THE ITALIAN CONSTITUTION AS A REVOLUTIONARY *AGREEMENT*

Marta Cartabia[*]

Abstract

In his recent book, *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law*, Bruce Ackerman counts Italy among the successful examples of "revolutionary constitutionalism" of the XX century, along with France, India, South Africa, Poland, Israel and Iran. All these countries went through the "four-time" development that he describes as components of the revolutionary constitutionalism and were able to overcome times of crisis, establishing fairly solid constitutional regimes that have endured to the present day. This essay discusses the idea of revolution as the basis on which the Italian Constitution is founded. In fact, as for its relationship with the past, the Italian Constitution is undeniably a «never again» constitution: one that rejects the previous regime.

The Constitution is imbued with anti-fascist principles. In this sense, there is a revolutionary side in the Italian transition, which marks a clean break with the fascist regime. Yet, the construction of the new polity was successful because of its inclusive, dialogical, incremental approach to constitutional change. The Italian Constitution was rather the result of the convergence between different and even opposed political ideas about the new society. It was not an abrupt and radical makeover of the country, but an incremental reconstruction of the legal, political, economic system. This article shows the continuity and discontinuity between the past regime and the new Italian republic and the long and difficult implementation of the new republican constitution.

[**] President of the Italian Constitutional Court

* I would like to thank dr. Alessandro Baro for his thorough editing, his integration of footnotes and cited references and his insightful observations on style and content: his help allowed me to enlighten and expand on my idea. Many thanks to Sabino Cassese, who introduced me to Bruce and was the first to read the draft of this piece in its early stages: his remarks and observations gave further depth to my reflections. Moreover, I benefitted of the conversation at the Yale Law School with all the participants to the Conference on "*Revolutionary Constitutionalism*" hold in August 24-25, 2018. I take full responsibility for the contents presented here. This paper has already been published in the proceedings of the aforementioned conference, R. Albert, ed., *Revolutionary Constitutionalism. Law, Legitimacy, Power*, 313-331 (2020).

TABLE OF CONTENTS

> [P]er compensare le forze di sinistra di una rivoluzione *mancata*, le forze di destra non si opposero ad accogliere nella Costituzione una rivoluzione *promessa*[1].

1. Introduction

Italy is one of the paradigmatic examples of Bruce Ackerman's *Revolutionary Constitutionalism*, the first ideal type of the three different pathways by which constitutions have won legitimacy in the past century. It is considered one of the success stories, which – along with France, India, South Africa, Poland, Israel and Iran –went through the "four-time" development and was able to overcome times of crisis, establishing a fairly solid constitutional regime that has endured to the present day.

Following Bruce Ackerman's account, in the Italian case, time one – where, according to his theory, «revolutionary movements» «mobilize the masses» and «manage to oust establishment-insiders», denouncing the existing regime as «illegitimate»[2] – was marked by the guerrilla fighters of the Resistance movement, who managed to create grassroots revolutionary governments in key areas of the North of Italy and

[1] «To give compensation to the left parties for a *missed* revolution, the right parties did not resist to admit in the Constitution a *promised* revolution». P. Calamandrei, *La Costituzione e le leggi per attuarla 7-8,* (2000, but 1955).

[2] B. Ackerman, *Revolutionary Constitutions*. Charismatic Leadership and the Rule of Law 6-7, (2019).

finally succeeded in seizing and killing Mussolini during the closing days of the war.

In time two – the time for the construction of a new regime based on the translation of «high-energy politics into a Constitution that seeks to prevent a relapse into the abuses of the past, and commits the republic to the new principles proclaimed during the long hard struggle of Time one», i.e. «the constitutionalization of the revolutionary charisma»[3] – the polls of June 2, 1946 are given an important place in the Italian history. Then, a majority of the Italian people[4] chose the Republic and rejected the Monarchy and also elected the Constituent Assembly, vested with the power to draft a new Republican Constitution.

Time three – a time of crisis, which takes place when the founding generation dies off, the political authority moves towards the «normalization of revolutionary politics», and the regime confronts a «legitimacy vacuum», which is occupied by an increasingly confident judiciary[5] – is identified in Italian history with the end of the first legislature (1948-1953), when De Gasperi's leadership of the Christian Democrats was «defeated»[6] and he fell from power and was stripped of his formal position as the head of the Christian Democratic Party. He died a few months later. At this time, the new Constitutional Court was established and began operating taking a vigorous stance among the other republican institutions[7].

Time four is the time of consolidation[8] of the new constitutional regime, thanks, if I am not mistaken, to the undisputed authority of the judicial bodies.

All this considered, Italy roughly fits in the ideal-type of revolutionary constitutionalism.

However, in Italy the role and the nature of the Italian "revolution" in the transition from fascism to the republic has some peculiarities that deserve attention in order to understand revolutionary constitutionalism as such.

In reality, the protagonists of the birth of the Republic hesitated to qualify the transition from the Fascist State to the

[3] *Id.* at 4.
[4] *Id.* at 141.
[5] *Id.* at 8-9.
[6] *Id.* at 150-52.
[7] *Id.* at 152.
[8] *Id.* at 155-56.

Republic as a revolution. The revolutionary approach was debated and rejected by the main political forces involved, and, in the Constitution itself, a revolution was announced more than codified. As Bruce Ackerman acknowledges, the Italian experience can be described by the famous words of one of the most popular protagonists of the epoch, Piero Calamandrei: «to compensate the forces of the left for a circumvented revolution, the forces of the right showed no opposition to a promised revolution in the Constitution»[9]. In the Italian case, the Constitution, rather than translating the chief tenets of a political revolution into higher legal principles, provides a legal framework that leaves room for a revolution yet to come. The question of whether this promise was later maintained is another matter.

