



## IMAGINING A NEW ORDER: INDIVIDUAL, GROUPS AND STATE IN ITALY BETWEEN FASCISM AND DEMOCRACY

Irene Stolzi

### Premessa

*La scelta di affidare questo testo a una rivista che nasce come luogo precipuo di discussione dei problemi legati alla storia e alla filosofia del diritto internazionale deriva da varie ragioni che, con ogni probabilità, si ricavano dal contenuto stesso delle pagine che seguono ma che ritengo tuttavia opportuno esplicitare brevemente. C'è, in primo luogo, una ragione legata all'occasione che ha portato alla redazione dell'articolo; l'occasione è stata lo svolgimento di una giornata internazionale di studi organizzata dalla facoltà di giurisprudenza dell'Università di Copenaghen nel dicembre 2010 sul tema: Law and the Formation of Modern Europe: Approches from the Historical Sociology of Law. E si tratta, a mio avviso, di una ragione solo apparentemente estrinseca, dal momento che mi è parso significativo che gli organizzatori di un convegno che ha coinvolto ricercatori di nazionalità diverse e di diverse estrazioni disciplinari abbiano sollecitato la stesura di un testo che ripercorresse un tratto rilevante degli sviluppi del pensiero giuridico italiano a cavallo tra fascismo e repubblica. Di parte di quel testo si realizza, nelle pagine che seguono, la pubblicazione. Quello successivo alla prima guerra mondiale si presenta, indubbiamente, come un tornante storico decisivo (almeno) sotto due profili: anzitutto perché è stato per opera di autori italiani che alcuni concetti — come quello di Stato totalitario — hanno trovato la loro prima declinazione teorica nel periodo fascista riuscendo ad animare e condizionare lo stesso dibattito che si è svolto fuori dai confini nazionali. Allo stesso tempo — e questo è il secondo profilo, speculare ma non contraddittorio — il peso di una vicenda, come quella fascista, che si è espressa non solo attraverso discorsi di giuristi, ma anche e soprattutto attraverso cospicue novità normative e istituzionali, ha finito per condizionare in modo specifico la successiva storia democratica italiana, storia che dunque riacquista, per questa via, una propria e peculiare individualità.*



## Looking for a new order

In this chapter, we attempt summarily to reconstruct the modalities in which Italian legal thought responded to the demands posed by the complex historical panorama, which followed World War I, and in which it projected socially adapted conditions of legal order. Then, proceeding from a series of reflections on the legal concepts underlying the doctrines of *corporatism* in Italian fascism, we aim, by way of conclusion, to look beyond 1945, and to present a composite picture of post-war Italy, which, marked both by new legal forms and the persistence of old ones, drew part of its (democratic) identity from interpretations of the historical experience of corporatism. We also try to elucidate the fundamental role played by the references to the intermediate bodies – politic parties, trade unions, enterprises and any kind of associations – to show the opposite identity they have taken under the fascist totalitarian season and the democratic one that followed. The main distance – of course – concerned the possibility to make reference to the existence of individual and social autonomy, seen as dimensions capable of limiting the State's power. From this point of view it's worth of consideration that many exponents of legal science, devoted to delineating the contours of the so-called social Europe, insist today that it is necessary to incorporate social laws in the EU Treaties. That is, these theorists argue that it is necessary for the sources of collective autonomy to be taken out of the mortifying category of *soft law*, and collective contracts need to be imputed binding status under EU law. What is at stake in this is not solely a question of transferring the solutions provided in many constitutions established in the years after World War II to the European level. On the contrary, the debate about European social law constitutes one of the means with which we can endeavour to imagine the concrete shape of a future that aspires to recreate the conditions for a stable (or more stable) relationship between economy and politics, between the market and protections, between private and public, between competition and regulation. For these reasons, it is no coincidence that some of these jurists now insist again on the correlation of social autonomy and rights. It is, in particular, no coincidence that they return to underline the importance of social autonomy and rights for



planning an order that is new and is not solely designed to defend the existing order<sup>1</sup>.

At a methodological level, further, we intend in this chapter to disentangle the complex legacy of interwar Italian legal theory. In particular, we examine ways in which under fascist rule in Italy both trade unions and the political party began to acquire new meaning as essential instruments for organizing the social and for enabling social participation in the governance of public affairs, albeit within the framework of a very authoritarian conception of coexistence. Under fascism a new conception of politics began to take shape: politics was seen as a dimension of society, in which a comprehensive project of coexistence could be elaborated, and in which the activities of all public and private actors, channeled and expressed through the political party, could be directed. This expanded concept of politics meant that social organizations were given a specific and distinct role: social organizations were entrusted with internal tasks of governance, connected with the organization of their members' everyday lives (it was in the fascist period, for instance, that the first organizations for sport and leisure were born). It is this respect that the complexity of the legacy of fascism becomes apparent. Clearly, some of the organizational processes pioneered under fascism were not connected with developments specific to fascism, but were rooted in a process of historical evolution and widespread transformation that was evident in many states and many societies, ruled by different political regimes. For this reason, after the fall of fascism these organizational innovations did not have to be abolished, but could be made compatible with life in the new democratic state, after 1945. Often, however, the weight of history – that is, the fact that many legal theorists from a liberal background associated corporatism with authoritarianism – meant that the conversion of corporatist ideas into democratically formative principles was obstructed. For instance, after 1945 political parties and trade unions were allowed to retain the status of private associations, even though they were responsible for important and tasks of undeniable public relevance. For this reason, this chapter addresses the legacy of fascism from a twofold sociological perspective. It examines the corporate legal ideals of fascism as reflect-

