Legality vs Constitutional Principles: the Italian Experience after the Second World War

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Introduction

In the history of Europe, the affirmation of the principle of legality began to take shape between the 16th and 17th centuries, its path becoming especially complex and tortuous between the 19th and 20th centuries.

This research aims to outline some aspects of the debates and clashes between institutions that took place in Italy after its defeat in World War II, when it was necessary to rebuild the State and to re-found the relationship between government and citizens according to the principles of the new democratic constitution that came into force in January 1948.

On the one hand, this situation led to a clash between the Court of Cassation and the Constitutional Court, the former acting as a defender of legality, the latter as defender of the constitutionality of laws. On the other hand, it required continual adjustments in the checks and balances of powers, first and foremost as concerned the judicial branch and the legislative and executive branches of government.

1. The Publication of the Italian Constitution and the Establishment of the Constitutional Court: Historical Context

At the end of the Second World War, Italy's economy, politics and indeed entire society was on its knees. The war had been lost, while cities and all major transport routes had been destroyed by the bombs of both the Allied forces of liberation and the Nazis. Everything had to be rebuilt from the ground up, including the country's very laws and their enforcement(1).

The war to liberate Italy from Fascism and the occupying German forces lasted two years, concluding only in April 1945. It had begun with the Allied invasion of Sicily in July 1943: as the British and Americans progressively took control of southern and central Italy, the Committee of National Liberation for Northern Italy, in coordination with the Allied High Command, fought to liberate the northern part of the country.

Once the war for the liberation of Italy was over, the risk of civil war was avoided thanks to an accord between left- and right-wing parties. The principle oflegal continuity of the "old" State won out, which was also supported by the British and American Allies(2). After an attempted purge, amnesty was granted to

(1) L. Lacchè, "Sistemare il terreno e sgombrare le macerie". Gli anni della "costituzione provvisoria": alle origini del discorso sulla riforma della legislazione e del codice di procedura penale, in L'inconscio inquisitorio. L'eredità del codice Rocco nella cultura processualpenalistica italiana, a cura di L. Garlati, Milano, Giuffrè, 2010, pp. 271301-; R. Bianchi Riva, "Per superiori ragioni di giustizia e di pubblico interesse". Legislazione eccezionale e principi liberali dal fascismo alla repubblica, in Giustizia penale e politica in Italia tra Otto e Novecento, a cura di F. Colao, L. Lacchè, C. Storti, Milano, Giuffrè, 2015 (Per la storia del pensiero giuridico moderno, 103), pp. 155179-.

(2) For a reconstruction of the events following the vote of the Grand Council of Fascism on 25 July 1943 (resulting in the fall of Mussolini) and the armistice reached with the Allied powers on 8 September of the same year, see the ever-relevant work ofL. Valiani, Il problema politico dellanazioneitaliana, in A. Battaglia, P. Calamandrei, E. Corbino, G. de Rosa, E. Lussu, M.

Fascists and Nazi collaborators inJuly 1946[3]; meanwhile, the country had just embarked upon the enormous task of refunding the State, not only in terms of rehabilitating its international standing through diplomatic channels, but also domestically, where the law itself was to be rebuilt. To do so, a Constituent Assembly was established in order to draft a new constitution for a democratic republic.

The Constituent Assembly was made up of 576 members who were elected on 2 June 1946, and it was organized into commissions and subcommittees. Despite the fact that no preparatory work had been carried out, let alone any 'initial project' put in place, the Assembly was able to work quickly and intensely. The same was true of the so-called Commission of 75, who drafted the definitive text[4]. The Constitution was approved on 22 December 1947, together with some transitional provisions and the electoral law. When it came into force on 1 January 1948, one of its authors, Vittorio Emanuele Orlando, called it a 'miracle'[5].

Sansone, L. Valiani, Dieciannidopo, 19451955-. Saggi sulla vita democratica italiana, Bari, Editori Laterza, 1955, pp. 3112-, especially pp. 5962-; P. Calamandrei,Il compromesso costituzionale iniziale, ibidem, pp. 211316-, pp. 214217-.

(3) P. P. Portinaro,I conti con il passato. Vendetta, amnistia, giustizia, Milano, Feltrinelli, 2011 and cf.G. Zagrebelsky, La magistratura ordinaria dalla Costituzione a oggi, in Storia d'Italia, Annali 14. Legge Diritto Giustizia, a cura di L. Violante, Torino, Eiuaudi 1998, pp. 713790-, especially p. 729.

(4) The institution of a Constituent Assembly had already been provided for in Lieutenant Decree Law n. 151 of 25 June 1944, and it was regulated by Decree Law n. 98 of 16 March 1946. Specifically, article 3 of the latter granted the government the exercise of legislative power "except for the constitutional matter", while electoral laws and laws on approving international treaties were reserved for the Constituent Assembly. The government was also "responsible for the Constituent Assembly". On this topic, see: Corte suprema di Cassazione – Sezione Unite civili – 28//1947, n. 1212.

(5) V. E Orlando,Prefazione (21 aprile 1948), in La Costituzionedella Repubblica Italianaillustrata con ilavoripreparatori da V. Falzone, F. Palermo, F. Cosentino del Segretariatogeneraledella Camera deiDeputati, Roma, Colombo, via Campo Marzio, http://documenti.camera.it/bpr/14611_testo.pdf, p. 6: "Now, in the case of the recent Constitution, approved in Italy by the Constituent Assembly, the initial preparatory phase was missing entirely {whereas in

There was no doubt that the constitutional structure of the Italian State had changed. The new democratic republic was founded upon the principle of the separation and balance of State powers, and it sought to guarantee citizens the rights to liberty, equality, work and social justice(6). A newly established organ, the Constitutional Court, was tasked with ensuring the constitutionality of legislation enacted by the politicalauthority (the Parliament). Operating on the premise of a rigid Constitution, this Court was actually given several functions, including the resolution of conflicts arising between the branches of government, and checking that ordinary laws respected constitutionally guaranteed principles(7).

