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## ***Constitutional review in Italy and the democratization process. Some reflections on the liberal state, dictatorship, and the birth of the Republic***

SOMMARIO: 1. Introduction – 2. Why constitutional review is important in the process of forming a modern democracy.

This essay examines the evolution of constitutional review in Italy from the late nineteenth century to the establishment of the Constitutional Court under the 1948 Constitution. Contrary to the widespread assumption that constitutional justice emerged only with the Republican Constitution, the study shows that reflections and practices relating to judicial scrutiny of legislation existed well before 1948, particularly during periods of political crisis and extensive use of emergency decree-laws. Through an analysis grounded in the theories of democracy developed by Robert Dahl and Luigi Ferrajoli, the essay highlights the relationship between constitutional review, the democratization process, and the transformation from a flexible constitutional system under the Albertine Statute to the rigid constitutional order of the post-war Republic. The paper explores key debates among Italian jurists on the limits of legislative power, the role of the Court of Cassation in reviewing decree-laws, and the tensions between formal and substantive legality. It also retraces the constitutional reflections during Fascism, the crisis of the liberal state, and the eventual choice to establish a Constitutional Court as a guarantee of rights and of the supremacy of the Constitution. The essay concludes by showing how constitutional review became central to consolidating Italy's modern constitutional democracy and ensuring the effectiveness of fundamental rights.

KEYWORDS: Constitutional review in Italy; Albertine Statute; Italian Constitutional Court; Emergency decree-laws.

### 1. Introduction

From a historical and legal perspective, the review of the constitutionality of laws is a topic that has always sparked significant debate in the past. However, it is commonly accepted in legal literature, and in part of the early constitutional

jurisprudence<sup>1</sup>, but above all in the dedicated textbooks, that constitutional justice only emerged in Italy with the birth of the democratic state (essentially only with the Republican Constitution of 1948), and that before that, given the absence of a rigid constitution, the conditions for it did not exist<sup>2</sup>.

Beyond the need for simplification, this is a generic statement that captures only some of the aspects that will be examined here. The establishment of the High Court of Sicily, a body provided for by the Special Statute (1946), is in itself an exception to this argument.

Equally common is the observation that constitutional justice originated with the famous *Marbury v. Madison* ruling, in which Judge Marshall, in 1803, introduced the principle that either the constitution is the supreme law that cannot be changed by ordinary means and a law contrary to it is not a law, or the constitution is no different from an ordinary law.

However, despite the circulation of American jurisprudence in Italy, the situation does not appear to be comparable. The idea that the Albertine Statute, granted at the time, had been extended to the rest of Italy brought with it the idea that it was flexible. The flexibility of the Statute means that this constitutional charter is of equal rank to an ordinary law and can always be amended. We will see later how many of these assertions are the subject of fairly intense criticism in contemporary legal literature and how the case law itself points in the opposite direction.

Another important point would be to identify the continental European models of constitutional justice: in addition to Seyès' 1795 proposal in France for a jury constitutionnaire as a branch of the legislature, in 1799 the Sénat conservateur was established with the task of preserving or annulling acts deemed unconstitutional by the Tribunal or the government. It was abolished in 1815. Furthermore, Kant's contribution to the theory of 'centralized' constitutional review led to "the introduction into the Austrian Constitution of 1920 of a Constitutional Court (the *Verfassungsgerichtshof*, from which the origin of *Verfassungsgerichtsbarkeit* derives) empowered to review the constitutionality of laws, investing itself with this task when it finds itself settling disputes between the various holders of state power, and in particular between the central government and the governments of the Länder.

The two prevailing models of European and American constitutional justice are therefore substantially different: the American model focuses on the rights of the individual, albeit in the course of a judgment relating to laws, while the European model has as its main objective the defense of the constitution and only indirectly that of the rights of individuals<sup>3</sup>.

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<sup>1</sup> Corte cost. sentenza n. 13, 1960

<sup>2</sup> E. MALFATTI, S. PANIZZA, R. ROMBOLI, *Giustizia costituzionale*, Torino, 2024, cap. 1.

<sup>3</sup> P. BIANCHI, *La creazione giurisprudenziale delle tecniche di selezione dei casi*, Torino, 2000, p. 16.