---

<sup>1</sup> S. Giubboni, *Diritti sociali e mercato – La dimensione sociale dell'integrazione europea*, Bologna, il Mulino, 2003.



ing a deep transformation of Italian society (and other societies) in interwar Europe. Yet it also addresses the problematic legacy of these ideals for the consolidation of democracy in post-war Italy. In the conclusion, we address attempts to find remedies for the weaknesses of merely private-legal ideas of societal membership, and we propose ways in which the corporatist theoretical lexicon might be re-opened.

It is probably unnecessary to re-examine the reasons for the legal complexity of post-1918 Italy. At the risk of simplification, we can say that after World War I it became increasingly difficult to assert the autonomy of the private sphere in relation to the public sphere. In general terms, it became difficult to assert the autonomy of law in relation to politics, and to the economy. More particularly, it became increasingly difficult to portray private law as a horizon inhabited by single and unrelated individual actors, defined by the primacy of their single wills, and to depict public law as a horizon inhabited solely by the state, a power that remained abstracted from underlying socio-economic dynamics and for this reason was considered capable of perpetuating its indisputable sovereign substance *ad aeternum*. This 'harmonious' and 'schematic' idea of a legal order 'in which everything is (was) reduced to the concepts of sovereignty and individual freedom' was overturned, after 1918, by a combination of various factors<sup>2</sup>, which are also well known and can be summed up through a number of diffuse ideas of *crisis*. On one hand, this was a crisis of the state, in which the state, besieged by the proliferation of organised interests, and the capacity of this new society of parties, unions, and concentrated economic formations to produce powers not finally reducible to relations between private parties<sup>3</sup>. However, private law was also afflicted by crisis. This was due to the fact that it was forced to come to terms with a state that, from the beginning of the war onward, had intervened heavily on the economic terrain, even invading the strongholds of nineteenth-century private law (property and the contract). Notably, the state had done this through expropriations and requisitions of farmlands and industrial plants, restrictions and obligations inten-

---

<sup>2</sup> G. Capograssi, *La nuova democrazia diretta* (1922), now in Id., *Opere*, vol. I, Milano, Giuffrè 1959, p. 409.

<sup>3</sup> L. Ornaghi, *Stato e corporazione – Storia di una dottrina nella crisi del sistema politico contemporaneo*, Milano, Giuffrè, 1984.



ded to determine the quality and quantity of production, and binding imperative interventions in future or already stipulated contracts, thus testified to the growing difficulty of identifying private law with the area of ‘free individual decisions’<sup>4</sup>. Nonetheless, private law, to the same degree as public law, was also pushed into a crisis due to the growing importance of organized interests, as these interests seemed to absorb the individual and its autonomy and risked transforming personal affiliation – that is, affiliation to a group, an organization – into the decisive precondition for the attainment of a full and accomplished legal subjectivity.

Imagining a new order, therefore, meant tackling a set of multifarious challenges. It required an attempt to delineate the contours of private and public, of law, politics and the economy, in a manner that reflected an awareness of the ways in which they were by now unavoidably connected. It is not superfluous to note that this was neither exclusively an Italian problem nor a problem limited solely to the climate between the two World Wars. What was specifically Italian, however, was the debate engendered by the promised emergence of a corporatistic civilisation, one that was intended to promote a fully twentieth-century society, for which fascism aspired to become the historical standard-bearer.

While the chronological limits of this paper have been clarified, a few words must be dedicated to explaining what the corporatistic order was or, more accurately, was intended to be. In the twenty-year period between the wars, references to corporatism alluded to an overall project of social, political and economic reform, a project that was supposed to develop in two successive and interdependent phases. The first phase, termed ‘union corporatism’ – the only one, we might add, which received an adequate normative and institutional expression – was based on the legal recognition of unions of workers and employers. This recognition was intended to enable trade unions and employers’ associations to oversee and discipline labour relations: primarily through the stipulation of collective labour agreements with *erga omnes* effect, but also through the assumption of responsibilities in respect of assistance and supervision towards the members of their respective professional categor-