Nonetheless, as Piero Calamandrei resolutely pointed out, this 'revolutionary' new constitutional structure was still just on paper(8). The same opinion was shared by some his fellow jurists at the time. The reform was incomplete, as there were still no laws in place to implement the many new organs that had been established by the Constitution, such as the Constitutional Court. Though the Constitution had indeed come into force, the previous institutional and legislative system was still in force as

other cases it had been formidable: think of the Codes} and one could go so far as to affirm that there was no initial project whatsoever. For this reason, I once said that the drafting of this Constitution could be considered a miracle".See alsoValiani, Il problema politico cit. nt. 1, pp. 8687-.

(6) On this, see the hopes expressed at the end of Valiani, Il problema politico cit. nt. 2, pp. 111 et seq.

(7) Art. 134 The Constitutional Court shall pass judgement on: – controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions; – conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions; – charges brought against the President of the Republic and the Ministers, according to the provisions of the Constitution.

(8) On Piero Calamandrei, illustriousexponent of the Action Party, see the following (whichalso include bibliographicalreferences): B. Sordi,Calamandrei, Piero (18891956-), in Dizionario Biografico dei Giuristi Italiani, a cura di I. Birocchi, E. Cortese, A. Mattone, M.N. Miletti, Bologna il Mulino, 2013, vol. I, pp. 377381-.

well ("the previous legal system remains in force") – this made it difficult to bring about the real social justice that Constituent Assembly members had proclaimed as a goal(9). One reason for this was the principle of continuity of the State, mentioned above; another reason was that in the meantime, no significant changes had been made to previous legislation. Indeed, contrary to the demands of several jurists, including Calamandrei himself, the Constituent Assembly had only been granted the power to write the Constitution, and not the power to reform legislation(10).

The new democratic Constitution was thus placed at the highest level in the hierarchy of the sources of law, though it was inserted into a system of legislative and code-based sources that drew on political principles from the pre-Fascist liberal age

(9) Calamandrei,Il compromesso costituzionale iniziale cit. nt. 2, especially p. 222, andwhereinthere areextensivereferences toC. A. Jemolo,Continuità e discontinuità costituzionale nelle vicende italiane del 25 luglio 1943, in Rendiconti Accademia dei Lincei, Roma, 1947; A. Amorth,La Costituzione italiana, Milano, 1948, pp. 910-; V. Crisafulli,La Costituzione e le disposizioni di principio, Milano, 1952, p. 31; P. Calamandrei, Cenni introduttivi sulla Costituente e sui suoi lavori, in Commentario sistematico alla Costituzione italiana diretto da P. Calamandrei, A. Levi, Firenze, 1950; Esposito,La Costituzione italiana. Saggi, Padova 1954, especially p. 2; BalladorePallieri,La costituzione italiana nel decorso quinquennio, in Foro Padano, 2(1954). Even though the Constitution had not limited itself to drawing up "an outline" regarding the arrangement of government organs in the new State, but rather had completely regulated the new organs, "the actual constitutional form of the State would not have been able to correspond to the type of democracy imagined by the Constituent Assembly if the necessary social transformations were not to take place". Indeed, the idea of the Constituent Assembly members had been to give rise "to a new type of republic, the essential features of which were highlighted in the introductory part of the constitution, entitled Fundamental Principles"; a democracy in which the proclamation of fundamental civil and political liberties was made through "an effective economic equalization of society, such that those proclamations might become profitable for everyone, and not just for the rich" (Calamandrei,Il compromessoc ostituzionaleiniziale cit. nt. 1, pp. 218220- con particolareriferimentoagliartt. 3 c.2, 4 e 36 dellaCostituzione with particular reference to article 3, paragraph 2, article 4 and article 36 of the Constitution). All of this falls under the name of social justice, as can also be found in article 20 of the Constitution of Kuwait.

(10) Loc. ult. cit. andValiani, Il problema politico cit. nt. 1, pp. 7177-: "And yet, the Constituent Assembly could have translated at least some rights to liberty into law immediately, thereby making it compulsory through an extensive interpretation of what was written on 16 March 1946 regarding the "constitutional matter" […]" (p. 72).

(1865-1922) and the Fascist regime (1922-1943)[11]. Legality was ensured, as even the systems in place before 1948 had generally been characterized by the principles of certainty and predictability of the law, but it could be said that the beginning of Italy's new constitutional State was marked by the existence of two levels of substantive legality. Indeed, the principles and political aims that informed the legality of the laws in force at the time were different from the principles that had informed the new State's constitutional policy[12].

Constitutional legality was 'suspended' so to speak, awaiting implementation. There was no immediate plan to enact a law that might put procedures in place to quickly declare invalid or illegitimate those laws that had previously been in force and which clearly went against constitutional principles[13]; on the contrary, the transitional provisions that completed the Constitution contained "meticulous prescriptions for the subsequent gradual adaptation of the old laws to the new form of government"[14].

As mentioned above, the Constitutional Court was one of the Constituent Assembly's unfinished works. The Constitution provided for its establishment, together with some principles relating to its function, but in keeping with the principle of the

(11) Valiani, Il problema politico cit. nt. 2, pp. 5969-, butalso 33and 35 et seq., 47.

(12) Valiani, Il problema politico cit. nt. 2, pp. 6364- (decree 16 March 1946) and 7172-.

(13) In this regard, there seems to be some difference between Kuwait's Constitution and Italy, given that, if I am not mistaken, the Constitution of 1992 left all previous laws in force, provided they did not go against the Constitution (Art. 180 [Continuation of Laws]of the Constitutionof Kuwait: "All provisions of laws, regulations, decrees, orders, and decisions, in effect upon the coming into force of this Constitution, continue to be applicable unless amended or repealed in accordance with the procedure prescribed in this Constitution, provided that they are not contrary to any of its provisions".