In other words, Italy is a successful example of path one, precisely because (and not despite the fact that) the revolutionary side had only a limited role, extending only to time one, in the transition from fascism to the republic. As for its relationship with the past, the Italian Constitution is undeniably a «never again» constitution: one that rejects the previous regime. Nevertheless, as to the future of the polity, the features of the new republic were, in a way, «undecided». It is true that there is a revolutionary side in the Italian transition, which marks a clean break with the fascist regime. The Constitution is imbued with anti-fascist principles. Yet, the construction of the new polity was successful because its inclusive, dialogical, incremental approach to constitutional change.

This character had some consequences for the «consolidation» of the new regime. First, the implementation of the new constitutional architecture was neither immediate nor swift, and even less so complete. What's more, the delayed implementation included some institutions that were intended to play a crucial role in the constitutional system, first of all the Constitutional Court. Second, the new constitutional order very soon, in the seventies and eighties, went through recurrent periods of crisis and broad calls for constitutional reform began when the process of implementation of the Republican Constitution was not yet complete.

I would like to revisit here some of the historical steps of the founding period that show the importance of the capacity to bridge

[9] *Id.* at 143.

divergent forces and design converging avenues in time Two, as elements of the success of Italian Constitutional revolutionary history.

More generally, I ask whether this capacity for «building bridges» is a necessary component of «time two» in all constitutional experiences at the time of the construction of a new polity after the dismantling of a previous regime.

Stephen Gardbaum's chapter[10] points out that among the Arab spring revolution, the Tunisian example is the only one that was successful. Its success can hardly be credited to a single charismatic personality or a single revolutionary party. The productive contribution of the Tunisian National Dialogue Quartet to the building of a pluralistic democracy in the wake of the Jasmine Revolution of 2011 was in no way a secondary element. The Quartet was established in the summer of 2013 when the democratization process was in danger of collapsing as a result of political assassinations and widespread social unrest. Then, in 2015 it was awarded the Nobel Prize for Peace. It bears noting that the prize was a tribute to the Quartet as such, not to the four individual organizations, representing different sectors and values in Tunisian society, that contributed to completing the constitutional process.

Another success story is South Africa, where much credit was given to the charismatic personality of Nelson Mandela and to his party. However, his personal charisma was not imposed *ex cathedra* on the people. His leadership was able to connect opposed factions, so much so that nobody doubts that the most relevant role was played by the Truth and Reconciliation Commission in the successful constitutional transition of South Africa

In these examples, and certainly in the Italian case, the building of the new order was not the "codification" of a single "charisma". It was, rather, the result of difficult agreements, an inclusive pact which opened a new process, an open-ended and incremental enterprise.

I consider it very important to learn this kind of lesson from history, particularly for the present stage of constitutionalism around the world. To me, and to many Europeans, «revolution has

[10]See Stephen Gardbaum, *Uncharismatic Revolutionary Constitutionalism*, in Albert, cit. at note *.

a destructive logic» (as Andrew Arato pointed out[11]), after the French and Russian prototypes. European experience shows that a revolutionary action is unable, as such, to have a generative effect. Conflict brings about more conflict. As to the origin of the Italian republic, the context cannot be overlooked: after two world wars and twenty years of fascism, the priority for the Italian leaders was the reconstruction and reunification of a devastated country.

2. Revolution and Constitution: a Multifaceted Relationship

The Italian Republican Constitution was indeed a *new beginning* in the history of the country, and the State was reconstructed on new founding principles. Remarkable differences distinguish the Republic from the Fascist and the prior Liberal State.

At the same time, the debate on the continuity and discontinuity of the State, since its origins in 1871 is still open and has never been settled, with some legal and political historians maintaining that the evolution from the liberal, to the fascist, to the republican phases took place without any clear-cut interruption,[12] and others heralding the new republican era as a veritable new world[13].

In reality, the great majority of scholars maintain the first thesis. One of the most representative supporters of this position was Piero Calamandrei, who had originally championed the need for a revolutionary reaction against the fascist regime and, after the approval of the Constitution, wrote:

> It was a *popular* constitution, approved when any hindrance from the former king had been barred by the institutional June 2, 1946 referendum […]. But *it wasn't a revolutionary constitution* in the sense of consecrating, in juridical forms, a *politically accomplished revolution*[14].

---

[11]See Andrew Arato, *Revolution on a Human Scale: Liberal Values, Populist Theory?*, in Albert, cit. at note *.

[12]See, eg, at least Guido Quazza, *La Resistenza italiana: appunti e documenti* (1976); Claudio Pavone, *Alle origini della Repubblica. Scritti su fascismo, antifascismo e continuità dello Stato* (1995); Sabino Cassese, *Lo stato fascista* (2010).

[13]See V. Onida, *La transizione costituzionale* 2 Diritto pubblico 571 (1996).

[14]My translation from Calamandrei, *supra* note 2, at 5: «[F]u una costituzione *popolare*, deliberata, quando ormai ogni ingerenza dell'ex sovrano era stata

For those who expected a «total makeover» or, at least, a radical renovation, the new Constitution was disappointing.

I would like to continue this discussion by dividing my reasoning into two threads: first I will move on the *legal* plane (2.1.) and show some elements of continuity and discontinuity between the fascist regime and the Italian democratic republic. Then, I will conduct a similar analysis on the *political* plane (2.2).

2.1 Continuity and Discontinuity in the New *Legal* Order

In fact, if a revolution is meant to reset a legal order from scratch, Italy can be hardly considered a good example of path one. Yet, since Ackerman's revolution «on a human scale» doesn't aim at a totalizing break with the past, and includes old and new elements, the conclusion is more nuanced.

a. Departures from the Past in the Basic Legal Structure of the State

Indeed, the Republican Constitution has introduced a relevant number of *legal innovations*, and almost all of them were responses to the legal tenets of fascism.

First and foremost, according to the results of the institutional referendum, the Constitution established a *republican* regime and rejected the *monarchy*, which had been tainted by fascism.

Moreover, the Constitution set in motion a paradigm shift in the legal order, because of its *normative* and *rigid character* as opposed to the *political* and *flexible* attributes of the Statuto Albertino[15]. This was a major and essential innovation that the Italian Republican Constitution shares with other twentieth century European constitutions, following the US model. This move was a true breaking point: in fact, the normative supremacy of the Constitution washed away the traditional idea of the sovereignty of parliamentary legislation and framed a new balance between the Parliament and the Judiciary.