---

<sup>4</sup> See F. Vassalli, *Della legislazione di guerra e dei nuovi confini del diritto privato* (1918), now in Id., *Studi giuridici*, vol. II, Milano, Giuffrè, 1960 and W. Cesarini Sforza, “Proprietà ed espropriazione”, *Educazione fascista*, III (1929), p. 119.



ies. In contrast to this, the second, more authentically corporatistic phase provided for the formation of corporations, that is organs of the state made up of elements drawn from unions, the administrative apparatus of the state, and the National Fascist Party. These organs were intended to constitute what was emphatically defined as the General Staff of the Italian economy. In particular, corporate groups were to be entrusted the task of promoting and realizing a so-called third-way model of economic organization: that is to say, they were intended to promote a system of economic-production relations capable of combining the continued respect for property and private initiative with various patterns of public intervention in economic matters (from direct intervention intended to have restricted scope, to the imposition of qualitative and quantitative results on production activities<sup>5</sup>, which was intended to become the general rule).

In this brief and summary description, I have used some verbs in the conditional mode. This is because we know – clearly – that corporatism was only realized to a very limited practical degree. Despite its disastrous results, however, it was capable of animating a debate possessing important theoretical depth<sup>6</sup>. Alongside a large host of sceptics who attempted to reduce new corporate ideas to traditional corporatistic images of legal order, a non-negligible number of legal theorists identified in corporatism a theoretical system that might have made it possible to move beyond nineteenth-century legal models and instruments. These theorists saw corporatism as a legal order that was able both to outline a conception of society capable of confronting the problem of legal citizen-

---

<sup>5</sup> Declarations VII and IX of the Labour Charter of 1927, which was intended to form the programme platform of the new Fascist Corporate State, have this express meaning. Declaration VII states: 'The Corporate State considers private initiative in the field of production as the most effective and most useful tool in the interest of the Nation. As the private organisation of production is a function of national interest, *the company organiser is responsible before the State for production policy*. The collaboration of production forces generates reciprocity of rights and duties among them. The employee, technician, clerk and labourer are active collaborators of the economic concern, whose management and responsibility are entrusted to the employer.' Declaration IX states: 'The intervention of the State in economic production occurs only when private initiative is either lacking or insufficient or when political interests of the State are at stake. This intervention can assume the form of control, encouragement or direct management.'

<sup>6</sup> See: A. Gagliardi, *Il corporativismo fascista*, Bologna, il Mulino, 2010 and I. Stolzi, *L'ordine corporativo. Poteri organizzati e organizzazione del potere nella riflessione giuridica dell'Italia fascista*, Milano, Giuffrè, 2007.



ship demanded by the bodies and organizations typical of the new mass society, and to confront the problem of the necessary interaction between private parties and the state in the economic arena.

From a similar point of view, the diffuse references to the function of government and the primacy of politics represented a call for a synthesis designed to identify the contours of a given project of society. This was conceived as a project that could be formulated by a wide range of authors and could integrate the most disparate contents, but that in any event expressed the ambition to connect the entire spectrum of social, political and economic energies, and to direct the conduct of all subjects, both private and public<sup>7</sup>. The idea that politics has a certain primacy was a general characteristic of different twentieth-century experiences, from the Weimar Republic, to totalitarianism, to the democratic constitutions established after 1945.

Of course, these concepts, circulating widely in the theoretical *milieu* of the early twentieth century, clearly assumed profoundly different meanings in different cases and in different theoretical articulations. This was because the selection of values called to support a certain project of society was subject to variation, the actors required to conceive the project differed, and the manner in which the guiding principles of the relation between state and society were reconstructed was variable. This explains why legal theorists interested in promoting the nascent corporatistic order saw it as an opportunity, not only to reflect on trade-union and production relations, but also, in more general terms, to provide an account of relations between the individual, state and social organizations; to concentrate attention on the function of political policy and to reflect on the relations between the different powers of the state; and, moreover, to enquire into the role given to policies that we would today call *welfare policies* or into the monopolistic characteristics of mature capitalism. Intellectual history, more than other sub-disciplines of history assumes decisive importance, not only as a means to elucidate the different and, at times, opposed horizons that produced apparently comparable solutions, but also to demonstrate the weight that, at the fall of fascism, the enduring attach-

---

<sup>7</sup> C. Mortati, *L'ordinamento del governo nel diritto pubblico italiano* (1931) Milano, Giuffrè, 2000 (new print of original text) and Id., *La costituzione in senso materiale* (1940), Milano, Giuffrè, 1998 (new print of the original text).



ment to certain outdated images of society played in interpreting the history of corporatism.

### **The doctrine of totalitarianism**

In this section, we intend to shed light on just a small number of aspects of the complex and variegated body of legal theory addressing questions of corporatistic order. Firstly, we wish to highlight how the references to corporatism constituted a theoretical framework for concepts focusing on the idea of a new state: that is, of a state that was new because it was totalitarian, because it was required, in contrast to (what appeared to be) the indecisive character of old-style patterns of authoritarianism, to envelop all individual and social energies within its ranks. Of the most fundamental importance in this respect was the emergence and formation of a *third area of law*.