(14) The reference is to the 18 articles of theTransitional and Final Provisions approved with the Constitution by the Head of State, Enrico de Nicola, on 27 December 1947; see alsoCalamandrei,Il compromessocostituzionaleiniziale cit. nt. 2, p. 222.

separation of powers, it was stated that the 'future' Parliament would have the task of promulgating laws on the appointment of its members and on its actual functioning (first paragraph of article 137:"A constitutional law shall establish the conditions, forms, terms for proposing judgements on constitutional legitimacy, and guarantees on the independence of constitutional judges")[15].

Five years would pass after 1948 before the Parliament managed to push through the complex procedure of a constitutional law and publish a law to implement the Constitutional Court; another three years would pass before the Constitutional Court became operative[16]. The first sentence was handed down on 14 June

(15) Art. 137, in the originalItalian: Una legge costituzionale stabilisce le condizioni, le forme, i termini di proponibilità dei giudizi di legittimità costituzionale, e le garanzie di indipendenza dei giudici della corte.Paragraphs 23-: Ordinary laws shall establish the other provisions necessary for the constitution and the functioning of the Court. No appeals are allowed against the decision of the Constitutional Court. On the debates surrounding the introduction of the Constitutional Court in the new democratic order: D. Luongo,Il giudiziocostituzionale, in Il poteredeiconflitti. Testimonianza sulla storia della magistratura italiana, a cura di O. Abbamonte, Torino, Giappichelli, 2015, pp. 179196-.

(16) Lawn. 87 of 11 March 1953. Calamandrei,Il compromesso costituzionale iniziale cit. nt. 2, pp. 223226-. In correspondence with the implementation of the separation of powers, the Parliament was also tasked with reviewing constitutional laws: Article 138 of the Constitution (English version) Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members. (Italian: c. 1 Le leggi di revisione della Costituzione e le altre leggi costituzionali sono adottate da ciascuna Camera con due successive deliberazioni ad intervallo non minore di tre mesi, e sono approvate a maggioranza assoluta dei componenti di ciascuna Camera in seconda votazione. c. 2 Le leggi stesse sono sottoposte a referendum costituzionale quando entro un mese dalla loro pubblicazione, ne facciano domanda un quinto dei membri di una Camera o centocinquanta o cinque Consigli regionali. La legge sottoposta a referendum non è promulgata se non è approvata dalla maggioranza dei voti validi. c. 3 non si fa luogo a referendum se la legge è stata approvata nella seconda votazione da ciascuna delle Camere a maggioranza di due terzi de suoi componenti).

1956. And in that period there was not even one law published to implement any of the principles outlined in the Constitution(17).

2. The Court of Cassation and Articles 12 and 15 of the General Provisions to the Italian Civil Code of 1942.

In the eight years that passed between 1948 and 1956, the role of constitutional judge was performed by the Court of Cassation based on article VII of the Implementation Provisions. Ever since Italian unification, this Court had occupied the highest level in the hierarchy of the Italian judiciary, and it was the final judge of the legality of sentences handed down by magistrates in the lower courts(18).

At this point it is necessary to embark upon a long digression regarding the Court of Cassation and its role as defender of legality. Just as had occurred within other apparatuses of the State bureaucracy and economy, Italy's constitutional change had not actually changed the composition of the Court of Cassation. From an ideological point of view, its judges were still tied, so to speak, to the political tradition of the former regime(19). Indeed, because of reforms to the legal system during

(17) Calamandrei,Il compromesso costituzionale iniziale cit. nt. 1, pp. 217218-.

(18) Zagrebelsky,La magistratura ordinaria cit. pp. 725726-. On the history of the Court of Cassation from unification to Fascism, seeM. Meccarelli,La Corte di Cassazione nell'Italia unita. Profili sistematici e costituzionali della giurisdizione in una prospettiva comparata (18651923-), Milano, Giuffrè, 2005.

(19) Historiographershaveshownalmostunanimouslythat in the judiciary, and aboveall in the highestranks of the judiciary, no judgeswerereplacedbetween the pre-war period, wartime and the new republicangovernment: A. Battaglia,Giustizia e politica nella giurisprudenza, in Dieci anni dopo cit. nt. 2, pp. 319408-; G. NeppiModona,Il problema della continuità dell'amministrazione della giustizia dopo la caduta del fascismo, in Giustizia penale e guerra di liberazione a cura di G. NeppiModona, Milano, Franco Angeli, 1984, pp. 1159-;Zagrebelsky,La magistratura ordinaria cit.; A. Meniconi, Storia della magistratura italiana, Bologna, il Mulino, 2012.

that time, the minister of justice and the magistrates of the Court of Cassation had exercised "pervasive power" which was not curtailed, if not very gradually[20]. By its own admission, the Court of Cassation had played an essential role in laying down and enforcing the regime's guiding principles[21]. Furthermore, they were still tied to the dogmatic, technical and formalistic point of view that had characterized the juristic school of thought in Italy during the Fascist regime – the same school that had overseen the reform of all the codes (civil, penal, civil procedure and criminal procedure) and major laws during the two decades of Fascist dictatorship[22].

It must also be highlighted that just six years prior to the entry into force of the new Constitution – in other words, during the last year of the Fascist regime – a series of provisions on the

(20) Zagrebelsky,La magistratura ordinaria cit., 716. Above all, the reference is to the 1941 reform of the legal system carried through by Minister of Justice Grandi. On the institution of the High Council of the Judiciary (1958) and the partial reforms of 1946, which had extended irremovability to the Public Prosecutor, and on the introduction of jurisdictional control over dismissals, etc.,ivi, pp. 724725-.