The review<sup>4</sup> of the constitutionality of laws in Italy has a very peculiar origin: it is an important aspect that has been present throughout the constitutional history of our country since the aftermath of unification and is destined to emerge and recur at critical moments. While this review had its own unique origins in Italy with respect to the characteristics of the territory, at the end of the Second World War, the choice of the Constitutional Court cannot fail to appear as a crucial episode in Italian constitutional history.

Articles 134 et seq. of the 1948 Constitution thus introduced a new body that was tasked with performing functions that had apparently never been performed before and that had no precedent. On the other hand, the Constitution had to be prescient, looking ahead and seeing far into the future<sup>5</sup>. This is not an insignificant issue in terms of political and legal choices: the option for a body such as the Constitutional Court, and for a democratic, rigid Constitution, broke sharply with previous tradition, contributing to the formation of a constitutional democracy in Italy<sup>6</sup>.

Here, we will follow in part Robert Dahl's theories on democracy and in part those of Ferrajoli, to explain how and why different forms of democracy have existed and therefore, in order to talk about democracy, it would be necessary, as Dahl<sup>7</sup> did, to provide a sort of history of democracy. In this contribution, this type of reasoning serves to explain how the emergence of the need for constitutional review in Italy is linked to the process of establishing contemporary democracy in Italy. In Dahl's research into the origins of the concept of democracy, he identifies what he calls the logic of *equality* as common ground. He talks about primitive forms of democracy in which group decisions were made.

Many have attempted to answer the question of what democracy is. Robert Dahl, for example, identified a close link with the existence of a specific set of rules aimed at regulating the decision-making and governance process of the state, the constitution, and identified a series of elements that represent its lowest common denominator, or the necessary and sufficient conditions: namely, 1. Effective participation, 2. Equality in voting, 3. Gaining enlightened understanding, 4. Exercising final control over the agenda, 5. Inclusion of adults

Given that democracy is considered to be a complex concept with many<sup>8</sup> aspects and that various attempts at definition often falter in the face of the variables that can be encountered, it is important to note that this concept must also be historicized (e.g., Athenian democracy may appear to today's jurists to

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<sup>4</sup> M. BIGNAMI, *Costituzione flessibile, costituzione rigida e controllo di costituzionalità in Italia (1848-1956)*, Milan, 1997.

<sup>5</sup> P. CALAMANDREI, *Intervento all'Assemblea Costituente, 4 marzo 1947, seduta pomeridiana, parte 2*, in ProfessioneGiustizia.it.

<sup>6</sup> L. FERRAJOLI, *democrazia costituzionale*, in *Revus*, 18, 2012, pp. 69-224 <https://journals.openedition.org/revus/2291>

<sup>7</sup> R.A. DAHL, *On Democracy*, Yale, 1998, p. 10.

<sup>8</sup> D. GALLIGAN, *Keepers of the Common Good. The People, Opinion, and the Social Foundations of Constitutional Authority*, Oxford, 2024, pp. 113 et seq.

be very undemocratic). At the turn of the 19th and 20th centuries in Italy, a form of (political) democracy was probably taking shape through a series of legislative reforms, according to Ferrajoli, which would culminate in the immediate post-war period (after the First World War, December 1918) with the so-called universal suffrage (for men) for all those who had reached the age of 21 (or who had participated in the war).

The political and institutional structures following the Great War are discussed by constitutionalist Gaetano Arangio Ruiz in a famous essay in which the assessment of the democratization process of many of the states participating in the First World War is accompanied by an examination of the powers used during the war emergency (legislative delegation laws, expansion of the regulatory powers of the executive, full powers laws, etc.) and the problem of constitutional review of decree-laws, electoral reform, the establishment of a parliamentary regime, its crisis, and its gradual progress towards a constitutional regime (meaning that the king keeps a government in place as long as he deems it appropriate).

But this democratic reality was emptied of content by the advent of fascism, demonstrating that even the principle of majority rule is very fragile in the face of a dictatorship that formally respects the institutional procedures for legislative and constitutional reforms. In essence, democratic procedures can be used to empty democracy itself of meaning if one remains anchored to a formal approach (Ferrajoli sees the limits of Kant's approach in this sense).

