Italian Constitutional Justice in Global Context

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Ai nostri maestri

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Preface

IT IS BY now a commonplace to recognize that the world is currently in a dynamic age of global constitutional dialogue and exchange, with a rich and growing network of interactions among constitutional norms and systems around the world. Comparative constitutional studies have exploded in scope and grown in sophistication, and tribunals around the world are drawing on the practical experience and jurisprudence of their counterparts in other countries. Both scholars and judges now widely read, borrow, and cite the jurisprudence of the high courts of other legal systems. Whatever one might identify and conclude about the causes and consequences of global constitutionalism, as an observable fact it is undeniably a prominent feature of our transnational juridical and political environment in the early twenty-first century.

Given the pervasiveness of this phenomenon, the extent to which the principal sources of constitutional borrowing and comparative dialogue remain dominated by a relatively narrow band of constitutional systems and courts is remarkable. Global constitutional dialogue often appears more like the three- or four-voice Renaissance polyphony of William Byrd motets than the full symphonic chorus embodied in Beethoven's Ninth Symphony. If global constitutionalism is to be an increasing source of the universal understanding and solidarity that the "Ode to Joy" represents, more instruments and voices, representing more fully the breadth and diversity of constitutional systems and traditions worldwide, will need to be added to the score.

Among the more notable voices missing in contemporary constitutional dialogues is that of the Constitutional Court of Italy. Its conspicuous absence is not in any way attributable to a lack of important and interesting aspects of the Court and its work. The Italian Constitutional Court represents one of the earliest, strongest, and most successful examples of constitutional judicial review established in Europe in the last century. Together with the Constitutional Court of Germany, it has served as one of the principal prototypes for later constitutional tribunals in other parts of Europe, from Spain and Portugal in the 1970s and 1980s, to Central and Eastern Europe after the collapse of the communist regimes in the 1990s, to the more recent reform of the French *Conseil Constitutionnel* in 2008. Its value transcends just Europe, moreover: it has a fascinating and instructive history for any country seeking to create and consolidate new institutions and systems of constitutional control; it is distinctive in its structural, procedural, and institutional dimensions; and it has a very well developed and sophisticated jurisprudence, with a unique voice distinguishing it among global constitutional actors, on a broad range of topics from fundamental rights and liberties to the allocations of governmental powers and regionalism.

Although a few great comparative law scholars of an earlier generation, notably Mauro Cappelletti, did briefly shine a brighter light on the Italian Constitutional Court, the growth of comparative constitutional law in general has relied overwhelmingly on the study of systems with jurisprudence and secondary literature available in what has become (for better or worse) the *lingua franca* of global constitutional dialogue: English. Familiarity with the Italian Constitutional Court has been hampered substantially by the very limited availability until recently of English translations of the great majority of its judgments and by the paucity of scholarly literature on it in English. Even though the Court has been making substantial efforts lately to disseminate more of its jurisprudence in English, much that is of potential interest still remains relatively unavailable to a global readership.

Against that background, this book aims to make the Italian Constitutional Court and its jurisprudence more accessible and familiar to scholars and judges engaged in comparative constitutional dialogue. We have sought to do so by providing a broad introduction to the development of the Court, from its formation and early history (Chapter 1) to its growing insertion into the regional European constitutional space (Chapter 7). Chapters 2 and 3 address the Court's structure—a dynamic hybrid of centralized and diffuse judicial review—as well as its judicial processes and its principal patterns of reasoning and methods of interpretation. The remaining chapters delve into several of the most important substantive areas of the Court's case law: rights and freedoms (Chapter 4); the allocation and interrelationship of powers among the branches of government (Chapter 5); and the distribution of authority

between the central State and more local entities (Chapter 6). In conclusion, we try to identify some of the most salient themes that make the Italian Constitutional Court an interestingly distinctive and important contributor to our understanding of constitutional law and politics in the global context in which we find ourselves today.

In order to accomplish these goals, we have made several very deliberate methodological choices. The first is to present the Court primarily through a selection of its most significant features, cases, and themes, rather than by trying to be exhaustive in covering every aspect of the Court's jurisprudence. Second, although there are inescapably many evaluative judgments that the authors have made in the process of selecting, describing, and analyzing the significance of the Court's cases, the aim of the book is not in the first instance to be a critical evaluation of Italian constitutional law. Instead, keeping in mind that the majority of readers will be encountering the Italian Constitutional Court here for the first time in any detail, we have sought to allow the Court's own voice to emerge. For both of the first two reasons, the book includes a larger number of longer excerpts from the Court's judgments than might otherwise have been needed. These permit the reader to enter more fully into the Court's own judicial style.