(21) For a recentoverview, see the collection of studies inPerpetue appendici e codicilli alle leggi italiane, a cura di F. Colao, L. Lacchè, C. Storti, C. Valsecchi, Macerata, eum, 2011, andIl diritto del Duce. Giustizia e repressione nell'Italia fascista, a cura di L. Lacchè, Roma, Donzelli Editore 2015 in addition to the following, wherein a bibliographyisavailable on the Court of Cassation'sstances: C. Storti Un mezzo artificiosissimo di governo per ottenere con inganno e con vie coperte ciò che apertamente non si potrebbe ordinare. Le circolari dei ministri di giustizia sul processo penale tra unificazione fascismo, in Perpetue appendici cit.,pp. 171- 195, especially pp. 577627-andStorti, Lavoratori ribelli e giudici eversivi. Sciopero e licenziamento collettivo nella giurisprudenza di Cassazione tra 1900 e 1922, in Il diritto del Duce cit., pp. 329-; O. Abbamonte,La politica invisibile. Corte di Cassazione e magistratura durante il fascismo, Milano, Giuffrè, 2003; Id., Indipendenza della magistratura e separazione dei poteri. La tormentata vicenda di un'endiadi, in Il potere dei conflitti cit., pp. 328-.

(22) There are countless bibliographical references to this school and its influence on legislation and the interpretation of law, starting from the first statement of its principles in the early 1900s. I will limit myself to citing the following, which includes a bibliogr aphy:Enciclopediaitaliana di scienze, lettereedarti. Il contributo italiano alla storia del pensiero. Ottava appendice. Diritto, Roma, Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, 2012.

legal effects of the law had been published together with the Civil Code of 1942. These laws were called Disposizionidellalegge in generale (General Provisions of the Law)[23], more commonly known as the Preleggi. To this day, jurists continue to analyze the history of theseGeneral Provisions – specifically, how they were drafted and the ratio that led lawmakers to publish them – because these laws are for the most part still in force, despite the fact that one of them, article 12, has been brought into question. Indeed, in addition to its constitutionality having been questioned, more recently it has also been at the center of some cases in which Italian laws have conflicted with European Union laws[24].

In any case, the legal system of 1942 was characterized by a rigid conception of the primacy of the law. In such a context, not only did lawmakers establish a hierarchy in the system of rules (laws, decrees, etc.), they also set out the criteria that any interpreter of the law was to follow when interpreting and enforcing all laws in the Italian legal system. Naturally, the first and foremost interpreter of the law is a judge. As mentioned above, ever since the unification of Italy, parties to a trial or a public prosecutor could bring an appeal to the Court of Cassation if they objected to the legitimacy of a sentence: in other words, if they believed the law had been enforced unfairly.

Furthermore, pursuant to article 15, only lawmakers had the power to annul a law that was in force, which they could do

(23) Disposizioni della legge in generale, approvate preliminarmente al codice civile con regio decreto 16 marzo 1942, n. 262.

(24) For an overview of the different theories, and with a specific focus on the applicability of article 12 of the General Provisions in cases of conflict between European laws and Italian laws, seeV. Velluzzi,Le Preleggi e l'interpretazione. Un'introduzionecritica, Pisa, ETS, 2013, pp. 6672-.

through its express repeal, or through the enactment of a new law that would regulate the matter differently than the previous law[25]. In applying article 15 to the new constitutional order, the key word was still 'repeal' if a law was to be declared invalid and thus no longer in force; the only thing that had changed in this initial phase was the composition of the Parliament, as now representatives of all constitutional political parties could become members[26].

As stated above, however, the Constitution had assigned the Constitutional Court the function of ensuring the constitutional legitimacy of ordinary laws, and article 136 had established that any laws declared constitutionally illegitimate by the Court would cease to have effect the day following the publication of the decision[27].

(25) General Provisions – Article 12 Interpretation of the Law: In enforcing the law, no other meaning shall be given to the law besides that which has been made clear through the actual meaning of the words of the law as understood in connection with the lawmaker's intention. (Paragraph 2) If a controversy cannot be resolved with a specific provision, then other provisions that regulate similar cases or analogous subject-matter shall be consulted; if the case remains in doubt, then a decision shall be made based on the general principles of the State's legal system.

(26) Article 15 Repeal of laws: Laws can only be repealed by subsequent laws as expressly declared by lawmakers, or if new provisions are incompatible with previous provisions, or if the new law regulates a matter in its entirety after said matter had been regulated by a previous law. This law was actually included in the Constitution through article 75, with provides for a referendum to repeal a law.

(27) Article 136, paragraph 1:When the Court declares the constitutionalillegitimacy of a law or enactmenthaving force of law, the law ceases to haveeffect the dayfollowingthe publication of the decision (Italian: Quando la Corte dichiara l'illegittimità costituzionale di una norma di legge o di un atto avente forza di legge, la norma cessa di avere efficacia dal giorno successivo alla pubblicazione della decisione). Similarly, article 173 of Kuwait's Constitution: The Law shall determine the competent legal Authority to deal with the settlement of disputes in respect to the constitutionality of laws and regulations and shall determine this authority>s jurisdiction and the procedure it shall follow. The Law shall guarantee to both, the Government and those concerned, the right to challenge the constitutionality of laws and regulations before that Authority. Where the above-mentioned Authority rules the law or the regulation to be unconstitutional that law or regulation shall be deemed null and void.

Thus, how was it possible to reconcile article 15 of the General Provisions, which granted the legislative branch (Parliament) the power to repeal laws, with the institution of a new organ that could rule on and declare the constitutional illegitimacy of laws, and which was, by definition, non-political? Furthermore, how could the continuity of the rule of law be guaranteed in this new system, which considered the principle of legality an inalienable prerequisite for the protection of citizens, but which also introduced a new concept of legality founded not only on certainty and predictability, but also on conformity with constitutional principles?

Between 1949 and 1956, a period in which the role of constitutional court had been assigned to the Court of Cassation, an effort was made by the lattertogether with the Council of State (the highest level of administrative law) to resolve this aporia by classifying the legal effect of constitutional laws. They based their efforts on the principle of the primacy of the law(28), as well as onthe conviction that article 15 of the General Provisions was in force and unassailable. The legal effect of many articles of the Constitution was deferred, as said articles were not viewed as being compulsory, but rather only directive and programmatic. This meant that they would only take effect if and when, in the future, legislators might decide to reform a given branch of law governed by the specific principle expressed in the article in question. As for the compulsory articles, the Court of Cassation and the Council of State made a distinction between compulsory articles that would come into effect immediately (namely those that applied to the branches of government) and compulsory articles that would be deferred, and which would only take effect

(28) M. Fioravanti, La Corte e la costruzione della democrazia costituzionale (http://www.sossanita.it/doc/2016_06_CORTE-DEMOCRAZIA-COSTITUZIONALE.pdf), pp. 1 and 4.

if a law was enacted to implement them[29].