Precisely for these reasons, in Italy, while maintaining the Albertine Statute, the fascist legislature carried out reforms aimed at establishing a markedly authoritarian corporative (fascist) state, but it was also possible, on the famous night of July 25, 1943, for the Grand Council of Fascism to depose Mussolini by withdrawing its confidence in him. And there were those who considered the decision of the now constitutionalized Grand Council of Fascism (chaired by Mussolini, which did not have the power to dismiss him but only to propose a list of names to the king, if necessary) to be unconstitutional, and the subsequent decision of the king to dismiss Mussolini, thus establishing a subsequent illegitimate, unconstitutional regime, with a supposed constitutional break ( ). There were also those who considered the Republic of Salò (<sup>9</sup>) to be the legitimate successor and in line with the previously established Italian state. Therefore, if we evaluate only the form, without taking into account the substance, we could, paradoxically, arrive at this conclusion.

In essence, the 'old' liberal state governed by the rule of law had an idea of democracy understood as a set of procedural, formal, constitutionally prescribed rules, but there were no mechanisms for monitoring constitutionality by a body independent of the government or the powers understood in their tripartite division.

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<sup>9</sup> C. LATINI, *Il Gran Consiglio del fascismo e la notte del 25 luglio del 1943* in *Fundamental Rights. Rivista di studi giuridici, storici e antropologici*, 2 /2024 – PAPER 5.

The constitutional justice of the state courts and the Court of Cassation was closely linked to the executive and the prime minister. Ultimately, if a type of constitutional review was admissible, as we shall see, with regard to decree-laws, this was carried out by the ordinary courts and the Court of Cassation. We can therefore speak of a paradigm shift in democracy precisely when the constitution changes from being rigid to flexible. As Ferrajoli wrote, "It is therefore in the virtual and structural divergence between validity and force, that is, between the constitutionality and the legislative nature of the law itself, that the paradigm shift consists, both in law and in democracy, generated by today's rigid constitutionalism. The constitutional positivization of fundamental rights also subjects the legislator to substantial limits and constraints, breaking the presumption of legitimacy of the law and opening the way to antinomies for the undue production of invalid laws and to gaps for the undue omission of necessary laws. In this sense, it amounts to a completion of both legal positivism and the rule of law: because it positivizes the legal obligation of the law itself and because it also subjects to the law that last remnant of government by men which consisted in the omnipotence of the legislator<sup>10</sup>."

Again, in his words, the complexity of the constitutional paradigm, with the rigid constitution of 1948, led to a redefinition of the conditions of democracy in Italy, in substantive and not just formal terms.

## 2. Why constitutional review is important in the process of forming a modern democracy

Constitutional review, and therefore the emergence of constitutional justice, are important in relation to the protection of constitutional norms and their effectiveness. It is no coincidence that in Italy, after unification, constitutional review began to be discussed—and the first rulings by the Court of Cassation were handed down—at a very difficult political moment, when the government had requested and obtained full powers through parliamentary support and the signing of the relevant decree-law by the king, in order to deal with situations such as political unrest and various emergencies, including earthquakes.

Emergency decrees were therefore the first type of legislation that, having a strong impact on constitutionally recognized rights, required constitutional review. We are at a political moment in which Italy is a constitutional monarchy. Suffrage is limited to males with a certain income. The Albertine Statute, the first and only Italian constitutional charter before the republican one of 1948, is considered by many to be flexible. It recognizes the freedoms of the subjects of the kingdom, but does not expressly provide for a means of protecting them, an independent body. Flexibility alludes, among other things, to the lack of aggravated procedures for constitutional reform, and the word itself refers to a sort of intrinsic weakness with regard to the protection of civil liberties and social rights. In fact, the first workers' demonstrations were suppressed by the army,

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<sup>10</sup> ID., no. 19.

with the instrument of political or fictitious martial law, activated by decree-law. The sanctions imposed by these regulatory instruments will be subject to constitutional review.