The doctrine of corporatism formed a composite front, which branched out along various theoretical paths. For instance, Alfredo Rocco, a legal theorist with a traditional training, committed himself to devising a version of corporatism capable of subordinating the management of every form of social conflict and labour unrest to the decision-making powers of the state. In contrast, Sergio Panunzio and Giuseppe Bottai were intent on demonstrating the utility that a solid network of groups and associations, artfully manipulated by the new state, could acquire in creating the *new man* – a man who, even at the most fundamental level, was devoted to the regime's values. In addition, more idealist theorists, such as, to name but three, Giovanni Gentile, Arnaldo Volpicelli, and Ugo Spirito, were convinced that it was the duty of corporatism to realize an identification between state and individual, between the private and public domains. They claimed that it was only in this manner that a legal system could be protected from the disruptive demon of pluralism. Nonetheless, despite this considerable diversity of views, all formulations of totalitarian corporatism attributed a decisive role to so-called *intermediate bodies*: that is, to social and economic organizations positioned between the state and the individual, which they saw as establishing a *third area of law*. No longer viewed as threats,



but rather as foundational resources of the new state, social, political and economic organisations were portrayed in corporatist theory as formidable *seminaria rei publicae*. If it was the case that the salvation of the state lay to a large degree in its proven capacities for organizing the society subject to its power, and if the antagonistic character of mass society found its own distinctive identity through its division into groups and subgroups, the state, on this account, also needed to avail itself of this omnipresent associative tendency in order to found its own power.

The emergence of the third area of the law presupposed a nuanced, balanced definition of statehood. In order for the party and the trade union (that is, the official union, necessarily described in the singular), together with the plethora of bodies summoned to forge the new fascist society and to plot the map of the various associations (the workers, youth, women, etc.) which were expected to play a part in transforming the entire individual and social space, the state was obliged to pursue a sophisticated strategy of institutional engineering. First of all, it was necessary for the state to renounce any type of representative and participatory logic. That is to say, it was necessary for the state to avoid a situation in which different social organisations could act on the basis of a free and spontaneous aggregatory impulse, capable of conditioning the exercise of state power itself. At the same time, however, it was necessary for the state to mark out a distance between the new form of statehood and previous forms of administrative order and, in general, previous patterns of public control over social life. To avoid falling back into the errors of the liberal state, it was indispensable for the fascist state to replace the idea of supervision and ‘external’ control by the state with the new idea of a state presence capable of converting the related corporate bodies operating in society into ‘productive auxiliaries of the state’<sup>8</sup>, or tools for the active and participatory cultivation of the new state. If the failure of the liberal state was perceived as to a large degree attributable to the insufficient consideration given to the social and to the increasingly ‘antagonistic’ character of mass society, the corporatistic endeavour to sanction ‘the state’s nature and importance in all of individual and

---

<sup>8</sup> G. Bottai, *Discussion at the Senate* (31.5.1928), on Id., *Esperienza corporativa*, Roma, Edizioni del diritto del lavoro, 1929, p. 398.



social life'<sup>9</sup> could only be consolidated if a 'more subtle and discrete mission' was ascribed to the new organizations<sup>10</sup>. In brief, it was necessary for the state to find the path that would make it possible thoroughly to catalogue society in all its diverse social, political and economic organizations (the so-called corporatistic organisation). Yet it was also necessary for the state, at the same time, to avoid resorting (or rather, resorting too heavily) to the forcible recruitment of individuals into these organizations.

Social organizations were required to fill the intermediate space between state and individual in order to make it possible to weld the individual to the state<sup>11</sup>. In turn, this made it possible to achieve the state organisation of the individual personality, which alone guaranteed the achievement of an active, participatory symbiosis, and not merely passive-transcriptive relation, between state and society. In this context, the frequent references to the producer, considered as the new model of the good fascist citizen was an argumentative resource intended to affirm the State's totalitarian face.

The realization of an organic conception of the individual required, in fact, an identification of the individual in the concreteness of its everyday position, which made it easier for the state to seize hold of the individual and close it in the ranks of the totalitarian machine.

At the same time, the so called social policies of fascism and the reference to the necessity to provide economic gratification for the subordinate classes were not only intended to ward off the prospect that social hierarchies might be overturned but they also played an important role in increasing the consensus that the regime sought to obtain from the masses. From this point of view, the social policies constituted more than a simple second altar for the accomplished abolition of pluralism, a central resource 'to reform society according to a certain plan'<sup>12</sup>, to realize and put into effect a process in which people were impelled to assume an attitude of active and participatory devotion towards the state, which

---

<sup>9</sup> A. Volpicelli, "I fondamenti ideali del corporativismo", *Archivio di studi corporativi*, (1930), I, p. 211.