Although such a distinction was technically and juridically correct, it did take on a political meaning and thus lead to political repercussions, as mentioned above. Indeed, the implementation of the Constitution was dependent upon "the willingness of the parliamentary majority called to translate it into ordinary laws"[30]. Once again, the premise that the prescriptions in article 15 of the General Provisions were unassailable led to a heated debate over which State institution had the power to declare null and void those laws from the past which contrasted with the new Constitution[31]. There was no doubt that the Constitutional Court had jurisdiction over the constitutionality of laws that came into force after the Court was created and became operative; but there was no such certainty as to whether the Court would also have the same power as the Parliament to examine the constitutionality of laws that had been in force prior to its establishment, and rule them unconstitutional if that should be the case. As far as the judges on the Court of Cassation were concerned, there was no doubt: laws were in force until Parliament intervened to repeal them. This stance was also supported by the Attorney General during the first case brought before the Constitutional Court, which I shall examine below[32].

(29) Calamandrei,Il compromesso costituzionale inizialecit. nt. 2, pp. 227229- with regard to the sentencehanded down by a joint session of the Court of Cassation on 7 February 1948 (Sezioni Unite penali 7 febbraio 1948 Marcianò),asdiscussed in Zagrebelsky,La magistratura ordinaria cit., pp. 726729- and the sentencehanded down by the fifthsection of the Council of State on 26 May 1948; seealsoV. Crisafulli,Le norme "programmatiche" della Costituzione, in Studi di diritto costituzionale in memoria di Luigi Rossi, Milano 1952, pp. 5183- (http://bovisiomagazine.it/files/norme_progrcrisafulli_amm.pdf); R. Bin,Atti normativi e norme programmatiche, Milano, Giuffrè, 1988.

(30) Zagrebelsky,La magistratura ordinaria cit. pp. 727728-.

(31) Cf. § 2.

(32) Sentence 11956/ pp. 23-: The State's Attorney General argued that "for what concerned legislation prior to the Constitution, the latter had no basis from which to rule on constitutional legitimacy, because the compulsory laws of the Constitution entail the

3. The Court of Cassation and Verifying the Constitutionality of the Law

Over the period in which it acted as a constitutional court, the Court of Cassation often disregarded matters of constitutional legitimacy(33).

In 1950 the Court of Cassation ruled on an appeal seeking the "repeal" – as could be read in the sentence – of article 113 of the Consolidated Public Safety Laws of 1931. According to this article, the posting or dissemination of writings or drawings in a public place required prior authorization(34). The appellants claimed that this went against article 21 of the Constitution, which guaranteed the free expression of thought(35). Nonetheless, the

repeal of previous laws should they be incompatible with the Constitution, and the declaration of such falls under the exclusive competence of the lower courts; on the other hand, programmatic constitutional laws do not imply any lack of legitimacy as concerns any of the laws prior to the Constitution"; failing that argument, the Attorney General requested that the Court declare that there was no 'incompatibility' between article 113 of the Public Safety Laws, article 663 of the Penal Code (which contained the relative punishment), and article 21 of the Constitution.

(33) V. Cavallari,Interventi, in Il giudice nella democrazia moderna. Giustizia e Libertà, Atti del III Congresso Nazionale di Salerno 710- maggio 1970, in Rassegna dei Magistrati. Organo dell'Unione Magistrati Italiani, I1970), pp. 2741-, especiallypp. 647648-; O. Lo Cigno (CassationCouncillor), Interventi, in Il giudice nella democrazia moderna cit., pp. 658660-, cited in my work entitledIl segreto di Stato tra «flessibilità» e «invecchiamento» della Costituzione negli anni <60 e <70 del secolo scorso in Dalla Costituzione «inattuata» alla Costituzione «inattuale»? Potere costituente e riforme costituzionali nell>Italia repubblicana. Ferrara, 2425- gennaio 2013, a cura di G. Brunelli, G. Cazzetta, Milano, Giuffrè(Per la storia del pensiero giuridico moderno, 103), pp. 279295-, especially p. 283 nt. 22.

(34) Royal Decree n. 773 of 18 June 1931, Consolidated Public Safety Laws, article 113: Except as provided for the publication of periodicals and ecclesiastical material, it is forbidden to distribute or circulate writings or drawings in a public place or in a place open to the public without the permission of the local public safety authorities. It is also forbidden to post writings or drawings in a public place or in a place that is open or exposed to the public, or to make use of lights or noise to communicate with the public, or to make inscriptions, even if they are epitaphs, without the aforementioned permission.

(35) Article 21 of the Constitution:Anyone has the right to freely express their thoughts in

Court of Cassation ruled that article 21 was not a compulsory constitutional law because it did not contain any specific orders or place any limits on conduct. The provision was effective insofar as it was a "simple, albeit solemn warning" to future lawmakers, but if it were to be enforced literally, it would lead to 'irreparable disorder', including the risk of legitimizing – or, worse yet, promoting – conduct that could subvert State sovereignty(36).

In a subsequent case of a similar type, the Court of Cassation pointed out that the matter of legitimacy on which it was to rule was of a very delicate nature, and that regardless, the fact that it was primarily a political issue meant that only Parliament could address it. Its sentence excluded the possibility of direct enforcement of "directive and programmatic" principles contained in article 21 of the Constitution, and exhorted Parliament to intervene immediately in order to ensure "certainty in legal relations"(37).