In light of these considerations, the analysis of the problem of constitutional review and its emergence at a significant moment in the history of our country, namely the so-called decade of blood (the last decade of the 19th century), when the use of emergency decrees began to be used more frequently, takes on a different light. The issue of constitutional review is closely linked to the process of democratization of the country. But, of course, we must also consider which process and which type of democracy, or, if you prefer, which aspects of it, and in which historical period.

In reality, on closer inspection, the issue had been raised several times in doctrine and jurisprudence and had been resolved in different ways depending on the case, but on the basis of the principle that the Court of Cassation was competent to decide on the legitimacy of laws. It should be noted that during this period, the terms 'legitimacy control' and 'constitutionality control' were often used interchangeably.

The issue arose in particular in connection with decree-laws and the related emergency powers<sup>11</sup> : in the absence of a provision in the Albertine Statute granting such extraordinary legislative powers to the executive, legal scholars were divided on their *de facto* recognition and on the review that the Court of Cassation could carry out on such decrees. Leaving aside for now the problem of the existence of several civil courts of cassation (four in fact) and their unification in 1923<sup>12</sup> , the unification of the criminal courts had taken place earlier (1888), it is necessary to highlight the main considerations on the subject. It is worth noting that the issue of constitutional review arose largely in relation to the abuse of decree-laws, precisely because of their tendency to limit the exercise of rights of freedom (which are also protected by the Constitution).

The use of emergency decree powers had become, in liberal Italy as well as in fascist Italy, a tool for curbing the emergence and recognition of the freedoms recognized by the Albertine Statute, in its capacity as a material constitution. The charter, which was inflexible in some respects, not only did not provide for the use of extraordinary powers, but also did not prescribe a mechanism for the aggravated revision of its own rules, nor did it provide for a Constitutional Court. Formally, therefore, it could be amended by a law that was in fact of equal rank, at least according to a certain doctrinal reconstruction that referred to interpretations of the Statute with which several of its rules had been disregarded. This ambiguous aspect of the Statute is an important point to bear in mind as a basis and prerequisite for any discussion of the emergence of constitutional review in terms of democracy. The Commentary on the Statute of the Kingdom

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<sup>11</sup> C. LATINI, *Governare l'emergenza. Delega legislative e pieni poteri in Italia tra Otto e Novecento*, Milano, 2005, *passim*.

<sup>12</sup> M. MECCARELLI, *Le Corti di Cassazione nell'Italia unita. Profili sistematici e costituzionali della giurisdizione in una prospettiva comparata (1865-1923)*, Milano, 2005.

by Francesco Racioppi and Ignazio Brunelli added that: "If an assembly were to disregard the limits of its freedom of action, there would be no legal means to call it to order, as there is no higher authority than the Chamber in our constitutional system, and it would be up to public opinion to influence the assembly to repeal the unconstitutional provision"<sup>13</sup>. Racioppi's starting point is freedom: when a judge was called upon to decide whether or not a citizen had a legal obligation, the judge could first be asked whether the law imposing that obligation was truly a law. The legislator can only regulate matters that are recognized as his own, and when he oversteps his bounds, his work is *ultra vires* and will not be binding or effective<sup>14</sup>. The reference to Dicey's thinking<sup>15</sup> is relevant here, as he believed that constitutional review was linked to a sort of supremacy of the constitution on which a federal state was based. It is no coincidence that he used the example of the United States, also in contrast (or at least in terms of evolution) to the English model. The French and Belgian examples served to demonstrate the almost constant absence of constitutional review of laws.

Given that constituent power was not considered superior to legislative power, and that the constitution and the law derived from the same body, in the absence of a true constituent moment involving the entire nation, the judge lacked the subject matter to be examined, as there could be no substantially unconstitutional laws. Despite these premises, in reality, according to Racioppi, the review of the constitutionality of laws was possible even in our legal system, but only within the limits of a formal review. According to Racioppi, the review could be both material and formal, depending on whether it concerned substance or form, merit or procedure. The examination of cases of formal review was not a mere *Doktorfrage* as Laband had argued<sup>16</sup>. The case of a lack of agreement between the two chambers on a law, which was then promulgated through innocent error, was anything but a theoretical hypothesis. In Italy, Racioppi notes, it had already occurred four times. Racioppi believed that it was up to the judiciary to investigate the existence of the law. Despite the controversy on this point, in his opinion, the spirit of the constitutional regime lay in establishing legal limits on public powers even in the absence of an express attribution. It was therefore not necessary to look for a rule in positive law that would hinder the exercise of this power of control, but on the contrary, it was necessary to find a rule that would prevent such exercise in certain cases. According to Attilio Brunialti, reference could be made to the American system: not only the Federal Supreme Court but any other judge could investigate the control of material and formal