The superior value of the constitution paved the way for judicial review of legislation to be carried out by a new special

esclusa dal referendum istituzionale del 2 giugno 1946 […]. Ma *non fu una costituzione rivoluzionaria*, nel senso che consacrasse in forme giuridiche una rivoluzione politicamente *già compiuta*».

[15]The Statuto Albertino (Albertine Statute) was the predecessor of the current Italian Constitution; it was released by king Carlo Alberto in 1848.

body, the Constitutional Court. Over time, this new institution would renovate the constitutional mindset that had informed the legal culture prior to the dawn of the republic.

Under these and many other respects, the new constitutional principles contrasted with the main features of the fascist state and went far beyond the basic ideas of the liberal state, which had left too much leeway to the maneuvers of the fascist regime[16]. Let us just mention a few of them.

The protection of fundamental rights increased sharply. Whereas the liberal ideas of individual rights were influenced by the theory of the *Reflexrechte* (elaborated by Gerber in Germany and imported to Italy by Rocco[17]), under the Republican Constitution human rights are the first limit on the power of the State. To highlight this point, Article 2 of the Constitution reads that the inviolable rights of each person are *recognized*, and not conferred, by the Republic, thus implying that they belong to each person and not to the State. Therefore, they are *inviolable:* nobody can be stripped of his or her rights, the State has no power to repeal them, and even constitutional amendments that infringe upon the core of those individual rights are considered unconstitutional (eternity clauses).

Special attention was given to freedom of speech (Article 21), which was utterly repressed under fascist *propaganda.*

As opposed to fascist corporativism, freedom of association (Article 18 of the Constitution) and freedom of other intermediate bodies (Article 2), including political parties (Article 49) and trade unions (Article 39), was released from State control.

Alongside social pluralism, veritable political pluralism was re-established, after many years of a single political party – *partito unico* – which had deprived the right to vote and electoral competition of any effective meaning.

The longstanding tradition of local self-government was restored (Articles 5 and 114 of the Constitution), whereas the fascist State had imposed strict governmental control by means of the *prefetti* (prefects) and *podestà* (the town mayor under the fascist regime), according to its centralized character. In the same vein, a new regional architecture was envisaged (Article 114 ff. of the Constitution), with five Regions endowed with enhanced

[16] S. Cassese, *Lo stato fascista*, cit at 12, at 47 ff.

[17] See A. Baldassarre, *Le ideologie costituzionali dei diritti delle libertà*, in Diritti della persona e valori costituzionali (2007).

autonomy at the legislative, administrative, and financial levels, and another fifteen with ordinary autonomy.

The constitution carefully countered the concentration of power that was one of the main features of the fascist state, under which the role of Parliament was pre-empted by the government. The Republican Constitution aimed at curbing such a powerful Government and any other form of concentration of power. «The specter of totalitarian dictatorship»[18] suggested that the Parliament be returned to a central position (Article 70 of the Constitution). The Chambers were vested with the legislative function (Article 72), whereas the normative power of the Government was strictly regulated (Article 76 and 77). The political structure was centered on the confidence relationship (Article 94 of the Constitution) between the Parliament and the Government in order to maintain strict parliamentary control over the political choices of the Government.

This analysis could go on, but these examples suffice to conclude that, indeed, the Republican Constitution has deeply transformed the constitutional principles on which the Italian State was based.

b. An Undecided New Polity

Yet, such innovations were not organized into a coherent new idea of State.

The Italian Republic was not founded on a single political idea. It was the result of different ideologies – Christian democrat, communist, socialist and liberal – that were bound together by a common *anti-fascist* commitment, but which did not share a common vision of the future. The unity and the innovations came from a common *reaction against the past*, rather than from a shared new plan for the future. The constitution was intended to prevent a relapse into the abuses of the totalitarian regime and was firmly grounded on an anti-fascist commitment. If any revolutionary charisma can be detected in the constitution, it was the antifascist one:

In those years, the break with the past assumed a more negative connotation, rather than showing the traits of a

[18]Giuliano Amato terms this weakness of the Italian politics as "the complex of the tyrant", in *Dal caso italiano al capitalismo ingovernabile,* in G. Amato, *Una repubblica da riformare* 37 ff. (1980).

definite and constructive project. In other, more precise, words, they wanted to prevent the restoration of fascism at any cost, even in disguise; yet, the common will to adopt an anti-fascist Constitution was not enough when it came to determining the features of the new forms of the State and the Government[19].

c. *The Legacy of the Past: Legal Rules and Public Officials*

The Italian Republic after World War II shows some legal continuities with the past that one would not expect from a constitutional revolution. This does not diminish the importance of the discontinuities highlighted above. It does, however, demand a more complex reading of the Italian constitutional experience.

Whereas the King was ousted, and a new Constitution replaced the old "Statute", the underlying legal system was wholly transplanted from the fascist state into the Republic. The Criminal Code of 1930 and the Civil Code of 1942, both drafted and approved by the fascist government, were and still are in force. The same is true of the procedural codes and all the basic administrative laws, the law on the judiciary, military legislation, and even the infamous law on public order[20]: not one of them was repealed[21].

The sub-constitutional legal framework of the new republic was imbued with fascist culture. The responsibility to wipe away all the legal dross of the fascist epoch would later be taken on by the Constitutional Court. Instead of resetting the legal system from scratch, the Republic was reconstructed within the legal framework of the fascist state. Step by step, norm by norm, the legislation in place was eventually brought into line with Constitutional principles by the judiciary: the Constitutional Court and the ordinary courts together. This incremental renovation took decades, and the business is still unfinished. At the outset, the old

[19]My translation from Livio Paladin, Per una storia costituzionale dell'Italia repubblicana 35 (2004): «[L]a rottura con il passato in quegli anni assunse connotazioni negative, piuttosto che presentare i tratti di un definito e costruttivo progetto. In altre e più chiare parole, ciò che si volle evitare ad ogni costo fu la restaurazione del fascismo, quand'anche mutato nelle sue vesti; ma la comune volontà di adottare una Costituzione antifascista non fu sufficiente a fissare le caratteristiche delle nuove forme di Stato e di Governo». See also Massimo Luciani, *Antifascismo e nascita della Costituzione* 2 Politica del diritto 183 ff. (1991).