In almost all cases, the translations of the Court's judgments are our own (where, exceptionally, they are official translations, it will be so noted in the text). As any good translator knows, it can be extremely difficult to render accurately both the literal meaning and a sense of the literary form of a text. This is all the more true of Italian legal language, which can be (from an Anglophone perspective) exceptionally dense and complex. Moreover, legal terms and constructs invariably contain many embedded presuppositions about the nature of law, the state, and society that can be very difficult to carry across to a different language. As a result, the translated excerpts may not always come across as the most fluid English prose but they do provide as faithful a taste of the "literary style" of Italian constitutional decisions as we have been able to convey.

Finally, this book also represents a conscious effort by all four of the coauthors to work in a systematically collaborative way. The individual chapters have not been separately authored and then collected into a single volume. Rather, all of the coauthors contributed substantially to each of the book's parts. In this we have sought to emulate some of the most successful examples of comparative legal scholarship, which so often depends on collaborative efforts to be able to bridge the gaps of understanding across legal traditions. Our labors have brought together two comparatists and two constitutionalists, three Italians and one American, two women and two men, a constitutional judge and three professors—in short, a microcosm of constitutional dialogue to contribute to the macro-dynamics of global constitutionalism.

Acknowledgments

THIS BOOK HAS been a truly cooperative effort not only of the four coauthors, but also of the many people who, at different stages and in different ways, contributed to its progress. As a consequence, each of us is indebted to numerous persons, and should acknowledge the contribution of each and all of them. In an attempt to thank most of them, we must begin with the participants in the seminar on the first draft of the book, which was held at the University of Florence, in a classroom of the Department of Legal Science, July 10–11, 2013. On that occasion, we benefited from the insights, comments, and suggestions of some of the most authoritative scholars and judges from both sides of the Atlantic: the Hon. Samuel Alito of the Supreme Court of the United States, Professor Anthony J. Bellia of Notre Dame Law School, the Hon. Guido Calabresi of the U.S. Court of Appeals for the Second Circuit, Professor Vicky Jackson of Harvard Law School, the Hon. Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit, Professor Cesare Pinelli of the University of Rome "La Sapienza," the Hon. Sabino Cassese of the Italian Constitutional Court, and Professor Vincenzo Varano of the University of Florence.

Professor Eric Longo, of the University of Macerata, gave valuable advice on our discussion of social rights and also served as our statistical expert. Without him, the tables in the appendices would have been, at a minimum, less clear, and probably would not have found their way into the book at all.

Professor Andrea Pin, of the University of Padova, shared with us his knowledge of fundamental rights jurisprudence, especially in the area of immigration, which has become crucial in the Italian political, social, and legal life of the last ten to fifteen years.

We are deeply indebted also to Mariangela Sullivan Crema for her extremely successful effort to put into beautiful English some decisions of the Italian Constitutional Court, written in a style that is often very difficult to translate.

Alessandra De Luca, of the University of Florence, has been a very careful reader of the various drafts. Many of her comments have been taken into account.

Last but not least, we owe our deepest thanks to a small group of doctoral and postdoctoral students of the University of Florence—Matteo Balloni, Sara Benvenuti, Luca Giacomelli, Sara Martini, Lucrezia Palandri, and Fan Yjan—who acquired a remarkable ability to move around the dozens of messy files that have been exchanged among the authors, always with high spirits and cheerfulness, as well as to Felicia Caponigri of Notre Dame Law School, who provided exceptional assistance with everything from translation and editing to organization of our Florence seminar.

I The Constitutional Court

1 The Historical Development of Italian Constitutional Adjudication

1. Constitutional Justice prior to 1948

The emergence and development of constitutional adjudication in Italy presents a basic puzzle. Over the decades since the adoption of the Constitution of 1948, the Constitutional Court, and the system of judicial review in which it is the central player, have become strong and stable, effective, and politically legitimate. At the same time, if we look at the longer historical trajectory of the Italian legal tradition in the century prior to the Constitution, and even in the first decades of the post–World War II Republic, the preconditions for such a development seem remote. Everything from the theoretical foundations of sovereignty to the institutional weakness of the Judiciary was aligned against the probability that constitutional judicial review could take root and flourish in Italy. How, then, did such a system succeed in being grafted onto a tradition of law and politics to which it was completely alien? As we will see both in this chapter and in the rest of this book, the factors that made that possible have affected the institutional character and jurisprudence of the Constitutional Court throughout its history, up to the present. Moreover, the keys to this puzzle are of course relevant far beyond the boundaries of Italy. Many of the obstacles to creating an entirely new but effective system of

constitutional justice that were present in Italy are structurally very similar to those faced in a variety of countries around the world today. Thus, the story of the conception, gestation, birth, and growth of the Constitutional Court yields valuable lessons for efforts to establish and strengthen constitutional justice elsewhere as well.