<sup>10</sup> G. Bottai, *Vent'anni e un giorno (24 luglio 1943)*, Cernusco sul Naviglio, Garzanti, 1949, p. 42.

<sup>11</sup> A. Volpicelli, "I fondamenti ideali del corporativismo", cit., p. 214.

<sup>12</sup> A. Lanzillo, *Per una teoria dell'intervento dello Stato* (1932), now in: in *Giuseppe Bottai e «Critica fascista»*, F. Malgeri (a cura di), San Giovanni Valdarno, Landi editore, 1980, p. 746.



distinguished totalitarianism from government activism and from old-style dictatorships.

## Democratic life: old and new corporatism

At the fall of the fascist regime in Italy, most people found the argument that the regime's collapse marked *'the crisis of corporatism'* plausible<sup>13</sup>, and it formed the basis for imagining a new order (democratic or simply post-fascist). In reality, while legal science un-animously accepted the end of corporatism, attempts at recon-structing the reasons that had determined the failure and/or break-up of the corporatistic order were once more shaped by divergent interpretations, and they reflected orientations in large part already expressed during the fascist era or even before. It is not difficult to find interpretations of corporatism that run through time unaltered and connect the end of the nineteenth century, or the first decade of the twentieth century, to the years that followed World War II. In fact, interpretations of the crisis of corporatism reappeared after 1945 which were divided into two camps. Some saw this as an op-portunity to re-define the parameters of legal order. Some saw this as an opportunity to denounce the fact that corporatism had de-tached the law from the individualistic conception of order, which – they claimed – had been adequately by the dogmatic categories employed in late nineteenth-century legal science (i.e. the study of pandects and the school of public law), which they viewed as con-stituting a definitive and indisputable acquisition of legal culture. Depending on point of view, corporatism either appeared to be a missed opportunity, irresponsibly soiled by the regime's indecisions. Or it appeared to be an authoritarian excesses: an impracticable *in re ipsa* hypothesis, inclined to subvert the sole and eternal conditions of legal order.

The earlier supporters of totalitarian corporatism, in particular, considered the collapse of corporatism a missed opportunity. They underlined how the indecisive actions of the fascist regime had pre-vented it from fulfilling corporatism's authentically totalitarian voca-tion. They argued that the regime had in the end diluted the innov-

<sup>13</sup> G. Cazzetta, "L' autonomia del diritto del lavoro nel dibattito giuridico tra fascismo e re-pubblica", in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, (1999), 28, II, p. 594.



ative importance of corporatism into a mere proliferation of bodies and offices, which served only to bring to completion the bureaucratic excrescence of the Italian state<sup>14</sup>. Moreover, they claimed that the fall of Fascism could not, as if by magic, eradicate the demands that had led people to imagine a corporatistic reorganization of social, political and economic dynamics.

The collapse of the corporatistic idea, however, was also considered a missed opportunity by the small number of legal theorists who, during the fascist era, attempted to propose an interpretation of corporatism, which, although hostile to the totalitarian perspective, had attempted to plot the parameters for a new legal order. Such theorists hoped to see a legal order capable of combining the centrality assumed by collective bodies, the presence of a strong state, and lasting respect for individual rights and autonomy. This was a complex theoretical challenge, which, for the sake of brevity, cannot be examined here. It is sufficient to note here though that these interpretations of corporatism also harked back to quite different disciplinary and intellectual patterns. To refer only to the leading proponents of such theories, the idea of a non-totalitarian corporatism can, for instance, be traced to the theoretical objectives of Widar Cesarini Sforza. Sforza was a legal philosopher who saw corporatism as an institutional device to reproduce a liberal-elitist conception of society even in the twentieth-century climate, and to reproduce it by ascribing a central position to collective rights. He defined rights as institutions with a character that was ‘more than private’ and ‘less than public’<sup>15</sup>, and that overcame and reconciled the traditional dichotomy of authority and freedom. This line of reflection on corporatism can also be found in the thought of Enrico Finzi, an expert in civil law with a liberal training who embraced the corporatistic cause. Finzi viewed corporatism as a means to reconstruct the relations between individual, social groups and the state, so as to reconcile respect for individual freedoms and plans for a functionalization of private activities, in which the purely proprietary sense of subjective rights and property rights was abandoned. Finzi argued that rights, especially rights of property, needed to be

---

<sup>14</sup> G. Bottai, “Verso il corporativismo democratico o verso una democrazia corporativa?”, in *Il diritto del lavoro*, (1952) XXVI, n.3-4, p. 128.