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<sup>13</sup> F. RACIOPPI, I. BRUNELLI, *Commento allo Statuto del Regno, (dall'art. 48 all'art. 84 ed ultimo)*, vol. III, Torino, p. 223.

<sup>14</sup> F. RACIOPPI, *Il sindacato giudiziario sulla costituzionalità delle leggi*, in *La legge. Monitore giudiziario e amministrativo*, XLV, 1905, col. 705; V. MICELI, *Incostituzionalità*, in *Enciclopedia giuridica italiana*, Milano, 1902, vol. 8, P. I, pp. 759-776. C. LESSONA, *La legalità della norma e potere giudiziario*, Firenze, 1900.

<sup>15</sup> V. DICEY, *Introduction to the Study of the Law of Constitution*, London, 1915, pp. 87 et seq.

<sup>16</sup> P. LABAND, *Das Staatsrecht des Deutschen Reiches*, Tübingen, 1911, vol. II, p. 326.

constitutionality, as Cooley argued<sup>17</sup>. In reality, on this point, some Italian legal scholars, such as Orlando<sup>18</sup> or Lessona<sup>19</sup>, seemed to go in the opposite direction, believing that any review was futile or, in any case, imposing limitations. Furthermore, formal review was not the responsibility of the king, because while it was true that he promulgated the law and that this power belonged solely to the king according to the Statute, it was also true that promulgation and sanction did not imply a judgment on the constitutionality or formal validity of the law. If the legislative act was to be the result of three factors, namely the Chamber of Deputies, the Senate, and the king, a legislative act that was not sanctioned within the terms of the session was not valid because it was not approved within the time limits prescribed by Law No. 23 of June 23, 1854, Article 3. The legislative function thus absorbed all the attributes of the Constituent Assembly, as also argued by Mortara<sup>20</sup>. It is interesting to note that the issue of constitutional review in Italy arose mainly in cases of decree-laws, or even parliamentary regulations<sup>21</sup>, which had a significant impact on citizens' freedoms. In times of particular crisis in the country, such as the Pelloux decrees, the so-called decade of blood, and the states of siege of 1894 and 1898<sup>22</sup>, as well as the Great War and the legislative delegation by which Parliament conferred broad regulatory powers on the government for the duration of the war, the issue of control, especially over decree-laws and all lieutenant decrees, was recurrent. Always in the formal terms of the 'legality' of decree-laws. The decree declaring a state of political siege itself presented a problem of constitutionality and legality, and for a long time there was discussion about the need for a conversion clause for decrees issued as a result of the state of siege, in the absence of which they could be considered lapsed and the judiciary could refuse to apply them once the period of urgent necessity had ended and it was recognized that the conditions of urgency no longer applied. It is well known that during Fascism, the problem of delegated decrees and decree-laws was only partially resolved, and a certain abuse in the rec<sup>23</sup> on of decree-laws remained. such as the so-called racial laws, which were issued by royal decree, and Law No. 100 of January 31, 1926, which attempted to limit emergency decrees to cases of necessity and urgency only. The Statute underwent some changes to bring it into line with the fascist state and the new ideology it espoused.

<sup>17</sup> T.M. COOLEY, *A Treatise on the constitutional limitations which rests upon the legislative powers of the States American*, Boston, 1868, p. 159.

<sup>18</sup> V.E. ORLANDO, *Teoria giuridica delle guarentigie delle libertà*, Torino, 1890, pp. 147 et seq. Orlando distinguishes between review of the intrinsic and extrinsic constitutionality of the law.

<sup>19</sup> C. LESSONA, *La legalità della norma e il potere giudiziario*, Firenze, 1900, pp. 31 et seq.