In Italy as in the rest of Europe, the great liberal revolutions of the late eighteenth century provoked strong movements toward constitutional and representative forms of government. The end of the Napoleonic empire and the "restoration" that followed the Congress of Vienna in 1815 led throughout Europe to support for constitutional charters that both protected the rights of citizens and established a separation of powers that included the creation of representative parliaments (in various forms).

Consistently with these developments, in 1848 Carlo Alberto, the King of Sardinia, promised to his subjects that he would adopt a statute to establish a representative system of government. Until then the small Kingdom of Sardinia, which would eventually become the Kingdom of Italy in 1861, was still an absolute monarchy, with all of its powers concentrated in the hands of the heir to the Savoy dynasty. Carlo Alberto was brought to this decision most immediately by the fact that in February of that year the Kingdom of Two Sicilies and the Grand Duchy of Tuscany both accepted new constitutions under the pressure of popular revolts. Carlo Alberto thereafter hurried to concede a constitution to his people because, as his minister said, "it is necessary to grant it rather than to have it imposed."[1]

After sleepless nights and innumerable meetings, on March 4, 1848, Carlo Alberto adopted a "fundamental, perpetual, and irrevocable law of the Monarchy." This Albertine Statute went on to serve as the constitutional foundation of Italy for the next one hundred years.

1.1. THE FIRST ITALIAN CONSTITUTION

The Albertine Statute consisted of 84 articles. Inspired by the French constitutional text of 1830 and that of the Kingdom of Belgium of 1831, it follows the general structure of liberal European constitutions. It is primarily devoted to establishing the rights and duties of citizens and to setting forth the powers of the respective governing institutions (the King, the Senate and Chamber of Deputies, the Ministers, and the Judiciary).

The Albertine Statute did not, however, recognize any power of judicial review of legislation, nor was there any subsequent movement toward developing such a power notwithstanding the Statute's status as "fundamental, perpetual, and irrevocable

[1] U. Allegretti, *Profilo di storia costituzionale italiana*, Bologna, Il Mulino, 1989, p. 368.

law". The prevailing juridical views throughout the period of the Albertine Statute regarded it as a "flexible" constitution, not a "rigid" one—that is, it was deemed capable of being modified at any time by the same means as any other law, making it therefore incapable of serving as a standard for judicial review of ordinary legislation.

The conventional reading of Italian legal history ascribes this dichotomy between *flexible* and *rigid* constitutions to the writings of two prestigious Oxford colleagues, Albert Venn Dicey and James Bryce. Dicey's *An Introduction to the Study of the Law of the Constitution* (1885)[2] and, even more, Bryce's *The American Commonwealth* (1888)[3] were very influential texts in early twentieth-century Italian legal and political thought. Nevertheless, explaining the Italian approach to the Albertine Statute requires a little more than citation to the work of those British authors. After all, Bryce was very familiar with the Constitution of the United States (he had been the English ambassador there) and with the "rigidity" introduced into the American system by Chief Justice John Marshall and *Marbury v. Madison*. On this basis he distinguished the written American Constitution with the unwritten British one, and associated flexible constitutions with unwritten ones while he considered all written constitutions to be rigid.[4] The Italian borrowing of the English theorists, therefore, was thus arguably based on a misreading of their work. More important, the work of Dicey and Bryce entered the Italian juridical scene well after the Albertine Statute had already been in effect for decades.

The English theories of flexibility had their technical and textual link to the Italian constitutional system in the absence of any established amendment procedure for the Albertine Statute:

> Our statute did not say who and by what means it could be subsequently amended. Consequently, not presuming that it could remain unchangeable for centuries, nor that the power to correct it should remain in the hands of the king, the power to amend it could only fall on the parliament, that is, on the direct representative of the sovereign body and the proper organ for issuing legal norms.[5]

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[2] Translated into French (the official language of the Kingdom of Sardinia) as *Introduction à l'étude du droit constitutionnel,* in 1902.

[3] Bryce's volume was originally translated into Italian by Attilio Brunialti, who is considered to be among the founders of political science and constitutional law in Italy, as *La Repubblica americana*, Torino, UTET, 1913–1916.

[4] J. Bryce, *Flexible and Rigid Constitutions*, in *History and Jurisprudence*, vol. I, New York, Oxford University Press, 1901 (the original essay dates 1884).

[5] F. Racioppi, I. Brunelli, *Commento allo statuto del Regno*, Torino, Unione tipografico-editrice torinese, 1909, p. 191.

In other words, lacking an amendment clause, assuming that the Statute could not be thought of as forever unchanging, and recognizing that the King had "irrevocably" ceded his own lawmaking power, the only body capable of modifying it would be the holder of the legislative power. Parliament, in the ordinary exercise of its legislative functions, could therefore pass any laws without constraint by the Albertine Statute because the latter was itself subject wholly to the same, ordinary legislative authority of Parliament.