<sup>15</sup> W. Cesarini Sforza, *Preliminari sul diritto collettivo* (1936), in Id., *Il corporativismo come esperienza giuridica*, Milano, Giuffrè 1942, p. 196.



viewed as objective rights, or as sources of duty and obligation towards the entire nation. This dimension of reflection on corporatism can also be found in the works of Lorenzo Mossa, the most unorthodox twentieth-century Italian specialist in commercial law. Mossa defined commercial law as an apparatus through which business, conceived as a unitary economic-legal reality, could reconcile the new logic of large-scale industrial production with a solidaristic vision, capable of establishing the defence of subjectivity and individual rights in manner that extended beyond simple proprietary ideals<sup>16</sup>. The industrial enterprise had central status in Mossa's theory. He saw the enterprise as a solidaristic community, unifying rights of individuals with the exigencies of national industrial production, and so overcoming the purely private-legal models of rights in liberal individualism.

In the views of these legal theorists, the collapse of the corporatistic idea had been a failure for two different and related reasons. First, it had been a failure because the demands for renewal that had violently emerged following World War I were still relevant after the fall of the fascist regime. This was demonstrated by the lasting and widespread references to the crisis. Second, it had been a failure because corporatism could have constituted an enormously beneficial opportunity for legal science as an academic discipline, as a result of which legal science might have assumed the status of an authentic planning vocation. It was perceived that, under corporatism, legal science was longer expected to solely work on statutory law and to arrange its formulae in systematic form. On the contrary, it was given authority to contribute directly to imagining the future of legal orders and the changing relations between law, politics and economy, and so to provide important mediation and connections between the diverse dimensions of society. It was able to do this because it was most deeply concerned with the problem of order, which could only be conceived if the relationship between individual, both collective and public, politics, law and the economy, were approached in conjunction with one another.

Nevertheless, in the same way that they had been isolated in the twenty years between the wars, even after liberation the position of

---

<sup>16</sup> I. Stolzi, *L'ordine corporativo*, cit., p. 359.



legal theorists representing such doctrines met with very little support.

In these respects, after 1945 interpretations of the interwar corporatistic experiment often became instrumental for attempts to re-affirm the centrality of traditional conceptions of the legal order. For experts in private law, corporatism became generically synonymous with authoritarian-dirigistic regulation. Private lawyers argued that corporatism had warranted stigmatization from the moment that it attempted to reinstate a conception of subjective law as absolute power of the will, such that it became incompatible with constraints of social finalization or a strictly privatistic-voluntarist idea of contracts. This applied in particular to the labour contract, which was, to a greater degree than other forms of contract, sensitive to the inequalities and imbalances produced by the socio-economic competition<sup>17</sup>. Meanwhile, for experts in public law, corporatism often appeared synonymous with the unwarranted invasion of the state by society. The stigmatization of corporatism by public lawyers provided a basis for contesting those aspects of the republican constitution (popular sovereignty, the so-called programmatic rules, the role of parties and unions), which revised the modalities in which the relationship between state and society had traditionally been imagined.

The danger implicit in all of the interpretations of corporatism, which continued to express an unaltered faith in the nineteenth-century constructs of the legal order, is quite apparent. On one hand, they risked postdating the onset of the twentieth century to the end of World War II. On the other hand, they risked denying that a new historical period demanded institutional solutions different from those proper to the nineteenth century. In some cases, this prevented these theories from adopting the clearly totalitarian – and not simply authoritarian – views typical of numerous theorizations of corporatism. Yet, after 1945, the tendency of legal science to pursue outdated images of legal order compromised the leading social and cultural role of legal science. In so doing, it made it impossible for many lawyers appropriately to experience the process of constitutional transition occurring at this time.

---

<sup>17</sup> G. Cazzetta, “L’ autonomia del diritto del lavoro nel dibattito giuridico tra fascismo e repubblica”, cit., p. 606.



On these grounds, it seems that the fall of fascism had greater importance in confirming the legitimacy of traditional conceptions of the legal order than in clearing the way for adequately modern legal-scientific responses. During fascism, taking refuge in tradition, in traditional images of the legal order, could constitute – and it was considered in this way by many<sup>18</sup> – a strategic device to obstruct the authoritarian expansion of the legal space that fascism pursued. Once the regime fell, the complete rehabilitation of typically nineteenth-century images of the legal order coincides with Croce's interpretation of fascism as a parenthesis, an accidental, although perverted, deviation from the physiological line of development of the Italian socio-political system. We need to be clear here in noting that the ranks of those who advocated a return to tradition did not form the only theoretical camp. By necessity, we have only provided an outline of a reality that was quite complex. However, this was certainly a dominant camp at least until the mid 1950s, and it was a camp that also succeeded in gaining hegemonic status because, compared to those promoting more innovative responses, it could claim greater coherence for its views, and at the same time it could rely on what were already extensively tried and tested theoretical instruments<sup>19</sup>. It goes without saying that the many variations on the theme of the immutability of the legal order, characterized by the clear dichotomy between private and public, inevitably influenced the new republican constitution of 1948. In particular, these ideas served to weaken the innovative importance of the constitution. They promoted, where possible, legal norms compatible with traditional images of the legal order. Moreover, they refused to recognize the normative force and obligatory standing of those sections of the republican constitution which did not simply reflect a neat division between private and

---

<sup>18</sup> In this sense, see for example, the well-known interpretation of Salvatore Pugliatti, the expert in civil law who 'divided' legal science under Fascism into two large, incommunicable categories. On one side, he saw the category of the apologists who were committed to the unwavering celebration of the virtues of Fascism. On the other side, he identified the category – to which he declared that he himself belonged – of the formalists: those jurists who utilized the cult of forms and concepts to weaken the regime's reformist aims from the inside; S. Pugliatti, "La giurisprudenza come scienza pratica", *Rivista italiana per le scienze giuridiche*, IV, (1950), pp. 49-51.