[20]Royal Decree of 18 June 1931, n. 773 (Testo unico delle leggi di pubblica sicurezza).

[21]For a more detailed analysis, see S. Cassese, cit at 12, at 47 ff.

and the new lived together in the new Republican Constitutional legal system. Later on, some of the old elements underwent a process of *unconventional adaptation* (to recall Ackerman's wording), whereas many others had to be struck down, because they were utterly incompatible with the new Constitution.

The alignment of the old legislation with the new constitutional principles was slow and difficult because the civil servants working in the public administration and the judiciary, who had been educated under the fascist culture, were still in office:

> «The administrative personnel of the state were mostly still the fascist ones, and the continuity was not only in the people themselves, but also in their mindset»[22].

The bureaucratic bodies had not been renovated and the employees were still the same, «conservative, authoritarian, and bureaucratic» people[23].

After all, the tentative "epuration" – that was supposed to purge all the public institutions from those who had been entangled with the authoritarian regime – was faltering and uncertain. For many commentators, it was, by and large, disappointing.

After a severe beginning with the first two decrees of December 1943 and July 1944[24], the legislation on epuration was softened by numerous acts handed down starting in the final months of 1945[25]. Similarly, the enforcement of that legislation was strict and severe in the first months, but later became more tolerant and indulgent. All things considered, the epuration machinery produced a massive number of files, but resulted in very few convictions.

---

[22]My translation from Aurelio Lepre, Storia della prima Repubblica. L'Italia dal 1942 al 1992 56 (1993): «Il personale nell'amministrazione statale era ancora, in gran parte, quello fascista e la continuità non era solo nelle persone ma anche negli atteggiamenti mentali».

[23]These are the words of MP Zuccarini at the Constituent Assembly (March 7, 1947), quoted in Paladin, *supra* note 19, at 38; on this point, see also Onida, *supra* note 13, at 571 and many others.

[24]They were the Royal Law Decree 28 December 1943, no. 29/B and the Royal Regency Legislative Decree 27 July 1944, no. 159.

[25]G. Melis, *Note sull'epurazione dei ministeri, 1944-46* 4 Ventunesimo secolo 17-52 (2003); see also A. Battaglia, *Giustizia e politica nella giurisprudenza* in Dieci anni dopo 21 ff. (Achille Battaglia et al. eds, 1955).

Long after the entry into force of the new Constitution, the top-level agents of the public administration were still people trained and educated under fascism[26]. The members of the judiciary remained almost untouched: after examining some hundred cases, only a few units of judges were dismissed, even most of the judicial body under fascism had been connected with the regime and had operated under the direction of the government[27].

The drive toward the national pacification of a divided, destitute and dejected country exceeded the urge of punishment and vindication, to the point that, right after the referendum for the Republic, on June 22nd, 1946 Palmiro Togliatti, the historical leader of the Communist Party acting in his capacity as Minister of Justice in the Government, signed a general amnesty for common and political crimes.

2.2 Political Continuity and Discontinuity in the Transitional Phase

The same ambivalence between continuity and innovation can be found in the *political process* that took place in the crossing-over phase between the old illegitimate regime and the new constitutional era.

From the historical point of view, two major facts give a revolutionary flavor to the founding of the Italian Republic: the role of the National Liberation Committees – the institutional offspring of the Resistance movements – and the institutional referendum of June 2, 1946, when the Italian people chose the Republic and turned down the Monarchy.

a. A Constitution Born out of the "Resistance"?

It is often said that the Italian Constitution was "born out of the Resistance". This statement wishes to recognize the value and the importance of popular participation in the final stage of the dismantlement of the fascist regime. This importance is undisputable. However, the very same statement can be misleading

[26]S. S. Cassese, *La formazione dello stato amministrativo* 5 (1974).

[27]A. Meniconi, *Storia della magistratura italiana* 250 ff.(2012). See also P. Saraceno, *Le «epurazioni» della magistratura in Italia. Dal Regno di Sardegna alla repubblica: 1848-1951* 39 Clio 521 ff. (1993).

if it is read as suggesting that the Italian constitution is solely the result of the violent uprising of a group of people that was able to take power, replacing the fascist regime.

As a matter of fact, the "resistance guerrillas" were present in only some areas of Italy, namely in the north and center of the country, whereas in the South the king still governed, and it was the allies who began the liberation of the country. Moreover, the nature and functions of the National Liberation Committees was not entirely clear. Certainly, they aimed at a double target: to set Italy free from both the external and the internal oppressors, the Nazis and the Fascists. As grassroots revolutionary forces, one could expect them to be the protagonist of the constitutional revolution, but in reality things were much more complex than that.

In 1945 – before the referendum and the elections for the Constituent Aassembly – Piero Calamandrei, one of the standout voices of the "Action Party", which championed the "revolution", wrote that the liberation committees, «after the liberation from the foreigners, shall have the constitutional task to complete the liberation of Italy from fascism. They are new bodies, born of historical need. Outside of any preconceived doctrinal scheme, they naturally rallied all the forces ready to hold their own against the oppressors and to rebuild the State based on the principles of democracy. […] Only these forces are entitled to rebuild the new Italian state. Only these forces. […] This is the great, unaccomplished function of the liberation committees. To ensure that the Constitution is the exclusive task of the revolutionary forces»[28].

