter please see: Raggi (1914).

⁸⁹Please allow me to refer to Mecca (2016b).

⁹⁰Among the many works, please see Martucci (1999), Ghisalberti (2002, 87–122 (chapter III. *L'Unificazione politica e la costruzione dell'apparato Statale*)), Pene Vidari (2010a), Genta Ternavasio (2012, especially chapter III. *L'unificazione politica: dal regno di Sardegna al regno d'Italia*).

⁹¹Latini (2005, spec. 210–226) and Pene Vidari (2010b).

which aspired to a union with the Sardinian State.⁹² A Lieutenant Decree of 11 June 1859 instituted a General Directorate at the Ministry of Foreign Affairs to which all the matters concerning the annexed Italian Provinces were conferred. With the exclusion of Lombardy for which the consent expressed through the 1848 popular consultation (*infra* § 4.1.) was deemed sufficient, in other Italian provinces between March and November 1860 plebiscites with voting rights granted to 21 year-old male citizens were carried out.⁹³ After the law of 3rd December 1860 the Government accepted the annexation of those Provinces of central and Southern Italy. The royal Decree of 17 December 1860 declared the annexation of the provinces of Naples into the Subalpine Constitutional Monarchy; the Royal Decree of 16 December the annexation of Sicily, the Royal Decrees of 17 December the annexation of the provinces of Marche and Umbria, by way of similar plebiscites the Royal Decree of 22 March annexed the provinces of Tuscany and the Royal Decree of 18 March the province of Emilia.

Historiography dedicated important pages to single moments or juridical institutions which consented political-institutional integration. Alongside studies on the customary institution of lieutenancies and on the activity of provisional governments, on plebiscites and on the law concerning full powers, scholars discussed, as well, if the Italian State was the prosecution of the Sardinian Kingdom or if it was a new State, the fruit of the reunion of the ancient kingdoms.⁹⁴ Here, however, we would like to observe the national Unification through a constitutional perspective. In other words, I will try to underline in which way constitutional forms were given to the dawning Kingdom of Italy. The constitutionalisation was realised by the recourse to three tools: the formula contained in the plebiscites, the granting of the Albertine Statute to all conquered territories and the parliamentarisation of the national cause.

The formula of the plebiscites was more or less the same: accession to the constitutional monarchy of King Victor Emmanuel II was required.⁹⁵ According to

⁹²Santangelo Spoto (1902–1905); Marchi (1918, 1920, 1925).

⁹³Cf. Mongiano (2003), Fruci (2007, 2011), Lacchè (2016d) and Pene Vidari (2016).

⁹⁴Anzillotti (1912), Romano (1950b), Marchi (1924), Orlando (1940).

⁹⁵*Formula of Tuscany plebiscite* (11th and 12th March 1860): «Unione alla Monarchia costituzionale del Re Vittorio Emanuele II, ovvero Regno separato» (Union to the constitutional Monarchy of the King Victor Emmanuel II, rather separated Kingdom); *Formula of Emilia plebiscite* (11th and 12th March 1860): «Annessione alla Monarchia costituzionale del Re Vittorio Emanuele II, ovvero: Regno separato» (Annexation to the constitutional Monarchy of the King Victor Emmanuel II, or: a separate Kingdom); *Formula of Neapolitan Provinces plebiscite* (21st October 1860): «Il popolo vuole l'Italia una e indivisibile con Vittorio Emanuele Re costituzionale e suoi legittimi discendenti?» (Do the people want one and indivisible Italy with Victor Emmanuel constitutional King and his legitimate descendants?); *Formula of Sicily plebiscite* (21st October 1860): «Il popolo Siciliano vuole l'Italia una e indivisibile con Vittorio Emanuele Re costituzionale e suoi legittimi discendenti?» (Do the Sicilian people want one and indivisible Italy with Victor Emmanuel constitutional King and his legitimate descendants?); *Formula of Marche plebiscite* (4th and 5th November 1860): «Volete far parte della Monarchia costituzionale del Re Vittorio Emanuele II?» (Do you wish to become part of the constitutional Monarchy of the King