At the same time, other comparative experience and theory existed throughout the era of the Albertine Statute that could have allowed the emerging Italian constitutional system to develop a rigid approach to that basic document and to accept some form of constitutional judicial review. For instance, other constitutional models did exist that distinguished between ordinary laws and constitutional laws (e.g., the Constitution of Belgium), or that required a supermajority to amend the constitutional text rather than the simple majority of ordinary legislation (e.g., the Constitution of Naples of 1848). Above all, the United States Constitution already provided an example of a constitution that had been interpreted to be "rigid" without having any explicit language in it to establish judicial review.

At the least, then, we need to identify the other factors, beyond imported British ideas and the silence of the text itself, which may have pushed the Italian tradition to adopt and maintain a flexible approach toward its first written constitution. Those factors can be found in the general climate and jurisprudential orientation of Italian legal and political culture in the era of classical Liberalism, and in particular in the twin emphases on the absolute sovereignty of the Parliament as legislator and on the correspondingly subordinated authority of a Judiciary lacking independence.

1.1.1. Parliamentary Omnipotence

The absolute authority of Parliament was in fact the cornerstone of Italian legal and political thought in the Liberal era. As one author of the period put it, precisely in connection with an analysis of the power of Parliament to modify the Albertine Statute, "the Italian Parliament, like the English one, regards itself as omnipotent, and as permanently constituent."[6] As these words reveal, this "super-principle" of the Italian constitutional order of the time is clearly linked to English theories of parliamentary sovereignty that were widely cited throughout Europe. Dicey expressed the idea, which had already been established and developed before him in William

[6] G. Arangio-Ruiz, *Istituzioni di diritto costituzionale italiano*, Milano, Fratelli Bocca, 1913, p. 466.

Blackstone's *Commentaries on the Laws of England* (1765–1769) and John Austin's *Province of Jurisprudence Determined* (1832), by saying:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever: and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.[7]

From this starting point, the idea of a rigid constitution that prevailed even over ordinary legislation, such as the one existing across the Atlantic in the United States, was very difficult to comprehend, let alone accept. Alexis de Tocqueville revealed the gulf between the two views in an illuminating passage describing how different judicial attitudes toward the law emerge from divergent ideas about the relationship between the constitution and society:

> The political theories of America are more simple and more rational [than in France or England]. An American constitution is not supposed to be immutable as in France; nor it is susceptible of modification by ordinary powers of society as in England. It constitutes a detached whole, which as it represents the determination of the whole people is no less binding on the legislator than on the private citizen, but which may be altered by the will of the people in predetermined cases, according to established rules. . . .
>
> It would be . . . unreasonable to invest the English judges with the right of resisting the decisions of the legislative body, since the Parliament which makes the laws also makes the constitution; . . .
>
> But . . . [i]n the United States the Constitution governs the legislator as much as the private citizen: as it is the first of laws, it cannot be modified by a law; and it is therefore just that the tribunals should obey the Constitution in preference to any law. This condition belongs to the very essence of the judicature; for to select that legal obligation by which he is most strictly bound is in some sort the natural right of every magistrate.[8]

From there, Tocqueville recalls the famous phrase of Delolme to describe the omnipotence of the English Parliament: "It is a fundamental principle with the

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[7] A. V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, London, MacMillan, 1885, p. 35.

[8] A. de Tocqueville, *Judicial Power in the United States, and Its Influence on Political Society*, in *Democracy in America*, vol. 1, Ch. VI, pp. 126–130.

English lawyers, that Parliament can do everything except make a woman a man, or a man a woman."

Using the same underlying conception of Parliamentary sovereignty, in Italy everyone accepted the succinct conclusion that every law that is properly issued is constitutional.

1.1.2. The Lack of an Independent Judiciary

Tocqueville's contrast among England, France, and the United States not only underscores the divergent understandings of the scope of legislative power vis-à-vis the respective constitutions in these systems, it also highlights the correlative differences in the roles of judges. In Italy, the severe lack of judicial independence was the other important element accounting for the impossibility of establishing a system of judicial review.

Ordinary judges in Italy at the time of the Albertine Statute were entirely subordinated to the other powers of the State, and especially to the Executive. Without any guarantees of independence or autonomy, "magistrates could always be removed at the pleasure of the king. In the same way, there were no criteria for the nomination of judges, because they were recruited without any guarantee of independence whatsoever. Only for the magistrates of the Senate and for the courts of appeal was it even necessary to have a law degree."[9]

The Albertine Statute itself established in Article 68 that "Justice emanates from the King, and is administered in his Name by the Judges that He appoints." In contrast, it also provided in Article 73 that "The interpretation of the laws, in an obligatory way for all, is the exclusive task of the legislative power."