<sup>20</sup> L. MORTARA, *Commentario del Codice e delle leggi di procedura civile*, Milano, 1923, vol. I, p. 124.

<sup>21</sup> G. ARANGIO RUIZ, *Il nuovo regolamento giudiziario del senato italiano*, in *Archivio giuridico Filippo Serafini*, 67, 1901, p. 452.

<sup>22</sup> C. LATINI, *Cittadini e nemici. Giustizia militare e giustizia penale in Italia tra Otto Novecento*, Firenze, 2010, pp. 275 et seqq.

<sup>23</sup> A. CONCARO, *Il sindacato di costituzionalità sul decreto-legge*, Milano, 2000, p. 41 ff., 83 ff.; A. CELOTTO, *L'«abuso» del decreto-legge. Profili teorici, evoluzione storica e analisi morfologica*, I, Padova, 1997, I, especially pp. 413 ff.

Therefore, by resorting to decree-laws, the government often limited or suspended certain freedoms protected by the Statute. The issue of the constitutionality of decree-laws was unrelated to their content (the protection of individual rights that had been violated), but mainly concerned their form (whether the government could legislate and the limits of its power to issue emergency decrees).

It is generally believed that this was possible because the Statute was a flexible or ductile-flexible constitution and therefore elastic<sup>24</sup>, a question that remains open<sup>25</sup>, despite the opinion of most legal scholars that, in the absence of a more rigorous procedure for amending the Statute, its flexibility was a given<sup>26</sup>, while others, albeit a minority, argued that it was a rigid document in light of the fact that King Carlo Alberto himself had defined it as a perpetual and irrevocable law of the monarchy. The point of flexibility and therefore of the amendability of the Statute by the legislature and that of constitutional review by ordinary courts are precisely the references from which Santi Romano starts in his essay on the limits of the legislative function<sup>27</sup>, highlighting how the question of the amendability of the Statute, although admissible, encountered certain limitations, and therefore it could only be amended in cases of necessity, or for the purpose of recognizing a custom that had a customary and legal force<sup>28</sup>, and when it was a question of supplementing the Statute. According to Romano, the legislative function encountered limitations in amending the Statute, despite the principle of parliamentary sovereignty, parliamentary omnipotence, a principle that was now difficult to apply given the emergence of a new system based on the balance between organs that were no longer sovereign but constitutional. This balance would be upset by the advent of fascism, which would strengthen the role of the government, already quite powerful after the Great War. Under the Albertine Statute, there had been significant violations of civil liberties, with the Court of Cassation intervening only in rare cases to protect citizens and their rights. On the other hand, the jurisprudence of the Court of Cassation had not been unanimous on the point of reviewing the legitimacy of laws: in some cases it had intervened, as in 1894, in others it had not, declaring itself incompetent. The very expression "constitutional review" struggles to emerge in this context, but it is nevertheless present. While it was fairly uncontroversial that ordinary

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<sup>24</sup> R. FERRARI ZUMBINI, *Tra norma e vita. Il mosaico costituzionale a Torino, 1846-1848*, Torino, 2016, p. 48.

<sup>25</sup> A. PACE, *Potere costituente, rigidità costituzionale, autovincoli legislativi*, 2<sup>a</sup> ed. (riveduta e ampliata), Padova, 2002; F. ROSSELLI, *Giudici e limiti al potere del legislatore, vigente lo statuto albertino*, in *Riv. Trim. dir. proc. civ.*, 1986, pp. 476 ff., 498 ff. and, especially for the examination of case law, M. MANDEL, *The Unbearable Flexibility of the Statuto Albertino*, Bologna, 2006.

<sup>26</sup> T. MARCHI, *Lo Statuto Albertino e il suo sviluppo storico*, prolusione all'anno accademico 1924-1925 nella R. Università di Parma, [http://documenti.camera.it/bpr/11850\\_testo.pdf](http://documenti.camera.it/bpr/11850_testo.pdf).

<sup>27</sup> S. ROMANO, *Osservazioni preliminari per una teoria dei limiti della funzione legislativa nel diritto italiano*, in *Archivio del diritto pubblico e della pubblica amministrazione italiana*, I, IV, 1902, p. 24.