Alberto Mario Banti the consensus by the Plebiscites was not a “founding act” but an “confirming act” of the will of the Nation.⁹⁶ Plebiscites were a political act more than a juridical act: they were made in order to please certain trends and necessities which manifested themselves in the public conscience and for reasons of international politics. In them there was a generic reference to the constitutional monarchy which meant gathering the main forces of the nation around the Sovereign. The constitutional monarchy should represent Unity and should stop those substantial discourses which prevented working at a common project.⁹⁷ In opposition to those who saw the constitutional monarchy only as an initial step that anticipated the Republic or at least the convening of a constituent assembly, Carlo Boncompagni said:

Per l'Italia, il Re non è solamente colui che regge le sue sorti, e che la guida alla sua liberazione; egli simboleggia una grande istituzione destinata a proteggere i suoi destini futuri. Che se lo stare in fede della monarchia fu necessario finora, questa necessità divenne più stretta dappoi che l'unità nazionale fu posta in cima del nostro programma. La monarchia fu la unificatrice di tutte le grandi nazioni d'Europa: la unificazione fallì là dove mancò quel simbolo del diritto nazionale che è il Re.⁹⁸

National unification was realised without a constituent assembly in that the Albertine Statute was deemed sufficient. In the two-year period 1859–60 the Constitution of Charles Albert was published/promulgated in every province for mere needs of legitimisation of the ongoing historical process of unification.

Victor Emmanuel II?); *Formula of Umbria plebiscite* (4th and 5th November 1860): «Volete far parte della Monarchia costituzionale del Re Vittorio Emanuele II?» (Do you wish to become part of the constitutional Monarchy of the King Victor Emmanuel II?); *Formula of the plebiscite of the provinces of Venetia and Mantua* (22nd October 1865): «Dichiariamo la nostra unione al Regno d'Italia sotto il governo monarchico costituzionale del Re Vittorio Emanuele II e dei suoi successori» (We declare our union to the Kingdom of Italy under the constitutional monarchic government of the King Victor Emmanuel II and his descendants). Cf. Mongiano (2003, 216).

⁹⁶Banti (2011).

⁹⁷Luigi Lacchè noted that on the European Continent the constitutional monarchy is a general formula, a complex political order, a conceptual space which took on a variety of characteristics. Cf. Lacchè (2016a, *History & Constitution* cit., 252).

⁹⁸«For Italy, the King is not only he who holds its fate, and who guides it to its liberation; he symbolises a great institution destined to protect its future destiny. If to trust the monarchy has been necessary till now, this necessity became more urgent ever since the national unity was placed at the top of our programme. The monarchy was the unifier of all the great nations of Europe: unification failed there where that symbol of national law that is the King was lacking». Boncompagni (1861, 34). Lampertico as well noted that: «L'idea di monarchia costituzionale richiama non solo l'idea di monarchia limitata ed è in contrapposto quindi a monarchia assoluta, ma inoltre di monarchia rappresentativa ed in cui i poteri sovrani si esercitano dal Principe e dai rappresentanti della nazione» (The idea of constitutional monarchy brings to mind not only the idea of limited monarchy and therefore is in contrast with absolute monarchy, but moreover it recalls the idea of representative monarchy where the sovereign powers are exercised by the Prince and by the representatives of the nation). Cfr. Lampertico (1886, 56).