Yet their role in the reconstruction of the country was not up to these expectations. The role of the Resistance and of the national liberation committees did not go this far. A number of different

[28]My translation from Piero Calamandrei, *Funzione rivoluzionaria dei Comitati di Liberazione* I, 2 Il Ponte 138-140 (1945, now republished in Andrea Mugnai, Storia e Costituzione. Radici politiche e tradizione culturale nella Costituzione italiana del 1948 33-37 [1998]): «dopo avvenuta la liberazione dallo straniero hanno la funzione costituzionale di portare a termine la liberazione dell'Italia dal fascismo. [Essi] sono appunto gli organi nuovi, partoriti dalla necessità storica, nei quali si sono spontaneamente raggruppate, fuor da ogni preconcetto schema dottrinario, tutte le forze decise a resistere agli oppressori ed a ricostruire lo stato secondo i principi della democrazia. […] A queste stesse forze, e ad esse sole, spetta oggi il compito di ricostruire il nuovo stato italiano. Ad esse sole […] Questa è la grande funzione, non ancora esaurita dei comitati di liberazione. Per garantire che la Costituente sia opera delle sole forze rivoluzionarie».

forces played a role in the composite and tortuous liberation process: the monarchy, the allies, the trade unions, the Catholic Church, and, yes, the parties of the national liberation committees.

In 1942, Great Britain believed that the existing anti-fascist leaders in Italy or in exile would not be able to create a movement that would succeed in countering fascism. On November 30, 1942, a note from the Foreign Office to the State Department said that, at that moment, there was no leader in Italy able to oppose fascism, nor was there any person abroad who could take up that task[29].

The Resistance movement covered a limited time period, spanning only from September 9, 1943 to the last days of April 1945. Anticipating or extending the terms of that period would entail the distortion of its exact definition and historical significance[30]. According to the protagonists of the guerrilla struggle, the men who fought in the Resistance never thought they were the winners. It was the allied armies who won, the English army, first, and, then, the Russians and the Americans. The contribution of the Resistance amounted to twenty months of suffering and armed conflict[31], within the context of a more complex process.

«The famous sentence "a Constitution born out of the Resistance" remained little more than an empty slogan»[32].

b. From the Revolutionary Approach to the "Provisional Constitutions"

The transitional period was a theater in which a variety of forces were at play, moving in different directions. A number of factors suggests that, upon closer analysis, the two great leaders of the constituent momentum, De Gasperi and Togliatti, at different stages of the transitional process, refused all *revolutionary* stances in favor of a more *evolutionary* approach. Both decided to support the Government lead by Marshal Badoglio in the wake of the fall of fascism and supported the two "provisional constitutions" issued

[29]See A. Lepre, *Storia della prima Repubblica. L'Italia dal 1942 al 1992*, cit at. 22, at 15, 56.

[30]P. E. Taviani, *Politica a memoria d'uomo* 69 (2002). Taviani is one of the main protagonists of the entire lifetime of the Christian Democratic Party and had the chance to fight in the final months as a guerrilla fighter in a Communist brigade.

[31]*Id.* at 73.

[32]My translation from Paladin, *supra* note 19 at 35: «[L]a celebre formula della "Costituzione nata dalla Resistenza" rimase poco più che uno slogan».

by the royal regency in 1944 and 1946[33], calling for a Constituent Assembly after a general election.

After Victor Emmanuel's decision to have Mussolini apprehended, following the resolution of the Grand Council of Fascism on July 25, 1943 to dismiss il Duce from his role as the leader of the Fascist Party in Italy, a discussion about the form of collaboration to extend to Marshall Badoglio's government and to the monarchy arose amongst the leaders of the parties of the National Liberation Committee and among their popular base, mostly in Northern Italy, where opposition to the Nazis was stiffer.

At that very moment, as De Gasperi would later recall in his address at the first congress of the Christian Democrats on April 1946, the parties were facing *two options: uprising or the Constituent Assembly*. At first, the Socialist Party, the Action Party (which was the second group of the Resistance in terms of the number of people involved), and the Communist Party were in favor of the first option; the Christian Democrats were in favor of the second. When Palmiro Togliatti, leader of the Communist Party came back from Moscow to Naples on March 27, 1944, immediately after the recognition of Badoglio's government by the USSR, first of the allied forces, on March 14, his first statements concerned the willingness of the Communist Party to be an active part of Badoglio's government, much to the surprise of the Communist popular base, and much to the anger of the Socialist Party and the Action Party. These parties later accepted that turn, though reluctantly and only under the condition that the King abdicated in favour of his son. They worked under a "veil of ignorance" as Ackerman notes.

In his report, De Gasperi also recalled himself saying:

> «I am not afraid of the word revolution, rather it bothers me, after twenty years in which fascism, always citing the rights of the revolution, committed so many abuses and violated the rights of citizens. In any case, the

[33]Royal Regency Decree 16 March 1946, n. 98 (Integrazioni e modifiche al decreto-legge Luogotenenziale 25 giugno 1944, n. 151, relativo all'Assemblea per la nuova costituzione dello Stato, al giuramento dei Membri del Governo ed alla facoltà del Governo di emanare norme giuridiche): it changes the Royal Regency Decree 25 June 1944, n. 151 (Assemblea per la nuova costituzione dello Stato, giuramento dei Membri del Governo e facoltà del Governo di emanare norme giuridiche), which would originally leave the choice between monarchy and republic to the Constituent Assembly.

> Constituent Assembly is the true revolution. […] The Christian Democrats are in favor of a democratic solution […]. The words "Constituent Assembly" did not come later; they were born during the conflict of those days as a democratic propensity over and against any insurrectionist ambitions. […] Our work in the government, which went forward amid shoals and difficulties of many kinds, was able to ensure that the Constituent Assembly and the referendum were part of the agreement»[34].

c. Monarchy or Republic?

As for the *Referendum of June 2, 1946*, it was indeed a clear-cut break with the past. The Italian people put an end to the Monarchy that had been involved with the fascist regime and chose to establish a democratic republic.

But here, too, a proper understanding of this historical fact requires careful interpretation. In reality, the referendum can hardly be considered "revolutionary", since it was the outcome of an agreement among government parties, and not the result of an uprising. The agreement was then adopted by an act of the royal regency and is usually referred to as "provisional constitution"[35].