In short, "the Italian Judiciary, for various reasons, was not capable of opposing the omnipotence of the [Parliament] in such a way as to give life to an Italian power of judicial review."[10]

1.2. TWO EXCEPTIONS TO THE ABSENCE OF JUDICIAL REVIEW

Notwithstanding the solid uniformity of the prevailing views outlined above regarding the impossibility of constitutional review of legislation in Italy under the Albertine Statute, two very specific exceptions nevertheless can be found to the rule against judicial scrutiny of the validity of laws prior to 1948.

The first exception was in circumstances where a legislative act might be impugned for procedural reasons. In order to apply any law, the judge first had to verify that

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[9] P. Marovelli, *L'indipendenza e l'autonomia della magistratura italiana dal 1848 al 1923*, Milano, Giuffré, 1967, p. 18.

[10] M. Bignami, *Costituzione flessibile, Costituzione rigida e controllo di costituzionalità in Italia (1848–1956)*, Milano, Giuffré, 1997, p. 19.

it was valid and in force, and this implied the need to exercise a preliminary check of the "formal requisites of law"—for instance, whether the text approved by the Chamber of Deputies was the same as that of the Senate, that the text had been published in the Official Gazette as required, that any necessary time lag between promulgation and taking effect had expired, etc. In such cases, although they were rare (one single example: *Cassazione Roma,* June 20, 1886), both the courts and scholars agreed that the judge should not apply any act lacking such formal and procedural validity. The second exception had a more significant scope of application, and its history is revealing of the challenge of trying to establish any form of judicial review in Italy prior to the Second World War.

Starting in the first half of the 1920s, many jurists began to oppose the practice of the government of the King, on the basis of the Albertine Statute, of issuing decrees having the force of law (so-called "Royal Decree-Laws"). Article 6 of the Albertine Statute stated: "The King issues decrees and regulations necessary for the execution of the laws, without suspending their application or eliminating them." In other words, the King could not by decree or regulation modify the primary source of law itself, the Parliamentary statute. Nevertheless, from the very beginning of the period of the Albertine Statute in 1848, the government and King used Royal Decrees to suspend or modify statutes, especially in order to declare "states of siege" in situations of threats to public order (such as rebellions or popular revolts) or natural disasters (such as the earthquake of Messina in 1908).

The Government, and some jurists, justified this practice at first on the basis of necessity. In addition, as a partial check on this extensive government power, starting in 1859 the decrees contained a clause requiring the presentation of the decree to Parliament for its "conversion" into ordinary legislation (although no time period for doing so was specified).

This practice grew disproportionately during the First World War, when more than one decree-law was issued on average per day. The arrival of the Fascist regime in 1922 made the problem even worse.

In contrast to the reluctance to consider a substantive judicial control over Parliamentary laws, the reaction of the scholarly community was strongly opposed to the expanding uses of decree-laws. Vittorio Emanuele Orlando, for example, although he otherwise excluded the possibility of judicial review of legislation, wrote that decree-laws "are in form irremediably unconstitutional—all of them! And even if the Judiciary cannot attribute to itself a parliamentary competence of 'annulling' the norms issued by the executive branch, nevertheless it can rightfully refuse to apply them in a concrete case."[11]

[11] *Id.*, p. 57.

Thanks in significant degree to Ludovico Mortara, a prominent law professor-turned-judge and then President of the Court of Cassation, there also began to appear judicial decisions affirming the possibility of a form of judicial review of decree-laws. In particular, decisions authored by Mortara held that decree-laws not containing the clause mandating their conversion by Parliament into ordinary law were illegitimate (*Cassazione Roma,* January 24, 1922), and also that judges may refuse to apply decree-laws when there is no urgency necessitating this exceptional form of lawmaking (*Cassazione Sezioni Unite,* November 16, 1922). Moreover, courts began to require that conversion by Parliament, which otherwise could take years, occur within very short time periods. Similarly, on the basis of this case law the use of decree-laws in criminal law was altogether prohibited.

The experiment was destined not to last long, however. By 1923, the "inconvenient" Judge Mortara had already been forced into an early retirement. By 1925, Fascism openly began to show its true authoritarian nature. Typically the explicit revelation of Mussolini's dictatorial intentions is associated with his famous speech to Parliament on January 3, 1925, where he openly spoke of a coup d'état and defended the barbaric assassination of the opposition figure Giacomo Matteotti by Fascist squadrons. Just two days later was the formal opening of the judicial term for that year, a solemn occasion in which the Judiciary formally expresses its evaluation of the questions most important for the administration of justice in the nation. On that occasion, the *Procuratore generale* (Attorney General) of the Court of Cassation expressly and publicly requested that "in Italy the same power be conferred on the highest judges that is conferred on them in America by the rules of the most free of peoples, that of the United States"—that is, the power of judicial review.[12]

The response of the Fascist regime was swift and decisive. Soon after the speech of the *Procuratore generale*, the Government obtained from Parliament a Law (no. 100 of 1926) on the powers of the Executive, which, without formally abrogating the Albertine Statute, was in open conflict with it. The law not only gave the Executive explicit authority to issue decree-laws, but also specified "the judgment of the necessity and urgency [of the decree-laws] is not subject to any control other than the political control of the Parliament." In this way, judges were excluded from reviewing decree-laws essentially by defining them as "political questions," and the brief foray into judicial control of constitutional legitimacy was suppressed.