The Statute was again elevated to the role of political symbol (not legal) of the new State and devaluation of the letter of Constitution continued.⁹⁹ Fedele Lampertico (1833–1906) noted that:

La Costituzione dello Stato Sardo ha bastato, perché mediante il concorso del Re, del Senato e della Camera dei deputati, ossia senz'uopo di costituente venisse proclamato il Regno d' Italia, e ne divenissero parte integrante i paesi d'Italia o soggetti già allo straniero o smembrati negli antichi Stati. Qui però l'atto costitutivo si è trovato immedesimato coll'atto stesso di unione, d'aggregazione, d'incorporazione nazionale. Il quale atto di unione ritrae origine e valore dai plebisciti, per cui venne a costituirsi l'unità d' Italia.¹⁰⁰

According to Lampertico the Statute was the fundamental and irrevocable law because by way of the nation consent permitted to share the sovereignty between the King and the Parliament. In a key passage the author noted that the Constitution was not only the written text but Constitution was inside the public sentiment, the practice, the customs, the legislation and in the history of Risorgimento.¹⁰¹ In the same years, public opinion constantly asked to restore constitutional order within the framework of the Albertine Statute. *La Gazzetta del popolo* of 13 January 1860, with the explicative title of *Give us back the Statute! (Restituiteci lo Statuto!)*, noted

In fatto di costituzione non si può e non si deve far credito, essenchè il semplice fatto di un credito costituiscono un debito verso la Costituzione, quindi un atto incostituzionale. Soggiungiamo che a noi non importa gran fatto che il Ministero si chiami Pietro o Paolo o che sia costituzionale in teoria, ciò che chiediamo che siano costituzionale in pratica.¹⁰²

Moreover, *La Gazzetta del popolo* of 12 August 1860 noted:

Lo Statuto nostro è buono, e possiamo dirlo anche migliore di quasi tutte le contemporanee costituzioni scritte. (...) Lo Statuto italiano (...) ha eziando agevolato il futuro ordinamento delle altre provincie d'Italia che aspettano la liberazione.¹⁰³

⁹⁹Manca (2015, 89–134).

¹⁰⁰«The Constitution of the Sardinian State was enough, because by way of the involvement of the King, the Senate and the Chamber of Deputies, or without the need of a constituent assembly the Kingdom of Italy was proclaimed, and the countries of Italy, which were either subject to foreign occupation or dismembered into the old States, became integral part of it. Here however, was the constitutive act identified with the same act of national union, aggregation, incorporation. Such act of union derives its origin and value from the plebiscites, by which the unification of Italy was constituted». Lampertico (1886. *Lo statuto e il senato* cit., 50).

¹⁰¹Lampertico (1886, 99).

¹⁰²«On the matter of constitution, credit cannot and must not be given, since the simple fact of a credit constitutes a debt towards the Constitution, therefore an unconstitutional act. We add that we do not care a lot for the fact the Ministry is called Peter or Paul or that it is constitutional in theory, that which we ask is that it is constitutional in practice».

¹⁰³«Our Statute is good, and we can also define it better than almost all the other written contemporary constitutions. (...) The Italian Statute (...) has also facilitated the future legal order of the other Italian provinces which wait for liberation».

The newspaper *L'Opinione pubblica* focused on specific constitutional issues like for example the legitimacy of the law concerning full powers and on provisional governments.¹⁰⁴ Alongside the restoration of constitutional rules by way of a return to the Statute, a part of the public law doctrine hoped for the immediate summoning of the Parliament.¹⁰⁵ According to Mazzini and the Mazzinians the Parliament did not have any title for facing the issue of national integration.¹⁰⁶ Cavour, however, decided to face the situation at parliamentary level. On 2 October 1860 the Prime Minister presented a Bill with only one article to the Chamber in which he asked for the authorisation of the Government to proceed onto the annexations of new provinces through royal decrees.¹⁰⁷ Cavour admitted in front of the Parliament that during the annexation process of Tuscany and Emilia many unconstitutional acts had been carried out:

Il nuovo Ministero si affrettò di dar opera all'annessione; ma, siccome questa incontrava gravi ostacoli nella diplomazia, parve opera savia e prudente l'associare il Parlamento al suo compimento; ed egli è per ciò che quando i dittatori dell'Emilia e della Toscana promossero il plebiscito, il Governo del Re li invitò a promuovere immediatamente l'elezione dei deputati di quelle provincie, chiamandoli tutti insieme a sedere in quest'aula. Ma così facendo, o signori, io lo dichiaro altamente, noi ci siamo scostati dalla stretta legalità, noi abbiamo commesso un atto incostituzionale; noi non avevamo, a termini di rigoroso diritto, facoltà di invitare i deputati dell'Emilia e della Toscana a sedere in Parlamento per deliberare assieme ai rappresentanti delle antiche provincie (e tra queste annovero anche la Lombardia) intorno all'annessione delle nuove provincie.¹⁰⁸

In this speech, the Count underlined that under international pressure the annexation procedure was not properly carried out according to a legitimate procedure, since the act was authorised through an enlarged Parliament with

¹⁰⁴*L'Opinione pubblica*, 29th September 1859, N° 271; *L'Opinione pubblica*, 6th October 1859, N° 278; *L'Opinione pubblica*, 14th October 1859, N° 286; *L'Opinione*, 24th November 1859, N° 327.

¹⁰⁵La nazione provvegga alla nazione. *Il diritto*. 28th April 1860, N° 118 and L'appoggio del parlamento. *L'opinione*, 6th May 1860, N° 126. Articles are also reprinted in the Appendix of the volume by Caracciolo (1960).

¹⁰⁶Mazzini, Giuseppe. Assemblea e plebisciti. *Il Popolo d'Italia*. 19th October 1860.

¹⁰⁷For a detailed analysis on the statute law and on the content of the Relation by Cavour to the bill, please see Santoncini (2008, 217–232).

¹⁰⁸«The new Ministry hastened to realise the annexation; but, since this met serious obstacles in diplomacy, a wise and prudent operation appeared to be associating the Parliament to its realisation; and it is for this reason that when the dictators of Emilia and Tuscany promoted the plebiscite, the Government of the King invited them to immediately promote the election of the deputies of those provinces, summoning them all together to sit in this Chamber. However, in doing so, Milords, I declare it loudly, we diverged from the strict legality, we have committed an unconstitutional act; we did not have, according to rigorous law, the faculty of inviting the deputies of Emilia and Tuscany to sit in Parliament in order to decree together with the representatives of the old provinces (and among them I include Lombardy as well) on the annexation of the new provinces». Cf. Artom and Blanc (1868, 606).

representatives of new provinces. To the South of Italy the statesman, therefore, proposed an alternative solution. In the same report, he asked for a motion of confidence. Cavour noted that it was «more consistent with the spirit of our institutions» to legally proceed, that is making the electoral committees vote the annexations first and then summoning the Parliament.¹⁰⁹

After a long discussion, the Chambers approved the annexations. The opposition was limited to more advanced criticism of different procedure than in the past. The statute law was approved on 16 October 1860, but it was promulgated only on 3 December 1860 after that the plebiscites of the Southern provinces, of the Marche and Umbria were carried out. Then, the Parliament was dissolved on 28 December 1860. The results of the elections of 27 January substantially rewarded the Cavour politics. On 18 February 1861 the new parliamentary session was inaugurated with a solemn meeting where for the first time the new representatives of the new State filed in together. Some days later a Bill was presented by way of which Victor Emmanuel II assumed the title of King of Italy for himself and his descendants.

8 Epilogue

Constitutionalisation was not a moment, it was rather a continuous process which characterised Italian Unification. It was a question of a phenomenon which had the purpose of giving constitutional forms to the Nation. The parabola of this process remains an open question with non-defined features for many aspects: it had its origins in Piedmont-Savoy when the small State connected its own politics and institutional transformations to the national cause; it proceeded during the making up of the Kingdom of Italy and continued also after the Unification. This phenomenon consisted in making a “common” constitutional patrimony based on the idea that statute laws and institutions must agree with the Spirit of the Albertine Statute come to the surface, and in making sure that this spirit spread within all the social body. A good part of the results are not easily valuable if we do not want to get to the heart of the matter with judgements on its value which often position themselves around the incompleteness of the constitutional forms and the limits of the institutional results which characterise the Italian State.