There were many reasons behind such a stance, but one cannot be ignored: as far as back as when the Constituent Assembly was carrying out its work, many political groups, citing completely different reasons, had declared their opposition to the Constitutional Court and to the fact that such an organ would have supervision over the constitutionality of laws enacted by

speech, writing, or any other form of communication. The print may not be subjected to any authorization or censorship.(Italian: Tutti hanno diritto di manifestare liberamente il proprio pensiero con la parola, lo scritto e ogni altro mezzo di diffusione. La stampa non può essere soggetta a autorizzazioni o censure).

(36) Court of Cassation, section III, 121950/10/: "Precisely because it is lacking in substantiality, it seems appropriate to interpret article 21 of the Constitution as a simple, albeit solemn warning addressed not only to future lawmakers, but also to the other powers of the State, such that in the system of laws in force, it might not be neglected by legal and administrative organs".

(37) Joint session of the Court of Cassation (Sezioni Unite Penali), 311951/3/. The subject of the case was the legitimacy of prefectorial ordinances as provided by municipal and provincial law, as well as by public safety laws and health laws.

Parliament, becauseit would not have been the expression of popular sovereignty(38). This same reason accounted for the delay with which Parliament had taken measures to enact the law to establish the Court itself.

Faced with the indefatigable resistance of those who supported 'legislative' democracy, whereby unconstitutional laws could only be repealed by Parliament, the supporters of 'constitutional' legality (i.e. a "constitutional democracy", or legality based on the Constitution) came up with a new model: namely, they made a clear distinction between 'illegitimacy'as definedin the Constitution,and 'repeal', which, as per article 15 of the General Provisions (mentioned above), requiredthe intervention of Parliament(39).

The Constitutional Court's first ruling in 1956 was on none other than article 113 of the Public Safety Laws, which had been the subject of the above-mentioned sentence handed down in 1950 by the Court of Cassation. The Constitutional Court's sentence established a clear distinction between repealing a law and ruling that a law was constitutionally illegitimate.

The Court had initiated proceedings based on the rulings of 30 lower-court judges who had ruled in favor of appeals brought before them by public prosecutors or defense lawyers on the

(38) One such example was the Communist party, though it believed that lawmakers were being conservative in their approach; for this and all the other stances, seeD. Luongo,Il giudiziocostituzionale cit., pp. 180185-. However, constitutional law n.1 of 9 February 1948 had established that appeals on the grounds of unconstitutionality could only be lodged as an incidental question. On other aspects of the debate regarding the Constituent Assembly, seeZagrebelsky,La magistraturaordinariacit. pp. 726728- and p. 730 on the so-called "obstructionism of the majority"; regarding the opinion of V. E. Orlando: M. Fioravanti, La Corte cit., p. 3.

(39) The terms and concepts of legislative democracy and constitutional democracy can be found in M. Fioravanti, La Corte cit..

grounds of constitutional illegitimacy. Many of these appeals had been lodged by the most prominent lawyers of the time, including some members of the Constituent Assembly (Mortati, Giannini, Battaglia, Calamandrei) and a future lawmaker in Giuliano Vassalli. The Court upheld the validity of the appeals, stating how the matter was enveloped in controversy and uncertainty, given that differing sentences had been handed down over the years in trials dealing with the failure to obtain authorization from public safety authorities before publishing posters or distributing pamphlets.

In defending the Premiership(40), the Attorney General made the case that, for what concerned appeals that were upheld at the appellate level on the grounds of constitutional illegitimacy, the only way to invalidate laws that predated the Constitution was to repeal them. The Constitutional Court, however, ruled that there was a difference between repealing a law, which fell under the powers of Parliament, and declaring a law unconstitutional, which the Court had the power to do without repealing the law. In this way, the Court would not encroach upon the principle of the separation of State powers(41).

The Constitutional Court ruled that the Constitution had not provided for a distinction between laws that came before and laws that came after the Constitution itself took effect. This conclusion was justified by the 'rigid' nature of the Constitution, as well as by the content of article 134, which provided for the "constitutional legitimacy of laws"(42) without elaborating further.

(40) On justifying the intervention of the Premiership: Constitutional Court Sentence 11956/ p. 4. The Court ruled that such was justifiable in that it favored due process, and because the sentences of the Constitutional Court had effects ergaomnes.

(41) Constitutional Court Sentence 11956/ p. 3, and for the case argued by the Attorney General, see nt. 30 supra.See alsoZagrebelsky,La magistraturacit., p. 730.

(42) Idem in constitutional law 1 of 9 February 1948, article 1.

Secondly, the Court reclaimed its power to make decisions on the matter by distinguishing between the repeal of laws and the unconstitutionality of laws: two legal institutions that "act on different planes, with different effects and different jurisdictions"(43). Furthermore, the Court claimed that even programmatic constitutional laws (that category of laws defined by the Court of Cassation and mentioned above) had 'substantiality', and that as such, they could and should influence the interpretation of laws that predated the Constitution, including the determination of their legal validity. Indeed, besides serving "to bind lawmakers", programmatic constitutional principles also "reverberated through the entire legislation".

In the case in point, the conflict between article 113 of the Public Safety Laws and article 21 of the Constitution did not derive from the fact that the former placed limits on the free expression of thought: after all, exercise of any right is inherently limited. On the contrary, it derived from the fact that the limit in this case – namely the authorization required in order to exercise a constitutional right – was not in place for the sole purpose of safeguarding the public peace and preventing the commission of crimes, but rather to subordinate that right to the exclusive discretion of the public safety authorities(44).

(43) Constitutional Court Sentence 1/1956 p. 5 "The two legal institutions of the repeal of laws and the constitutional illegitimacy of laws are not identical, they act on different planes, with different effects and different jurisdictions. Furthermore, the sphere of repeal is more restricted when compared to that of constitutional illegitimacy, and the conditions required to repeal a law due to incompatibility with general principles are much more limited than those that may lead to the declaration of constitutional illegitimacy of a law".