The number of votes in favor of the Republic did not amount to an overwhelming majority: the republic gained 12,717,923 and the monarchy 10,719,284, so that the difference was about two million votes. However, 1.498.136 votes were invalid. The votes in favor of the Monarchy came mostly from the south of the country;

---

[34]My translation from Alcide De Gasperi, Linee programmatiche delle Democrazia Cristiana, National Secretary's address at the I Congress of the Christian Democrat Party, April 24-28, 1946, http://s3-eu-west-1.amazonaws.com/dellarepubblica.it/Legislature/1943-46/1946/Dc-%201cong%2046/Popolo%20Icongresso%2046/De%20Gasperi.pdf: «Non temo la parola rivoluzione, ma ne ho piuttosto fastidio dopo venti anni che il fascismo, richiamandosi ai diritti della rivoluzione, ha commesso tante soperchierie e violato i diritti dei cittadini. A ogni modo la vera rivoluzione è la Costituente. […] I democratici cristiani sono per la soluzione democratica […]. [L]a parola Costituente non è venuta più tardi, ma è nata nel conflitto d'allora ed è nata soprattutto come tendenza democratica contro velleità di carattere insurrezionale […]. La nostra opera di Governo, che seguì fra scogli e difficoltà diverse, ha portato ad assicurare la Costituente nell'accordo stesso delle parti in causa e ad introdurre anche il referendum».

[35]See Cassese *supra* note n. 26.

the Christian Democrats, the largest political party at the time, were split about this basic choice.

A legal dispute was brought before the Supreme Court of Cassation as to the interpretation of the majority required to grant victory to one or the other of the two options – the controversial clause referred to "voters" rather than to "valid votes". The Supreme Court was expected to announce the poll results on June 10, but the pronouncement was postponed, leaving the country in very dangerous suspense for weeks. Before the results were officially communicated, the King left country. Under the guise of a subtle legal dispute, a major political conflict was raging[36].

All things considered, the country had chosen in favor of the Republic, but polls showed that Italy was a split country from a political point of view. And this division cast its shadow on the constituent process, which had to take into consideration the conservative soul of a significant part of the Italian people: if the new Republic was to be established on solid ground, the Constitution had to represent the whole Italian people, including those who were still nostalgic for the monarchy.

d. *The Unexpected Convergence of a Polarized Political System*

The Constituent Assembly was made up of a very fragmented political body: out of the 552 members at the end of its mandate, 209 were Christian Democrats, 104 were Communists, 65 were Socialists, 49 were Workers Socialists, 25 were Republicans, 22 were Liberals, 20 were members of the Common Man's Front, and the others were members of 5 further groups. None of the political groups had the majority of the votes. Moreover, none of the parties could imagine whether, at the next elections, they would be able to govern the country or would instead be the opposition. Nevertheless, the final text of the Constitution was the result of broad agreement – 453 votes in favor and 62 against – on which all the political parties had made their mark. This agreement was a remarkable result, considering that, by the time of the final vote on the Constitution, the Communist Party had just been ousted from the government coalition. The Constituent Assembly took a very inclusive stance. None of the many voices tried to impose its own view on the others. The Constitution was not the result of a single ideology. Consider, for example, that Article 7 of the Constitution –

[36]Battaglia *supra* note 25 at 21 ff.; Paladin *supra* note 19 at 30.

regarding the privileged position of the Catholic Church regulated by a concordat signed by Mussolini – was supported by Palmiro Togliatti, the leader of the Communist Party, together with the Christian Democrats. Reasons of social peace and reunification of the country prevailed over divergent ideologies. For similar reasons, in every constitutional clause, the footprints of different, and even competing, political ideas can be easily recognized.

The constitutional principles were phrased in such a way that they were open to development in many directions. Consider those relating to the economic model, a very sensitive issue at the time: «Property is public or private. Economic assets may belong to the State, to public bodies or to private persons» (Article 42 of the Constitution). «Private enterprise is free» (Article 41 of the Constitution), but «economic activity may be oriented and coordinated for social purposes». Principles like these were susceptible to leaving room for a liberal free market or for state control of the economic sector. Or, again, for a "third" model, championed by the Christian Democrats.

As has been said, the Italian Constitution was a "compromise constitution". In fact, one can hardly say that, in the Italian experience, the new Constitution was the result of the constitutionalization of a unique revolutionary ideology. Firmly rejecting fascist ideology, the Constitution set the basis for future, undetermined developments. The revolution was not an accomplished fact, nor was it translated in coherent legal principles.

Given this historical and political background, the question arises of whether the Italian Constitution was born out of a *revolution* or was, rather, at the origin of a "gentle", "incremental" *evolution*. For sure, the Italian constitutional transition was not an abrupt change; the Constitution triggered a new beginning that brought about a "slow release" transformation. Discontinuity with the past was remarkable, but not immediate. Many constitutional principles were open-ended and left many things undecided[37]. It would take decades after the entry into force of the new Constitution to implement the new principles, give birth to the new institutions, and remodel the whole legal system[38].

---

[37]See Cass R. Sustein, *Foreword: Leaving Things Undecided* 110 Harv. L. R. 6 (1996).
[38]See Maurizio Fioravanti, *Per una storia della legge fondamentale in Italia: dallo Statuo alla Costituzione* in M. Fioravanti ed., *Il valore della Costituzione. L'esperienza della democrazia repubblicana* 17 (2009).

3. The Meandering Implementation of the Constitution

The ambivalent origin of the Constitution and the open-ended result of many Constitutional principles accounts for the difficult and uneven implementation of the Constitution.

The old principles and institutions received swift implementation. A new Parliament was elected in 1948, a new President of the Republic was elected, and a new Government nominated. On the contrary, it took almost a decade to establish the Constitutional Court (1956) and the Supreme Council of the Judiciary (1958), an essential security measure for the independence of the judiciary. It took more than twenty years to put the ordinary Regions and the referendum (abrogative and constitutional) into place (1970). And some of the constitutional provisions – like Article 39 on the trade unions and Article 46 on "the rights of workers to collaborate in the management of enterprises" – have yet to be implemented. In a word, the Constitution was enforced at different speeds, and some of its provisions were simply ignored.