<sup>28</sup> F. LAMPERTICO, *Lo Statuto e il Senato*, Roma, 1886, pp. 103 and 105.

courts could review the formal constitutionality of a law, substantive constitutional review met with strong resistance.

But returning to the problem of the abuse of decree-laws, linked to a practice of the executive that had found support in a certain opportunistic anti-parliamentarianism, Law No. 100 of 1926 on the executive's power to issue legal norms requires a focused analysis. The text of Article 3, in particular, established:

"By Royal Decree, subject to deliberation by the Council of Ministers, regulations having the force of law may be issued: 1) when the Government is delegated to do so by law and within the limits of the delegation; 2) in extraordinary cases, when urgent and absolute necessity so requires. The judgment on necessity and urgency is subject to no control other than that of Parliament. In the cases indicated in paragraph 2 above, the Royal Decree must include a clause requiring its submission to Parliament for conversion into law and, under penalty of forfeiture, must be submitted for conversion to one of the two Chambers no later than the third sitting after its publication. Immediate notice of the submission shall be given in the Official Gazette. The bill for the conversion of the decree into law shall be considered urgent. In the event of the closure of the session, at the opening of the new session, the bill for conversion shall be deemed to have been resubmitted to the Chamber where it was pending for examination. When one of the two Chambers approves the bill, its president shall transmit it within five days to the Presidency of the other Chamber; this transmission shall be deemed to constitute the presentation of the bill. If one of the two chambers refuses to convert the decree into law, the president shall publish this information in the Official Gazette, and the decree shall cease to have effect from the date of publication of the information... If, within two years of its publication, the decree has not been converted into law, it shall cease to have effect from the date of expiry of this term"<sup>29</sup>.

There is a rather interesting parliamentary debate on the issue of the abuse of decree-laws concerning the appropriateness of a guarantor, a debate whose expectations would have been disappointed by the political choice of this law, which makes clear reference to the impossibility of constitutional control of government decree-laws. An examination of this debate is addressed, on the eve of the entry into force of Law No. 100, by Gaetano Arangio Ruiz<sup>30</sup>, who provides a historical reconstruction of the abuse of decree-laws in Italy, while describing parliamentary systems and the difficult process of establishing modern democracies. The countless series of decree-laws, which he considered unjustified, reached their peak with the Pelloux decrees, aimed at repressing nascent social rights and constitutionally protected freedoms (rights of assembly, association, press, strike in public services, etc.) against which the left mounted

<sup>29</sup> *Gazzetta Ufficiale del Regno d'Italia*, 25, 1926.

<sup>30</sup> G. ARANGIO RUIZ, *Leggi ed eventi costituzionali del periodo bellico e postbellico, Prolusione al corso di diritto costituzionale, letta, in tutte le sue parti essenziali nella regia università di Torino, il 22 gennaio 1925*, [file:///C:/Users/carlo/Downloads/11968\\_1899\\_t-1.pdf](file:///C:/Users/carlo/Downloads/11968_1899_t-1.pdf), pp. 25 et seq.

fierce opposition in 1899, resorting to obstructionism until the First Criminal Section of the Court of Cassation ruled that the decree had lapsed due to failure to convert it, as the parliamentary session had been closed.

At a time of serious social crisis, with social issues coming to the fore, the crisis of the modern state described by Santi Romano, but also by Arangio Ruiz, was accompanied by the emergence of a form of trade unionism that was at times antagonistic to the state itself<sup>31</sup>.

There were divergent interpretations of the so-called judicial review of decree-laws: in some cases, formal review was considered admissible, as in 1894, while in others, such as in the case of the Pelloux decrees, the Court of Cassation had avoided ruling on the review, highlighting the formal defect of the expiry of the parliamentary session. However, in 1922, suddenly, the Court of Cassation changed its attitude and claimed a role in the judicial review of emergency decrees. Meanwhile, the bill that would later become Law No. 100 of 1926 went in a completely different direction, recognizing the power to review the necessity and urgency of the measure only to parliament, excluding the Court of Cassation and, in general, the control of the courts. Attorney General Appiani was opposed to this solution and, in addition to disagreeing, invoked the need for a Supreme Court like the American one, with the same powers. While recognizing that the Court had probably overstepped its powers, it was clear that the greatest protection of freedoms came from the judicial authority<sup>32</sup>, whose control of the conditions for emergency decrees, namely generality and abstractness, had to be verified by the Court of Cassation, at least according to Appiani.