(44) This discretion had not even been limited by legislative decree n. 1382 of 8 November 1947, which had provided for appeals to the Public Prosecutor's office if such authorization was denied.

Thus, as far as the Court was concerned, the law under examination was constitutionally illegitimate, as were the punishments in the penal code which were specifically connected to it. However, it also made it very clear that lawmakers could replace it with "more adequate" laws which might have the goal of "avoiding abuses" of the constitutional right to free expression, without infringing upon it. This was actually taking place at that time, as bills on the matter had been introduced in both houses of Parliament.

Nonetheless, the Constitutional Court's approach did not satisfy those who believed that Parliament alone held the power to intervenein cases of conflict between laws and the Constitution; indeed, heated political clashes immediately ensued. Ten years later, Giovanni Colli, head of the Magistrates Union and a judge on the Court of Cassation, would rebuke the Constitutional Court for having embarked upon 'a slippery slope' with that sentence of 1956. That first sentence had 'subverted democratic rules', it had engendered and continued to stoke "grave moral distress" among judges, and it had led some judges to give in to the temptation to "compensate for the shortcomings of legislative authority". The fact that the Court had taken it upon itself to decide on the constitutionality of laws that predated the Constitution showed that it was moving towards the adoption of "a political function" – a function that did not fall within its scope. At this point, it is impossible not to recall the debates surrounding the Constituent Assembly, mentioned above(45).

Collimaintained that article 15 of the General Provisions prevailed over article 101 of the Constitution, such that only lawmakers (not the Constitutional Court and certainly not judges

(45) Zagrebelsky,La magistratura ordinaria cit. pp. 731732-.

from the judicial branch of government) could alter legislation in order to bring it in line with constitutional principles(46). After all, again in the words ofColli, "our fundamental law has grown old, and it has lost contact with a reality that has progressed at unimaginable speed"(47).

The Court of Cassation reaffirmed these stances in 1970 when it ruled against an appeal lodged on the grounds of the constitutional illegitimacy of an article of the 1930 Code of Criminal Procedure. Just as it had done back when it was acting as a constitutional court, it declared that such an appeal was overtly unfounded(48).

Meanwhile, on several occasions other judges had pointed out that the Constitutional Court was in an extremely weakened state because of the opposition it faced from the Court of Cassation. Indeed, such a weakened state had severe repercussions when it came to safeguarding the rights of citizens, as it hindered the affirmation of the constitutional guarantees needed to restore balance to the relationship between citizens and government authority – especially in light of the fact that the legislation inherited from the past had granted the government such extensive powers(49).

(46) Here I shall cite from C. Storti. Il segreto di Stato tra "flessibilità" e "invecchiamento" della Costituzione negli anni '60 e '70 del secolo scorso in Dalla Costituzione «inattuata» alla Costituzione «inattuale»? Potere costituente e riforme costituzionali nell>Italia repubblicana. Ferrara, 2425- gennaio 2013, a cura di G. Brunelli, G. Cazzetta, Milano, Giuffrè, 2013, (Per la storia del pensiero giuridico moderno, 103), pp. 279-295, especiallyp. 285. The references are toG. Colli,Parlamento e Corte Costituzionale, in Rassegna Parlamentare (1966), pp. 6979-, especiallypp. 7778-; Id., I giudici e la democrazia, in Rassegna Parlamentare 1968, pp. 625635-, especiallyp. 632; Zagrebelsky,La magistratura pp. 731732-.

(47) Storti,Il segreto di Stato tra «flessibilità» cit., p. 285.

(48) Loc. ult. cit. p. 288 with reference to Cass. Sez. I, 24 febbraio 1970, in il Foro italiano 1971, cc. 185190-.

(49) G. Maranini, Il tiranno senza volto, Milano, Bompiani, 1963, pp. 2330- and 125,and seeStorti,Il segreto di Stato tra «flessibilità» cit., pp. 283284-.

4. Upholding the Law or Upholding the Constitution: The Role of Ordinary Judges

As demonstrated above through the words of Giovanni Colli, even lower-court judges were faced with a serious dilemma to which no clear solution was in sight. The Constitution did not provide a hierarchy or scale in the principles outlined in the rights and duties of citizens (Part I) or in the organization of the republic (Part II)[50]. This was a problem when dealing with cases such as those examined herein, namely, when it was necessary to establish the limits within which a judge – who, in order to guarantee the judiciary's independence from the other branches of government (Part II, Title IV "The Judicial Branch")[51], was "subject only to the law" (article 101) – could and was expected to enforce laws or acts having the force of law that prima facie seemed to be unconstitutional.

A conference held in 1965 in Gardone by the National Magistrates Association (founded in 1961) brought this conflict to a head. It had been brewing under the surface for years, especially due to generational turnover and the changing stances of younger judges, with some judges adhering to the principle of rigid legality and others who advocated 'constitutionalism', that

(50) Pisapia,Relazione introduttiva in Segreti e prova penale, pp. 1923-, especially20; Storti, 1, p. 281.

(51) Article 101 of the Constitution, paragraph 2: Judges are subject only to the law. (Italian: I giudicisonosoggettisoltantoallalegge).Article 162 of the 1992 Constitution of Kuwait: The honor of the Judiciary and the integrity and justness of Judges are the foundation of Rule and the guarantee of rights and liberties; article 163: No Authority may yield any dominion over a Judge in his rendering of justice and in no circumstanceshall interference be permissible in its performance. The Law shall guarantee the autonomy of the Judiciary and define the Judges> warranties, the provisions concerning them, and the conditions governing their immunity from dismissal; and article 167: The Public Prosecution shall, in the name of Society, bring public lawsuits, supervise matters relating to judicial seizures, and watch over the application of penal codes, the pursuit of offenders and the execution of sentences.

is an interpretation of the law based on the Constitution(52). As mentioned above, everything revolved around the interpretation of article 101 of the Constitution, which stated that judges were subject only to the law in the performance of their jurisdictional functions. What had the Constituent Fathers really meant with the expression "subject only to the law"?(53)

In those years, however, many ordinary judges (i.e. those in the courts of first and second instance) were highly skeptical about challenging constitutional legitimacy because they knew that any such proceedings would meet the resistance of the Court of Cassation. As a result, these judges often succumbed to the temptation to act on their own and interpret the law according to the Constitution, which also entailed acting on their own in the non-enforcement of the law. They found support for this approach in the free-law doctrine coming from the Anglo-Saxon world. Nonetheless, it was clear to all involved that granting an individual judge the power and responsibility to interpret the law according to constitutional principles (to the point that, as mentioned above, in any given case a given law might not be interpreted as per custom, or might not be enforced altogether) could jeopardize the very principle of legality that served as a guarantee of predictability and certainty in law enforcement(54).