The constitutionalisation of the Italian Unification had a written constitution at its core. The Albertine Statute was considered the main bond for the political-social dimension, a political necessity, but it did not rise to the role of a law higher than the other norms of public law (hierarchicalisation of norms) and a control of constitutionality was lacking.¹¹⁰ No judge had the faculty of pronouncing on the

¹⁰⁹Artom and Blanc (1868, cit., 607).

¹¹⁰Among those who fought for a control of constitutionality there was for example, Racioppi (1905). The author admitted a judicial control all the times that procedural norms included in the Constitution were not respected. Moreover, the judiciary could verify if the Parliamentary consent was validly formed. Racioppi tried to single out norms included in the Albertine Statute which

legitimacy of a statute law. The Court of Cassation, in a decision of 26th January 1871, was firm in holding that searching for the opposition of a norm to the Statute and to the rights of the citizens was a duty exclusively reserved to the Parliament and the Sovereign.¹¹¹ Such a reconstruction was corroborated by the theory of separation of powers, according to which it was not acceptable that the judicial power syndicated the act of another power. The guardian of the Constitution was solely and only the legislative power (so-called parliamentary syndicate).

Within this framework the term-concept Constitution referred both to the idea of a *pactum* which gave shape to the Nation and to the written document. De facto, the same normative dimension of the Constitution rested on the idea of a “perpetual constituent assembly”. Common features could be found in all the experiences that belong to the model of the so-called granted constitutions. That which makes the Italian experience a unique case as regards the *Charte constitutionnelle* (1814 and 1830) or the *Landständische Verfassung* was the longevity of the constitution of Charles Albert. The Albertine Statute survived political and institutional changes without there being a formal change of juridical norms. Institutional mechanisms and dynamics generated constitutional forms which were diverse according to contingencies and spontaneous requests. In this context, jurists could affirm that the essence of the Constitution was the Spirit, not its letter and that the Constitution was something more than the written text.

allowed a syndicate by the judge. Instead, Gaetano Silvestri both acknowledged a normative prominence to the Albertine Statute, and invoked a jurisdictional syndicate: «La “legge costituzionale”, dunque, si distingue dalla massa delle “leggi ordinarie” per un rapporto di priorità storica, che la costituisce come presupposto di tutti gli atti del potere legislativo. Ma si distingue pure per un rapporto materiale di priorità logica e giuridica. Difatti, lo Statuto, oltre a fissare i caratteri formali obbligatori di ogni legge, ha per contenuto un particolare corpo di norme aventi per oggetto la tutela dei diritti fondamentali (*Grundrechte*) dei cittadini: diritti, i quali costituiscono il *minimum* indispensabile per l’esistenza e per la struttura dello “Stato giuridico”. La “carta costituzionale”, invero, non stabilisce dei precetti vaghi e indefiniti, i quali non siano suscettibili di applicazione pratica, ma chiude e tutela diritti determinati in precise disposizioni positive, dotate di una adeguata garanzia di stabilità» (The “constitutional law”, therefore, distinguishes itself from the mass of “ordinary laws” for a relationship of historical priority, which constitutes it as pre-supposition of all the acts of the legislative power. However, it distinguishes itself also for a material relationship of logical and juridical priority. Indeed, the Statute, besides fixing the compulsory formal characteristics of every statute law, contains a particular body of norms whose object is the protection of fundamental rights (*Grundrechte*) of the citizens: rights which constitute the indispensable *minimum* for existence and for the structure of the “juridical State”. The “constitutional charter”, indeed does not establish vague and indefinite precepts, which are not susceptible to practical application, rather it encloses and protects determinate rights in precise positive provisions endowed with an adequate guarantee of stability). Cf. Graziano (1914, 39). On these aspects please see Meccarelli (2002) and Stronati (2015).