<sup>19</sup> G. Cazzetta, "L'autonomia del diritto del lavoro", cit., p.585; M. Gregorio, "Quale costituzione? Le interpretazioni della giuspubblicistica nell'immediato dopoguerra", in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, (2006), XXXV, p. 888.



public law, or between the political, the juridical and the economic. They often explained this by stating that these parts had been drafted by politicians (or, in any event, by jurists foolishly inclined to confuse politics and law), and not by technicians of law<sup>20</sup>. Overall, a neo-classical interpretation of the 1948 constitution was promoted, which sought to eradicate its dimensions derived from corporatistic ideas.

The distinctive features of the Italian constitution, similar to many post-World War II democratic constitutions, are well known. Simplifying to the utmost, we can say that the 1948 constitution expresses an attempt to define, *per relationem*, the identity of private, collective and public domains, and it attempts to see the articulations of a single relational context in these spheres. It is a constitution, in particular, that sees the relations between the different dimensions of society as obliged to project legal order into the future, focusing on a common life project whose fulfilment presupposes the contribution of all actors, both private and public.

The constitution, in short, is a constitution that gives valence to the areas of coexistence between social dimensions and that – as we have already stated – defines this intersection as an enriching, not disruptive, moment of democratic reality. The constitution contains contours of a unitary design, whose coherent realization presupposed a concerted policy of constitutional implementation, capable of holding together the many and correlated aspects which it addressed. In this regard, however, we know that the constitution underwent a particularly troubled process of implementation, and the implications of its relational ideas never became reality. Piero Calamandrei said of it that it was ‘more than an infanticide’ [...] ‘it was an abortion’<sup>21</sup>. It was, most particularly, the distinction, inaugurated by jurisprudence and consecrated by doctrine, between its preceptive (immediately practicable) provisions, and its programmatic provisions (provisions without a normative nature) that permitted a *sine die* postponement in implementing the new constitution<sup>22</sup>.

To be sure, the pro-Constitution front progressively grew in numbers after 1948. This camp attracted prestigious figures, and it

<sup>20</sup> M. Gregorio, “Quale costituzione?”, cit., p. 861.

<sup>21</sup> P. Calamandrei, *Dieci anni dopo: 1945-1955. Saggi sulla vita democratica italiana* (1955), now in Id., *Costituzione e leggi di Antigone*, Firenze, Sansoni 2004, p. 135.

<sup>22</sup> See the pronouncement of the Corte di Cassazione (SSUU penali) on the 7th February 1948.



gave life to monographs – one important example was *La costituzione come norma giuridica* [*The Constitution as legal Norm*] by Paolo Barile, published in 1951 – that would eventually constitute authentic milestones in the history of Italian legal thought. Moreover, 1956 saw the first sentence handed down by the newly instituted Constitutional Court, and legal theorists began to view this organ of the state with interest and to entrust most of their hopes for the implementation of the constitution to this organ of the state. The constitution, though, could not live solely through the constitutional court. The organization of the constitution presupposed a ‘political engine’<sup>23</sup>: that is, it presupposed a system of parties capable of interpreting the sense of the new constitution and of guaranteeing the effective enactment of its provisions. Naturally, the constitution, like many others, was born in the shadow of a compromise between different constituent political forces. This compromise inevitably left unresolved the question of how its provisions should be enforced. This alone, however, need not have undermined the ‘common respect’ for the inspiring principles of the constitution itself<sup>24</sup>.

Of particular note is the fact that, in the view of the members of the Constituent Assembly, the political parties were supposed to assume responsibility for the implementation of the constitution, which was conceived as a ‘sort of politics on a grand scale, that was to unfold on a different and higher level than the mere majority political stance’<sup>25</sup>. However, the inability of the parties to fulfil its provisions, meant that the constitution was dangerously exposed to the risk that it would become near-sighted, incapable of assuming and preserving a strong regulatory role for the future, and thus destined appear outmoded.

In this context, it’s not surprising that from the 1970s onwards neo-corporatism or corporate societies present themselves as interesting discussed themes. In fact, neo-corporatism is discussed in a way that has two different, but complementary, meanings. On one hand, this term is used to designate, diagnostically, the process of

<sup>23</sup> M. Gregorio, “Quale costituzione?” , cit., p. 913.