5. The Constitutional Court's Stance

All of this was overcome, so to speak, thanks to the use of reason and the events that would subsequently transpire.

It must be said that when the Constitutional Court finally became

(52) Zagrebelsky,La magistratura cit., pp. 723733-; Meniconi, Storia della magistraturacit., pp. 267274-.
(53) Storti, Il segreto di Stato tra «flessibilità» cit., p. 284.
(54) M. Fioravanti, La Corte cit., p. 3.

truly operative, hostility on the part of those who supported the supremacy of the Parliament and the Court of Cassation with its judges over the Constitutional Court was gradually subsiding. There were certainly changes in the historical, political and economic context of the time that accounted for this, but let us focus on the approach adopted by the Constitutional Court.

In building a new "constitutional democracy"(55), the Constitutional Court was resolute in affirming its power and the power of the judiciary. For example, it rejected the premise that only the Court of Cassation could hold powers that, according to the Constitution, were 'common' to and exercisable by the entire judiciary, such as the authority to resolve conflicts arising from the allocation of powers of the State(56).

As far as the rest is concerned, the Court has gone down two different paths, so to speak: on the one hand, it has often been a vigorous defender of the fundamental principles and guarantees established for citizens in the first 24 articles of our Constitution (the right to liberty, etc.); on the other hand, it has been much more conservative when asked to rule on the constitutional legitimacy of laws that concern State security. In any case, the Court has always exercised a form of self-limitation when it comes to its own jurisdiction, as was seen in its very first sentence in 1956: namely, it makes sure to indicate to lawmakers the key elements of constitutionally guaranteed principles, which they are to respect when drafting any future laws that might place limits on the exercise of constitutional rights(57).

(55) M. Fioravanti, La Corte cit. SeealsoL. Lacchè,Il tempo e i tempi della Costituzione, now in History and Constitution, Frankfurt amMain, Vittorio Klostermann, 2016, pp. 639656-, aswellas ivi, Europa una et diversa. A proposito diiuscommuneeuropaeume tradizioni costituzionali comuni, pp.639706-.

(56) Sentence 2311975/ in Storti,Il segreto di Stato tra giustizia e politica, p. 240.

(57) M. Fioravanti, La Corte cit., pp. 1213-.

At the same time, with the Constitution as its guide, it has helped define the limits and prerogatives of each branch of government in its relations with the other branches,as well as the extent to which each branch is obliged to work with the others in order to resolve conflicts of power arising in the legislative, executive and judicial branches. It has always recognized the fundamental role of Parliament – and thusof political power – in deciding if and how to legislate new relationship frameworks between the branches of government, with a special focus on the relations between the two 'political' branches (legislative and executive) and the judicial branch(58).

6. Conclusions: Legality in the Relations between Branches of Government

In conclusion, the transition from Fascist institutions to a democratic constitution was characterized by a heated debate over the law, centered around the sources of law and the affirmation of the primacy of the law as a means to achieving legal certainty. This debate did not arise because there was any doubt as to the value of legality, but because rules needed to be defined so that when the primacy of the law was affirmed, it was in line with constitutional principles. First and foremost, implementing constitutional principles meant redefining the relationship between citizens and government: indeed, compared to that which had characterized the previous historical period in Italy, it required a completely different conception of the citizen as a "person"(59) in society and of how that citizen related with government authorities.

(58) Cf. Storti,Il Segreto di Stato, passim.
(59) Cf. M. Fioravanti, La Corte cit., pp. 47-.

Furthermore, in order to determine which institutions and procedures were expected to pursue constitutional legality, it was of paramount importance to define the nature of the different branches of government in the new Italian State. In particular, there needed to be clarity concerning the relationship between the legislative branch and the judicial branch: the former took the form of an elected Parliament, an expression of popular sovereignty; the latter acted to defend the Constitution, namely by determining the constitutionality of laws, but it was not directly elected by the people, despite the fact that it was in the best interest of society itself to implement constitutional principles of equality, liberty, work, equal opportunity, assistance, welfare, and protection against bureaucracy and police discretion. In terms of implementing these principles, public opinion – often expressed by lawyers and professors – played an increasingly important role in expanding the influence of the Constitutional Court.

Judges also played and continue to play a fundamental role, as their very office confers them the power to bring appeals against laws on the grounds of unconstitutionality. Nonetheless, after almost a century of subordination to the executive branch(60), the judiciary too was forced to address the issue of its status and its prerogatives in relation to the other branches of government: a problem of balance which initially played out over the first thirty years in which the constitution was being implemented, but which actually continues to present itself today, albeit in different forms.

(60) An authority that is customarily 'subordinated'; seell segreto di statotragiustizia e politica, p. 237.

In the history of Europe, the affirmation of the principle of legality began to take shape between the 16th and 17th centuries, its path becoming especially complex and tortuous between the 19th and 20th centuries. From a legal historian's point of view, it has fueled debates not only from a political and legislative point of view, but also as concerns the relations between government institutions and between branches of government: after all, the different branches of government are responsible for drafting, executing and enforcing the laws. Needless to say, this process has led to a continual re-examination of how, in practice, branches of government should be divided and how they should work together.But this is a typical problem of democracy, which is often imperfect and always perfectible.

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