¹¹¹The decision is quoted by Miceli (1902. *Incostituzionalità*, cit., 775).

9 Summary (Italian)

Il focus di questa indagine è la costituzionalizzazione intesa come *processo di integrazione legale*, entro la struttura dello Statuto Albertino, e *meccanismo d'interpretazione e d'emendabilità (revisione) del testo costituzionale*, che porterà ad un'unificazione nazionale senza un documento scritto quale atto di un potere costituente esercitato dal popolo. Si tratta di leggere lo Statuto Albertino attraverso la sua evoluzione, tenendo conto delle competizioni e delle contrapposizioni per mantenere in armonia le istituzioni con la società civile.

La promulgazione dello Statuto Albertino costituiva la prima tappa del lento e difficile processo di costituzionalizzazione fatto di progressi, ma anche di reazioni, battute di arresto. L'altra fase è quella della sperimentazione che portava ad un'evoluzione della lettera dello Statuto alla luce del contesto storico-sociale. La costituzionalizzazione dell'Unificazione nazionale è, pertanto, un fenomeno di lungo periodo, costituendo la cifra per leggere il *National Building*. Specificamente, lo Statuto Albertino era un punto di partenza più che un punto di arrivo. Dal momento in cui il sovrano concedeva la costituzione, ci si rendeva conto che l'atto normativo era di per sé insufficiente, lo Statuto Albertino era un atto che non poteva essere revocato, ma la costituzione per vivere doveva riposare sul consenso e l'opinione pubblica doveva credere in essa.

Nel preambolo lo Statuto Albertino è definito «legge fondamentale perpetua ed irrevocabile». È assai probabile che, nell'intenzione del sovrano l'espressione «legge fondamentale» evocasse le teorie sulle *lois fondamentales* proprio della monarchia assoluta francese. «Perpetua» stava a significare il giuramento (obbligo politico e giuridico) assunto dal Re, per sé e per i suoi successori, di non revocare in alcun modo la concessione costituzionale.

La parola «irrevocabile» era, invece, intensa nel significato di un patto tra Sovrano e Nazione. L'idea del patto rinviava anzitutto all'antica concezione che vedeva nelle *leges fundamentales* un contratto attraverso cui si regolavano i rapporti tra sovrani e assemblee parlamentari garantendo la successione al trono. Tale idea consentiva di fondare le origini dello Stato non sulla sovranità popolare ma sulla parità giuridica delle due parti contraenti.

Sebbene l'esperienza italiana non conoscesse il principio di supremazia della Costituzione, l'espressione “incostituzionale” non era sconosciuta sotto lo Statuto Albertino. Ad un esame delle fonti non è difficile rinvenire che durante le sessioni parlamentari gli oratori sollevavano questioni di incostituzionalità di leggi e regolamenti. Vi era una certa coincidenza tra il significato che assumeva il termine incostituzionale in seno al diritto pubblico inglese e l'espressione impiegata nella prassi costituzionale italiana, ove incostituzionale era genericamente inteso «ogni comportamento costituzionale scorretto».

In generale, la validità di una norma giuridica doveva rinvenirsi nella più generica conformità al sentire dell'opinione pubblica. Pertanto si faceva risultare incostituzionale ogni atto o fatto normativo discorde o contrario allo spirito della Costituzione. Fu Cavour che inaugurò questa forma di interpretazione dello Statuto

Albertino. Ciò fu il più importante lascito dello statista alla teoria costituzionale del periodo liberale. A partire dal 1850 ogni atto normativo veniva vagliato alla luce della lettera ma soprattutto dello Spirito della Costituzione che consentiva di mantenere in costante armonia l'ordine legale con la pubblica opinione.

