The Constitution as a tool for power restrain and enforcement of rights

by Francesca Fiecconi, Justice of the "Corte Suprema di Cassazione", Italy

Introduction and Acknowledgments

While researching the above subject matter I decided that I'd rather refer to it as the basic elements of constitutional legal order. This paper is written from the viewpoint of a European and Anglo-American experience, where the constitution was born under the strong pressure to find a rational and legal justification for the exercise of state powers and governance of people rights. In doing so, I found some precious ideas from the manual of Constitutional Law written by Costantino Mortati, a prominent Italian scholar who contributed to the writing of the Italian Constitutional text that since 1948 governs the Italian People (and inspired other European and non European texts). Also the numerous and profound scripts of Prof. Antonio D'Andrea, of the University of Brescia (Italy), have spurred me to maintain the traditional approach that looks at the Constitution as a "living legal text", with a positive vision, and avoiding any reference to the political issues and debate that can circulate when one talks about the reasons for having a Constitution. The lessons of Prof. Valerio Onida, past president of the Constitutional Court, Prof. Ernesto Bettinelli, Prof. Francesco Ferrari, all having met at the University of Pavia (Italy) in the early eighties, and the teachings of Prof. George Anastaplo, of the Loyola School of Law, Chicago (USA) where I attended some classes as a visiting student, will always be precious to my heart. The last one mentioned, Prof. George Anastaplo, became famous for having impaired his academic career (only the Loyola law faculty accepted this brilliant scholar) by refusing to answer questions about membership in the communist party, although nobody in the U.S. alleged that he had membership in the communist party. His stance was based on constitutional principles, namely the First Amendment of the U.S. Constitution. In my view he is the "living example" of what a constitutional text means.

Finally, the courage to write this small script, without any pretense of scientific severity, was given to me by the International Association of Law Schools, to which I am always very grateful to be part of this splendid legal community, working as an international think-tank for promoting excellence in legal education.

Indeed, from all of those precious suggestions and stimuli I came up with the strong conviction that the Constitution, conceptually, is a living text based on five fundamental elements – pillars without which a democratic, peaceful and stable regime cannot be established or sustained.

First pillar: The Constitution as the spine of the legal system

Starting from the XVIII century the State has been a sovereign authority and a collective entity with a definite legal structure. While in the past and contrarily, without the support from a set of normative settings and judicial rulings this authority was left to discretionary and extemporaneous regulation, available to whom was governing a community either by the obvious force of facts or, at best, an illuminated vision of power.

Since then, the constitutional norms stemming from a "written Constitution" or a "Constitutional tradition" represent a unitary set of rules aimed to define and specify firstly the structure and the

functions of the State apparatus, and secondly, to enable the State power to interfere with the life of citizens and the community in general.

In such cases it comes to the role of the “rule of law” and other sources of law to building a legal system complying with principles settled by the Constitution. In other terms, in the construction of the legal systems the constitutional rules are a fixed legal entity as opposed to the flow of different sorts of legal rules.

Second pillar: The Supremacy of the Constitution

A Constitution Chart or Tradition accompanied by a flow of different sorts of legal rules and principles of laws is not sufficient to build a State governed under a constitution. There must be the recognition of the supremacy of the Constitution over the flow of legal rules and judicial statements that reflect the complexity of the legal system. That means that the Constitution, while it justifies its validity, it establishes the primacy of certain rules and values. By so doing, it establishes its primacy over the flow of the legal rules and judicial rulings.

Historically, the idea of the supremacy of the Constitution over any other sources of law was first established by the Anglo-American legal system, namely by the Declaration of Independence of July the 4th, 1786, where the first definition of democracy is sculptured under these terms:

> “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.
> --That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,
> --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security”.

Since then, equality among human beings, consent of the governed ones to the governing power, and recognition of the unalienable Rights to Life, Liberty and pursuit of Happiness are the basic components of this one Constitution that remains even at this present time.

The presence of those components are essential for the establishment of the supremacy of the Constitution, as opposed to the supremacy of the existing power.

Third pillar: Constitutional Judicial Review

The supremacy of the Constitution over other sources of law also means that the law cannot contradict the constitutional text, otherwise the Constitution may serve either as a formal shell for

the existing power or as a tool to limit a power that is conceptually unlimited (see Marbury v. Madison, Supreme Court of the USA, 24 feb.1804).

Few jurists can argue with Marshall's statement of principle, "*that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument*". Moreover, the principle fits well with the government's commitment to checks and balances. Therefore, even nowadays the supremacy of the Constitution is evidenced by the fact that a law contrary to shall be stated ineffective and that State powers, at whatever level, are obliged to comply with it by not applying the contrasting law.

The presence of a Constitutional justice capable to assess whether a law complies or not is the third important pillar of a Constitutional legal system. Their aim is not only the adjudication of unalienable Rights and the definition of the State powers, but also the enforcement of those Rights and the curbing of illegitimate exercise of power by central or peripheral organisms of the State.

The judicial review of laws and norms under Constitutional terms, therefore, is the condition of not betraying the role of the Constitution as a, "tool for powers refrain and enforcement of rights", no matter how it is organized in the legal system.

Indeed, even if the way to obtain judicial review of laws may change from State to State, it must serve the same purpose and also requires a reliable judicial system. For instance, every judge in the United States is legally empowered to engage in constitutional interpretation. When a lower court decides on a constitutional question, however, its decision is subject to appellate review, sometimes at more than one level. When a State statute is challenged as violating the state Constitution, the final authority is the Supreme Court of that state; moreover, when a federal or state statute, or a state constitutional provision is challenged as violating the Constitution of the United States, the ultimate arbiter is the U.S. Supreme Court.