What is even more remarkable is that – as Bruce Ackerman recalls – an attempt was made to downplay the legal value of the Constitution, in particular its more innovative principles on social rights, healthcare, working conditions, and pension and social assistance, (dis)qualifying them as political provisions to be left to the political bodies, rather than legal ones, and not susceptible to enforcement by the judiciary. The most innovative features of the Constitution as higher law, which was normative and rigid, as opposed to the political and flexible Albertine Statute, were at risk.

A very dangerous attack on the authority of the Constitution was, in fact, launched by a landmark decision of the Supreme Court of Cassation on February 7, 1948[39] (a few weeks after the entry into force of the Constitution), which drew a distinction between preceptive rules and mere programmatic principles, which were to be treated as non-justiciable, and the binding force of which was conditional upon legislative implementation. The Supreme Court of Cassation was giving voice to a very conservative position that

[39]Court of Cassation, Criminal United Sessions, 7 February 1948, 2 Foro ital., 57 ff. (1948).

was circulating among some legal scholars (V. E. Orlando[40] and many others) and in the judiciary, where the vast majority of the judges were those who served in the previous regime.

Had this doctrine taken root, the innovative driving force of the Constitution would have been neutralized. Had the implementation process been left to the Parliament, the translation of the constitutional framework into practice would have been distorted or, at least, incomplete.

In reality, the political landscape had dramatically changed in the meanwhile, with the Communist Party excluded from the Government since May 1947. After the election of 1948, when the Christian Democrats won more than 48.5 percent of votes and the parties on the left lost the competition, it became clear that the Communist Party would not return to the government for a long time, also considering the unwritten agreement on the implicit *conventio ad excludendum* subsequent to De Gasperi's visit to the US in 1947. The Parliament and the political institutions were dominated by the Christian democrats.

That was the reason why the parties on the left turned to the judiciary to have their voices heard in the implementation of the Constitution.

There are two relevant facts to be recorded: the establishment of the Constitutional Court, and the Congress of the *Associazione nazionale magistrati* (National Association of Judges) that took place in 1965 at Gardone.

Whereas most of the politicians on the Constituent Assembly were skeptical about all forms of judicial review of legislation, after the first electoral turn, the opposition parties endorsed the idea of the Constitutional Court as an institution capable of counterbalancing a very powerful majority in the government. The Communists, who had strongly resisted the idea of judicial review of legislation because it could impair the idea of parliamentary democracy, later became the main supporter of constitutional adjudication. On the contrary, the Christian Democrats, who in the Constituent Assembly had pushed for its provision within the Constitution, became more hesitant after gaining the 1948 election, and the implementation of the Court was postponed.

---

[40]Vittorio Emanuele Orlando, *Studio intorno alla forma di governo vigente in Italia secondo la Costituzione del 1948* 1 Riv. trim. dir. Pubb. 5 ff. (1951). See also Francesco Gentile & Pietro Giuseppe Grasso, eds., La Costituzione criticata 137 ff. (1999).

As a matter of fact, starting with decision 1 of 1956[41], the Constitutional Court, instead of taking sides in current political disputes, emerged as a defender of the anti-fascist constitution that was hammered out at the founding through an agreement between all the political parties. Despite the personal and professional records of some of its members[42], the Constitutional Court was able to do its job and to disseminate the new constitutional principles in a legal system that was very much in need of renovation. As has already been recalled, the new Republic took her first steps in a legal environment that was shaped under fascism. From its inception, the Italian Constitutional Court started a longstanding project of renovating old legislation, cutting away all the pieces of legislation that bore the imprint of fascist culture. The Court soon became one of the most influential authorities in the Italian institutional architecture, quickly garnering the respect of all the other branches of government. Since its very origins, the Italian Court has shown solid self-awareness and high esteem for its own mission of implementing the new constitutional principles, while, at the same time, it has maintained an open and cooperative approach to other actors, both political and judicial.

This last remark on the cooperation with the judiciary brings us to another step. The judicial implementation of the Constitution in Italy was the result of a joint effort between the judiciary and the Constitutional Court. First, the Constitutional Court could not act alone[43] because the main avenue to bring cases before the Court is the incidental procedure of review, which implies cooperation with lower courts. Second, in 1965, the national congress of the judiciary marked a turning point in the very idea of the judicial function. In the final document of that Congress (where, for the first time, the judges of the *Magistratura Democratica*, or Democratic Judicary, the

[41]Ackerman, *supra* note 2 at 173; see also Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia & Andrea Simoncini, Italian Constitutional Justice in Global Context (2015).

[42]Giuseppe Capograssi, Costantino Mortati, Tommaso Perassi, Gaspare Ambrosini, Nicola Jaeger and other members of the first Constitutional Court belonged to an older generation: they were born at the sunset of the XIX or at the dawn of the XX century and had spent their careers under the Monarchy and the Fascist time. The most astonishing example is probably Gaetano Azzariti, President of the Constitutional Court from 1957 to 1961, who had held the post of President of the "Race Tribunal" under the fascist regime.

[43]See Elisabetta Lamarque *It takes two to tango* in, Corte costituzionale e giudici nell'Italia repubblicana 101 ff. (2012).

progressive "current" of the judiciary, gained the majority) three principles were spelled out. First, the Constitution has direct effect and every court is required to apply constitutional norms to the cases and controversies under their jurisdiction. Second, parliamentary legislation which is in contrast with the Constitution is to be referred to the Constitutional Court for judicial review. Third, a new method of interpretation is to be followed, i.e., interpretation in conformity with the Constitution. In American legal terminology, this method would say that, where a statute is susceptible to two constructions, one that gives rise to doubtful constitutional questions arise, and one that is able to avoid such questions, a court's duty is to adopt the latter[44].