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[12] R. De Felice, *Mussolini il fascista*, Torino, Einaudi, 1968, pp. 40–41.

2. American-Style Constitutional Review during the Postwar Transition

With the fall of Fascism in July 1943 and the collapse of the regime's institutions, Italy entered into a transitional period. When the war finally ended in the Spring of 1945 with the liberation of all Italian territory, the antifascist parties and the King agreed on a pact: on the one hand, the King did not abdicate, but instead agreed to withdraw to a strictly private life and to name his son as the caretaker, or *Luogotenente*, of the Kingdom (literally, the "Lieutenant," thus not giving him the title of King); on the other hand, the Italian people would be given an opportunity, by referendum, to choose between a monarchy and a republic, and to elect a Constituent Assembly to draw up a new constitutional document.

The decree-law establishing this compromise (D.L.Lt. June 25, 1944, n. 151) provided that "until such time as the new Parliament is established, acts having the force of law shall be issued by the Council of Ministers through legislative decrees approved by the *Luogotenente* of the Kingdom." In this way, in the absence of an elected Parliament, the Executive formally acquired legislative power.

Moreover, even more interesting for the purposes of understanding the development of a system of constitutional justice in Italy, after the election of the new Constituent Assembly a new Legislative Decree of the *Luogotenente* (D.Lgs. Lgt. March 16, 1946, n. 9) established that "during the period of the Constituent Assembly and until the convocation of the first Parliament in accordance with the new Constitution, legislative power remains delegated to the executive, except in constitutional matters."

The phrase "except in constitutional matters" in fact had significant implications. It meant that legislative power (then in the hands of the Executive) could not intrude upon the substance of the constitutional order. It thus affirms directly the "rigidity" of constitutional matters by establishing that they could not be modified or derogated by "ordinary" legislation. This opened the door to a new form of judicial review, one as diffuse as the American model first created by *Marbury v. Madison*. As a result of this distinction, during all of the nearly two years of sessions of the Constituent Assembly (from June 2, 1946 to May 8, 1948), ordinary Italian judges were empowered to exercise a constitutional control of legislation, and in this way they began to experiment with an American-style, diffuse system of judicial review.

This is even more remarkable given that, until the new Constitution would come into effect on January 1, 1948, Italy had no written constitutional text at all, except for perhaps the Albertine Statute. In fact, an intense debate took place over just this point: What constitutional norms should judges apply? The answer was found in a few general principles of constitutional law, such as separation of powers, or

equality. On this basis, the Court of Cassation issued its first judgment of unconstitutionality in 1947 (*Cassazione Sezioni Unite*, July 28, 1947), refusing to apply the legislation at issue to the parties in the case (but not nullifying the law through a judgment of general effect).

This experiment with the American model of diffuse review represented a significant period for the development of Italian constitutional adjudication. Although the Constitution itself came into force on January 1, 1948, for a series of reasons (which will be discussed further in the following sections) the Constitutional Court did not become operative until January 1956. In the interim, Transitional Provision VII of the Constitution provided that "Until such time as the Constitutional Court begins its functions, the decision on controversies indicated in Article 134 [i.e., questions of constitutionality] shall be conducted in the forms and within the limits of the provisions already in existence before the implementation of the Constitution." Thus, the practice of constitutional judicial review by ordinary courts in fact lasted almost a full decade.

During that period, judges in courts at all different levels of the judicial system issued about 70 decisions regarding the constitutionality of laws. These cases had several of the typical hallmarks of constitutional decisions within diffuse systems of judicial review. They did not limit themselves to the formal or procedural validity of legislative acts, but instead used the new Constitution as a parameter for making substantive and material judgments about constitutionality. Moreover, these cases not only examined legislation enacted by the new Parliament after the entry into force of the 1948 Constitution, they also reviewed laws preceding the new constitutional order. And finally, the decisions regarding constitutionality were limited to the concrete case before the court and did not have a general effect on the validity of the law as such.