È cosa nota che la costituzione scritta era scarna e molte norme avevano il sapore di principi generali piuttosto che di norme giuridiche direttamente vincolanti. Di conseguenza, la vera partita si giocava sul piano della prassi e dell'interpretazione, sulla perenne difficoltà a ricondurre i principi in esso contenuti entro i confini del costituzionalismo moderno. Si trattava, in sostanza, di estrapolare dal testo della Costituzione limiti effettivi al potere monarchico ed enucleare regole che consentissero un reale sviluppo del principio parlamentare garantendo diritti e libertà fondamentali.

I giuristi parlavano in modo generico di interpretazione secondo lo spirito della Costituzione, modifiche, deroghe o abrogazione dello Statuto. Le modifiche alla lettera furono pochissime. L'attenzione deve però essere concentrata sulle c.d. «modifiche tacite», cioè sui cambiamenti al significato della costituzione senza che per questo si cambi il documento scritto. Le modifiche tacite intervenivano sul documento implementando, sviluppando la lettera dello Statuto e correggendo gli eventuali errori. L'interpretazione e la prassi costituivano i più importanti meccanismi di cambiamento costituzionale. In questo contesto si riconosceva un ruolo di primo piano alle norme non scritte.

In conclusione, la costituzionalizzazione avvenne attraverso il ricorso a tre strumenti: la formula contenuta nei plebisciti, l'estensione dello Statuto Albertino a tutti i territori conquistati e la parlamentarizzazione della causa nazionale. Essa non fu un momento ma un processo continuo che caratterizzò l'Unificazione italiana. Si è in presenza di un fenomeno che aveva per scopo dare forme costituzionali alla Nazione. La parabola di questo processo resta una questione aperta, per molti aspetti dai tratti non definiti: aveva origine nel Piemonte-Savoia quando il piccolo Stato legava la propria politica e le trasformazioni istituzionali alla causa nazionale, proseguiva durante la formazione del Regno d'Italia e perdurava anche dopo l'Unità. Questo fenomeno consisteva nel far emergere un patrimonio costituzionale "comune" fondato sull'idea che le leggi e le istituzioni debbano essere concordi con lo Spirito dello Statuto Albertino, fare in modo che questo spirito si diffondesse per tutto il corpo sociale. Buona parte dei risultati non sono facilmente valutabili se non si vuole entrare nel merito con giudizi di valore che spesso si attestano attorno all'incompletezza delle forme costituzionali e sui limiti degli esiti istituzionali che caratterizzarono lo Stato italiano.

La costituzionalizzazione dell'Unificazione italiana aveva a fondamento lo Statuto Albertino che era considerato il principale collante della dimensione politico-sociale, una necessità politica, ma non assurgeva al ruolo di legge più alta rispetto alle altre norme di diritto pubblico. Mancava, inoltre, un controllo di costituzionalità. Nessun giudice aveva la facoltà di pronunciarsi sulla legittimità di una legge. In questo orizzonte è difficile poter dire quando il termine-concetto Costituzione rinviava alla tradizione delle *leges fundamentales*, all'idea di un ordine precostituito frutto di un *pactum unionis* e alla tradizione, e quando si rinviava al

documento scritto. Per certi versi i due momenti tendono a coincidere e rendono l'esperienza italiana originale in quanto conciliava un costituzionalismo a base scritta con un costituzionalismo a base consuetudinaria. Restava di fatto che la stessa dimensione normativa della Costituzione poggiava sull'idea di una "costituente perpetua". Lo Statuto Albertino era sopravvissuto a cambiamenti politici ed istituzionali senza che ci fosse un formale cambiamento delle norme giuridiche. Meccanismi e dinamiche istituzionali generavano forme costituzionali diverse a seconda delle contingenze e delle domande spontanee. In questo contesto, i giuristi potevano affermare che l'essenza della Costituzione fosse lo Spirito non la lettera e che la Costituzione fosse qualcosa di più del testo scritto.

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