<sup>24</sup> P. Calamandrei, *Incoscienza costituzionale* (1952) now in Id., *Costituzione e leggi di Antigone*, cit., p. 126.

<sup>25</sup> M. Fioravanti, *Costituzione e politica: bilancio di fine secolo*, (1999), in Id., *La scienza del diritto pubblico. Dottrine dello Stato e della costituzione tra Otto e Novecento*, Milan, Giuffrè, 2001 t.II, pp. 877- 881.



the growing oligopolistic segmentation of society<sup>26</sup> – of a society increasingly less capable of finding common seats of political representation. On the other hand, this term is used to examine the use of so-called concerted procedures: that is, ‘neo-corporatistic’ instruments to discipline the relations between government and unions<sup>27</sup>. In both cases, neo-corporatism is discussed in order precisely to underline the insufficiency of party-parliamentary channels for preserving the relation between public and private, social and economic domains.

As the system of interaction between state, workers and employers is not seen solely as a means for resolving strictly contractual bargaining issues, but, on the contrary, it is also perceived as a technique for plotting the conditions of development and evolution for a certain sphere of production at a more global level, we might even claim that the idea of concerted action provided motivation for the plan to give trade unions a ‘substantially’ integrated role in the constitution. That is to say, this was a concept that has made it possible to accord to unions the central role that the Constituent Assembly had imagined for them, yet also to impute this role to them outside the forms provided for by the Constitution itself. As is well known, Art. 39 of the Italian constitution stipulates that the ‘registration of unions in care of local or central [public] offices’ constitutes a condition enabling unions to agree to collective contracts with *erga omnes* effect. Similarly, it is known that the requirement of registration has never been satisfied, due largely to the mistrust directed – in the wake of the fascist corporatism – towards the authoritarian appropriation of union life. At the same time, however, the ‘decision that unions should have a position fully grounded in general law (whether this concerns the right of the union as an association, or the relations of unions with the State)’<sup>28</sup> has had the beneficial result that it has led to an affirmation of ‘an inter-union order, as a particular, sectional order, distinct from that

---

<sup>26</sup> P. Rosanvallon, *Lo stato provvidenza tra liberalismo e socialismo*, trad. it., Roma, Armando editore, 1984, p. 35.

<sup>27</sup> G. Vardaro, *Introduzione* a Id. (a cura di), *Diritto del lavoro e corporativismi in Europa: ieri e oggi*, Milano, Angeli, 1988.

<sup>28</sup> G. Cazzetta, *Il diritto del lavoro e l'insostenibile leggerezza delle origini* (1996), now in Id., *Scienza giuridica e trasformazioni sociali*, Milano, Giuffrè 2007, p. 322.



of the state, but capable of auto-regulation'<sup>29</sup>. As such, it has contributed to defining the identity of Italian democracy.

The position of unions under general law, therefore, developed to form a 'model that lay outside the plan of the constitution but that was not against it', and it did not contradict the idea of social autonomy embraced by the constitution<sup>30</sup>. The implications of this reconstruction, accompanied by the idea that collective autonomy could be portrayed as private, civil-law autonomy, are quite evident. As soon as it was established that social groups were no longer capable of projecting their interests onto the level of the general order of the state<sup>31</sup>, it was difficult to prevent the return of legal ideals more or less strategically designed to identify labour law with the law of the individual labour contract<sup>32</sup>. In other words, labour law became identified with a law, which, even when it did not overtly favour the 'strong' private contracting party, tended to presuppose an elementary, simplified relational context. Such law was incapable of binding (or of binding with sufficient force) the state to the dictates of a constitution, which was intended 'to oblige the republic to employ its regulatory resources' in order to elevate the position of the workers and others objects of social democracy. As this is the case, the interest aroused by corporate concerted action can also be seen to have represented a means for acknowledging non-fulfilment of Art. 39 without relegating unions exclusively to the sphere of civil law. In short, concerted action helped to reconcile the formal status of unions under general law with the public-law significance of the the functions which they performed. In so doing, it enabled unions to assure themselves that the state itself had a character that was not simply reducible to the varying 'contractual' strength of competitors and of lobbies, but was in fact capable of assuming tasks of mediation and, especially, of more complex and demanding planning. In a similar context, the attempt to institutionalize practices of concerted action – an attempt expressed by the so-called Ciampi-Giugni Protocol of 1993 – probably represented the (perhaps most extreme) endeavour to recreate, before the definitive collapse of these policies in 2002, a perception of the future that re-

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> G. Cazzetta, *Il lavoro nella Costituzione di Costantino Mortati cinquant'anni dopo* (2005), now in *Id.*, *Scienza giuridica e trasformazioni sociali*, cit., p. 338.

<sup>32</sup> *Ibid.*



mained sensitive to the value and importance of collaboration and shared programmes.