3. A Complex Conception: Designing the Constitutional Court

The Constituent Assembly that was elected on June 2, 1946 (by universal suffrage, for the first time in Italian history) had the task of drafting a new Constitution, in place of the Albertine Statute, for an Italian State that was reborn out of the ashes of Fascism after the Second World War. By referendum, the Italian people chose to establish a republic rather than a monarchy (by 54.3 percent to 45.7 percent). The "founding fathers" of the Constituent Assembly were left with virtually all of the other fundamental decisions that needed to be made. Would the form of government be a presidential system or a parliamentary one? Was it to be a unitary or a federal State? What individual rights would be recognized and guaranteed? And, most relevant to our discussion here: Would the constitutive document also establish a system of constitutional adjudication, and if so, according to what model?

The Assembly was formally in session from June 25, 1946, until December 22, 1947, when the Constitution was approved. However, it remained in extended working sessions up until January 31, 1948, because of the need to approve various "constitutional statutes,"[13] including, as we will see in further detail below, one regarding the Constitutional Court.

3.1. THE CONSTITUENT ASSEMBLY DEBATE

The Constituent Assembly was composed of 556 delegates. The two strongest political groups, which together comprised almost 80 percent of the total Assembly, were the Christian Democrats on the one hand (with 207 seats), and on the other the Italian Communist Party and the Proletarian Unity Socialist Party (with 219 seats combined). The remaining 130 seats were distributed among various parties, most of which represented a generally secular, liberal-democratic ideology. The three political groupings entered the debate with divergent views on the issue of constitutional adjudication.

One group, associated principally with the Christian Democrats, favored having a system of constitutional adjudication. Even before the fall of the Fascist regime, their leaders had been issuing statements—similar to those of other Christian political parties in France and Germany—in support of a high court with the power to guarantee the constitutional order. In a 1943 pamphlet, Alcide de Gasperi, the Italian statesman and founder of the Christian Democratic Party (writing under the pseudonym "Demofilo"), advocated a supreme court that "would protect the spirit and the letter of the Constitution, defending it against every abuse by public powers and every threat from the [political] Parties."[14] De Gasperi and others called for a court not only as a guarantee of constitutional rigidity, but also to protect what they regarded as the supreme value of the human person and the basic social principles that the Constitution should embody.

Some liberal-democratic parties, such as the Republicans and the Action Party, were allied with the Christian Democratic position, although for somewhat different reasons. The Liberal Party, which represented the pre-fascist political class, was substantially divided between a conservative wing more wedded to an older conception of Parliamentary sovereignty (and thus reluctant to accept limits on legislative

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[13] In the Italian Constitution, in addition to the text of the Constitution itself, there are other legal sources called "constitutional statutes" (or "constitutional laws") endowed with the same legal value as the Constitution. They are approved by the Parliament through a special procedure—provided by Art. 138—that is the same as that requested to amend the Constitution.

[14] Demofilo (pseudonym of Alcide De Gasperi), *Le idee ricostruttive della Democrazia Cristiana*, in *Atti e documenti della Democrazia Cristiana*, Roma, Edizione Cinque Lune, 1959, pp. 12–15.

power) and a more progressive wing in favor of establishing a system of constitutional adjudication. The latter included Luigi Einaudi, who later became the first President of the Republic of Italy, and who in the Constituent Assembly was the only person who spoke in favor of the American model of judicial review.

The political Left, and in particular the Communist Party, was instead strongly opposed to the creation of a Constitutional Court, for various reasons. A theoretical objection derived from the communist conception of the State. As Palmiro Togliatti, the leader of the Communist Party, expressed it:

> Only the national assembly can pronounce upon the constitutionality of law, as the Parliament cannot accept any control other than that of the people. The proposed Court may be composed of the most illustrious men, the most prepared in the subject of constitutional law, but as they are not elected by the people they do not have the right to judge acts of Parliament.[15]

They also had a strong practical suspicion of the proposed court, based on the notoriety of the American experience of the United States Supreme Court placing strong obstacles in the path of Franklin Delano Roosevelt's New Deal social policies. Togliatti, again, stated the objection succinctly in the Constituent Assembly. He described the Constitutional Court as "something bizarre" that would lead to "a fear that tomorrow there may be a majority that is the direct and free expression of the working classes, who want to renew profoundly the political, economic, and social structure of the country."[16] In short, the communists saw the Court as a conservative organ destined to block the socialist reform of the State in the event that the political alliance of the leftist parties succeeded in winning the future elections.

This same line of pragmatic reasoning, however, eventually led the communists to change their course as the debate continued. What if the parties of the Left did not win the elections? What if they found themselves in the opposition? At that point their interests would be reversed. In the words of Piero Calamandrei (one of the Assembly's rapporteurs on the question of the Constitutional Court, an expert in constitutional law, and ultimately the key figure in determining the design of the Court), "in preparing a democratic constitution it is more opportune and more prudent to start from the point of view of the minority" rather than the majority.[17]

This led the parties of the Left to shift and to accept in principle a constitutional court, but on condition that it would be composed exclusively of judges appointed

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[15] *Atti Assemblea Costituente* (Working papers of the Constituent Assembly), p. 92.