In a few U.S. States, and in many European member States, questions as to the constitutional validity of a statute may be referred to in abstract form to a high court by the chief executive or the legislature for an advisory opinion. In most systems, however, this is unusual and, in any event, supplementary to the normal procedure of raising and deciding constitutional questions.

The more efficient pattern, however, is for a constitutional question to be raised at the trial-court level in the context of a genuine controversy and decided finally in appellate review of the trial-court decision. This way requires a strong trust in the judicial system as a whole, and the construction of an independent judiciary as well.

However, the U.S. pattern of widespread constitutional adjudication is not followed in all countries that have written constitutions. In some countries (e.g., Germany, France, Italy), there is a special Court at the highest level of government that handles only constitutional questions and to which all such questions are referred as soon as they arise and before any concrete controversy occurs. A constitutional question may also be referred to the special Court in abstract form for a declaratory opinion by a procedure similar to that prevailing in the minority of U.S. states that allow advisory opinions. In France, members of the parliament may demand (and increasingly have demanded) that the constitutionality of legislation be certified by the Constitutional Council prior to it becoming law.

In other countries, written constitutions may be in effect but not accompanied by any conception that their authoritative interpretation is a judicial function. Legislative and executive bodies, rather than courts, act as the guardians and interpreters of the constitution, being guided by their

provisions but not bound by them in any realistic sense. Modernization in the developing countries (as in Latin America, Asia, and sub-Saharan Africa) and the transformations from authoritarian to democratic governance (e.g., in Greece, Portugal, and Spain in the 1970's and '80s) have meant that there are fewer instances of wholly impotent courts. Still, in some countries, the courts remain captive to political elites or open to manipulation by the government, or the courts' authority to exercise the judicial review to which they are constitutionally entitled remains tenuous. In 1993, for example, the Russian constitutional court was dissolved by President Boris Yeltsin and replaced with a system of appointments that ensured greater presidential control.

In any case, widespread judicial review still works as a powerful tool for guiding and enhancing the interpretation of the law under Constitutional terms.

Fourth pillar: The Constitution as an intangible good

Besides the presence of a public and independent authority that works as an impartial guardian and mouth of the Constitution, separation of powers must be the normal way to contain excessive power and the desire to overcome the Constitutional text.

In fact, article 16 of the Declarations of Human and Citizens rights tells us that a society that does not have separation of powers and does not protect human rights, does not have a Constitution. Separation of powers means that the constitutional text is not the "book of dreams" for the advantage of the few ones to whom it is given, but a living text by which every form of power and social organization shall be inspired. Therefore, financial tools must be driven in order to fulfill such a scope of the State by separate and economically independent powers, as stated in Article 12 and 13 of the Declarations of Human Rights. Mainly, the Constitution cannot work as a program of the Government, since it can live, absurdly, in the absence of the Government.

When the existing power makes efforts to have a part of the Constitution changed, there might be a problem of internal control about the text of the Constitution as well. In fact, the Constitution must be preserved from those attempts. Therefore, the Constitutional text is a juridical restraint (*vinculum*) for the Legislator as well, and not only for the Government even if stemmed from the majority. That means that the Constitutional text works as a general binding law that cannot be changed, although it may be "revised" and "ameliorated" in certain points by amendments passed through rigid protocols and procedures among the different branches of the Parliament. For instance, article 139 of the Italian Constitution prohibits any revision of the Republican form. That means that any act against the Constitutional text, bypassing such rigid procedures, purports a betrayal of the Constitution by the different branches of the power that swore loyalty to it, while the lack of its application works *de facto* as a formal infringement.

In other terms, as the Constitutional text shall not be betrayed by the existing powers, even if not formally overturned, it cannot be reduced to as a sleeping beauty or a dead shell, because it is the identity element of the people organized under its basic rules.

Fifth pillar: The International Constitutionalism

After the end of World War II the States strengthened the basic principles of the Constitution by asserting fundamental Human Rights in different international binding agreements, such as the Universal Declaration of Human Rights of 10 December 1948 and the European Convention on Human Rights of 4 November 1950, the last one strengthened by its strong protocols and the

European Court of Human Rights. Even the European treaties have taken this new commitment by incorporating the same principles in the Nice Declaration of 2000, that contains principles common to European legal orders and gives a definition of new social rights. The Nice Charter was finally incorporated in the European Treaties in 2009 and represents the higher form of the new European Constitutionalism.

Nowadays, it is the common European legal and judicial space, more than the single European market, that is building up a legal area based on mutual recognition, simply harmonizing national legal systems. The role of its two Courts of Luxembourg and Strasbourg and the widespread judicial national review proved to be fundamental in guaranteeing a common feeling of legal security and enforcement of human rights among European member states. Mainly, confidence in the European judicial area is not limited to partial responses to specific emergencies, but to statements of principles of law as enshrined by the Charters of Fundamental Rights.

This new pattern of international Constitutionalism works as a powerful tool to refrain national existing powers from deviating from the common fundamental Rights. Therefore, it happened, de facto, that the Charter of Fundamental Rights and the European Convention on Human Rights created the ground to make them genuinely constitutional. It is also shown that international Constitutionalism may absurdly work in the opposite way, at a national level, impairing the established Rights as well.

Indeed, this recent experience is proving the presence of a sense of political resentment in the existing powers for not being able to govern internally according to the so called national interest, values and traditions, feeling threatened by external dangerous forces, not really interested in sharing and preserving their own internal values. However, the only tool to combat all these sources of internal concern is to enforce the Rights, internally, under constitutional terms. Any other attempt to protect the territorial boundaries or building up “psychological walls” is the expression of ephemeral instances not endorsed by the Constitutional text, in any way.

At last, also the strongest nationalism, wherever it raises, will be overturned by the internal and natural force of basic principles enshrined in the Constitution, if adopted under the above terms.