The old assumption of the Court of Cassation of 1948 on the programmatic nature of the Constitution was utterly rebuffed. And this "Gardone congress" soon became a milestone in the evolution of the judicial function in Italy[45].

La bouche de la loi turned out to be the voice of the Constitution, as well, in a constitutional framework where the judges are still defined as "subject to the law" (Article 101 of the Constitution).

4. Difficult Consolidation

"Revolutionary constitutionalism" describes a four stages process in which, after some phases where the Constitution is in the hands of the political actors that lead the fundamental change, the judiciary emerges on the stage. This evolution is easy to see in Italian Constitutional history.

However, the Italian experience provides some food for thought if one considers what happened after the founding period.

Before the end of the seventies, the struggle for consolidating the Constitution was heading towards success. The time of constitutional freezing had come to an end. The implementation process was almost completed, and the Constitutional Court, together with all the judicial bodies, had developed all the tools necessary to keep the Constitution alive. The most important pieces of social legislation come from those years. The reform of the

[44]See, eg, Jones v. United States 526 U.S. 227, 239 (1999) quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U. S. 366, 408 (1909).
[45]Meniconi, *supra* note 27 at 312 ff.

middle schools was approved in 1962[46], thus implementing Article 34 of the Constitution, which provides that, «Primary education, given for at least eight years, is compulsory and free of tuition». In 1970 the «Statute of the Workers» was passed by Parliament, establishing a long list of safeguard measures for workers that implemented Articles 1 and 35 *et seq*. of the Constitution and, around the same time, new legislation implemented Article 38, on social assistance for people unable to work and on pensions. In 1978, the public universal health care service was established[47], adding another pillar to the welfare system related to Article 32 of the Constitution, which states that, «The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent». These and other pieces of legislation passed by the Parliament, together with some crucial decisions of the Constitutional Court, were able to translate some of the promises stipulated by the Constitution in social matters into reality.

However, at the same time, a new crisis was looming, and the political institutions began showing symptoms of weakness and vulnerability. During the seventies, social legislation was translating into reality even the more "revolutionary" – i.e. progressive - constitutional principles, but the political parties, together with all the political institutions, began experiencing new problems, along with increasing political fragmentation and governmental instability[48]. Long before the present-day populist challenges, Italy has undergone a number of political crises, which reached an acute phase in the early nineties, with a massive anticorruption investigation that implicated the vast majority of political leaders, to the point that the period is commonly referred to as the beginning of the "second republic". That was not an ordinary difficult time: for a number of historical reasons, all the political forces that had led the constituent process – and notably the Christian Democrat Party and the Communist Party – were wiped away, and a new difficult transition began.

This political instability prompted the debate on Constitutional reform. Over the last forty years, an unending and perennially incomplete debate on the *reform of the Constitution* has

[46]Law 31 December 1962, n. 1859 (Istituzione e ordinamento della scuola media statale).
[47]Law 23 December 1978, n. 833 (Istituzione del servizio sanitario nazionale).
[48]Fioravanti, *supra* note 38 at 28 ff.

produced a number of drafts that were ultimately not approved by the Parliament, or were subsequently rejected by the people in referendums (as happened with the constitutional reform promoted by the Berlusconi Government in 2006 and again, ten years later, with the one promoted by the Renzi Government in 2016). None of these projects was able to overturn the original Constitution. However, this prolonged debate has put the Republican Constitution under stress and has had detrimental effects on its legitimating authority.

5. A Revolutionary Agreement

Bearing in mind the Italian experience, a tentative remark could be added to the four-stages analysis of revolutionary constitutionalism. Time three and time four – the normalization of the revolutionary – cannot be exclusively judicial or purely political. A proper balance between the two poles is always a necessary condition for the Constitution to work. The judicial "guardians of the Constitution" – to recall a Kelsenian expression – cannot do the whole job, nor can the political actors do it alone in any of the phases, and much less so in the time of consolidation. In order for the constitution to reach stability in time, the judicial and the political bodies should work together in the implementation of the new principles enshrined in the founding text, and do so in a contextual, rather than a sequential pattern. Italian experience shows that one should avoid a reading of Ackerman's "four-time" model as if it were suggesting that "there is a time for the people, a time for the parliament, [and] a time for the judiciary" (echoing *Ecclesiastes*[49]), as distinct segments of a linear idea of time.

Constitutions are not mere political documents, nor are they ordinary legal rules. At the constitutional level, politics and law are strictly intertwined. Their effective legitimating capacity rests on the converging contributions of *gubernaculum* and *iurisdictio* alike.

The new constitutional values are polysemic and lay out a pluralistic understanding of society susceptible to a plurality of interpretations. With such a symphonic composition, none of the interpreters can play alone.

[49] See Ecclesiastes 3.

Whereas, in many revolutionary experiences, the constituent process is founded on an act of will of a *minority* strong enough to oust the political forces in power and willing to change the historical development of the country according to a new ideology[50], the legitimation of the Italian Constitution rests, to a great extent on *agreement.* In the fight against the totalitarian regime there was not a single winner, nor may De Gasperi be considered the only charismatic leader of the constitutional momentum. The Christian Democratic Party had many souls; there was a strong Communist Party, and, again, there were strong leaders from the right-wing parties. No one questions the fact that the Italian Constitution was forged through agreement. In a way, it can be considered a "revolutionary agreement" – to remain in accordance with Ackerman's doctrine – because it involved all the anti-fascist political forces, determined to counter fascism and any form of dictatorship. However, in the absence of any single winner, the Constitution does not codify a univocal new vision of civil life. Pluralism is the stamp of the constituent process and of the Constitution itself. Therefore, in the founding of the Italian republic the new and the old, the people and the elites, the discontinuity and the continuity, the political and the legal, the revolutionary and the evolutionary are all bound together in a historical dynamic, where opposite poles are connected in a "*et-et*" rather than an "*aut-aut*" relationship.

[50] See Paolo Pombeni, *La questione costituzionale in Italia* 56 ff. (2016); see also Harold J. Berman, *Law and Revolution, the Formation of the Western Legal Tradition* (1983).