[16] *Atti Assemblea Costituente* (Working papers of the Constituent Assembly), p. 121.

[17] *Atti Assemblea Costituente* (Working papers of the Constituent Assembly), p. 127.

by Parliament (thus bringing the court back into the dynamics of "political" decision-making). With that reversal, the Constituent Assembly as a whole arrived fairly quickly at the conclusion that there needed to be a system of constitutional control on legislation.

As soon as the discussion moved on to the means of realizing that end, however, it was clear that the members of the Constituent Assembly had very vague and divergent ideas among them. On the one hand, very few of them had sufficient technical expertise to grapple with the complex questions posed by the different models of constitutional adjudication. On the other hand, they were dealing with a problem that was absolutely novel: Italian constitutionalism. As the Constitutional Court said of itself some years later in Judgment 13/1960, such an organ was "unprecedented within the Italian legal order." Whereas for organs such as the Parliament, the Judiciary, the Executive, and even the President (within a Parliamentary system), previous experience could serve as a reference point, even if only to criticize and modify prior practices, no such precedents or comparative examples existed within the Italian experience for a mechanism of constitutional control. As we have already seen, throughout the century of the Albertine Statute, Parliamentary omnipotence reigned supreme, alongside an exceptionally weak and subordinated Judiciary. Fascism had completely erased any real possibility of judicial review of legislative decisions. And even if the transitional period did witness a de facto form of diffuse review, it was entirely a judicially created practice inspired generically by the example of the United States, with no systematic structure or regulation to it. In sum, there were no sufficient Italian models upon which to rely.

As a result, foreign models of constitutional adjudication provided the only available reference points. Two in particular were known to some degree to members of the Assembly: that of the United States, and that of the Austrian Constitution of 1920. Both were born in particular historical, cultural, and political contexts quite different from the Italian one, so there was no suggestion that either could simply be transplanted directly into the new Italian constitutional order (with the exception of Einaudi's plea to wholly adopt the U.S. model). The Assembly's task would be one of elaborating a new institution proper and appropriate to the emerging Italian constitutional environment by mixing elements of the other models and generating a new hybrid form of judicial review.

The United States, on one side, offered a model in which the review of legislation is clearly judicial—that is, it is conducted by regular courts within the judicial branch, in the exercise of their ordinary jurisdictional functions—and it is diffuse among any judge who is called to apply the impugned law. It is also what in Italy would be referred to as "incidental"—that is, the exercise of constitutional review arises from within an actual case or controversy, which then also makes it concrete.

The judgment in the end is thus, strictly speaking, only applicable *inter partes* in the case at hand (although the subsequent applicability of the decision as a judicial precedent in future cases can give it much broader effect).

On the other side, the Austrian model of 1920, deeply influenced by the thought of Hans Kelsen, represented a system of constitutional control that was centralized in a single, specialized tribunal. Conceived of as a "negative legislator," the Court is in an important sense not understood to be part of the Judiciary at all, and is therefore composed of special judges all named by the Parliament. Certain designated institutional actors may raise questions of constitutionality directly in the Court on an abstract basis—that is, independently of the application of the law in question to a concrete case—and consequently a judgment of unconstitutionality has an *erga omnes* effect by nullifying the offending legislation and rendering it generally inapplicable.

Of the three initial proposals for the new Italian Constitutional Court presented and discussed in the Constituent Assembly, none reproduced in a "pure" form either of these two foreign models. Instead, all the proposals offered certain elements of the American form of review alloyed with aspects of the Austrian one.

Almost all of the parties started with a default preference for the Kelsenian model of centralized control in a specialized body, although the delegates were divided as to whether it should be considered a fundamentally judicial organ in its nature and composition, or instead a political one. In certain ways, this debate never did get resolved in the Assembly.

The American model was not really taken into consideration because of a number of difficulties stemming from the continental constitutional tradition. Certainly, a more rigid conception of the separation of powers and the absence of stare decisis were obstacles to the transplant of the diffuse model in Europe. However, more relevant is the fact that—as Mauro Cappelletti pointed out:

> [c]ontinental judges usually are "career judges" who enter the judiciary at a very early age and are promoted to the higher courts largely on the basis of seniority. Their professional training develops skills in technical rather than policy-oriented application of statutes. The exercise of judicial review, however is rather different from the usual judicial function of applying the law[18].

Such an innovative and delicate function was, therefore, attributed to a special and specialized institution, the composition of which would radically differ from that of any other court.

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[18] M. Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford, Clarendon Press, 1989, pp. 136–146.