Certainly, the Statute did not lay the foundations for a state of free and equal subjects, having in mind a specific ideal type of subject, but neither did it consider discrimination, such as racial discrimination during Fascism, or the long exclusion of women from certain rights such as voting, access to the judiciary, the legal profession, etc. These exclusions were based more on a misogynistic interpretation that was part of the culture of the time (or part of it) than on actual discrimination based on the Constitution. In the latter case, it was a further step towards the transformation of the Chamber of Deputies into a chamber of fasci and corporations, which took place with Law No. 129 of January 19, 1939. The fascist transformation of vital organs of the Italian state changed the constitutional structure of the country at its core.

It was no coincidence that the need for constitutional review emerged again in 1925, at a time of crisis for the liberal state and its form of government<sup>33</sup>.

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<sup>31</sup> S. ROMANO, *Lo Stato moderno e la sua crisi, Discorso per l'inaugurazione dell'anno accademico nella Regia università di Pisa, 1909-1910*, in *Rivista di diritto pubblico*, Milan 1920. Republished in S. ROMANO, *Profusioni e discorsi accademici*, publication of the Faculty of Law of the University of Modena, 1931, and in S. ROMANO, *Scritti minori* I, p. 345.

<sup>32</sup> G. APPIANI, *Discorso del procuratore generale della Cassazione del regno Giovanni Appiani nella assemblea generale del 5 gennaio 1925, Roma, cartoleria della Ariccia, 1925*, p. 17, [AG 1925 relazione APPIANI.pdf](#).

<sup>33</sup> G. D'ORAZIO, *La genesi della Corte Costituzionale*, Milano, 1981, p. 26.

Between 1925 and 1926, the process of fascistization began, thanks in part to the establishment of the Special Court for the Defense of the State, which culminated in a full-fledged constitutional reform. The new form of state that was established was grafted onto the old Statute, but from that moment on, it undoubtedly represented something new. The events following the advent of the Badoglio government and the purges would confirm a further and suggestive hypothesis with respect to that examined by Lanchester<sup>34</sup>, namely that, given the coup d'état of January 3, 1925 (Mussolini's speech on the Matteotti murder), the Albertine Statute, a generally rigid document, despite the absence of the two requirements of aggravated revision and an ad hoc constitutional justice body, had in fact been openly violated and forced to the point of crisis. The issue of a rigid or flexible constitution became a subject of debate in Italy once again, until the introduction of the concept of constitutional elasticity, a concept that best expressed the condition of the Albertine Statute under the fascist reforms<sup>35</sup>. Luigi Rossi, with his concept of constitutional elasticity<sup>36</sup>, and Costantino Mortati<sup>37</sup>, with his concept of a material constitution, reconstructed the framework within which the Statute could be placed. After the end of the dictatorship, with the start of the work of the Constituent Assembly, serious reflection was also given to constitutional justice, considered one of the cornerstones, together with the provision for an aggravated revision mechanism, of a rigid constitution, also in light of the transition from monarchy to republic. On January 13, 1947, the second section of the second subcommittee of the Constitutional Commission began discussing the Supreme Constitutional Court ( ), starting from a number of points already outlined in legal doctrine. First of all, they addressed the problem of parliament controlling itself, which was to be avoided, and the question of the nature of control depending on the type of constitution, rigid or flexible, and consequently extrinsic or intrinsic control.

The establishment of the Constitutional Court itself brought back the discussion on the type of constitution, rigid or flexible. In many cases, the debate at the Constituent Assembly had shown that the question of the establishment of the Supreme Constitutional Court was linked to the principle of whether the Constitution was rigid or not.

In reality, the Constituent Assembly members were faced with the need, on the one hand, to make the limit of constitutional rigidity operational, which would have been a key element of the constitutional structure, but also, on the other hand, to take into account the needs of a regional state and, finally, to protect constitutionally recognized freedoms. The two main models of judicial review, the American and the Austrian, were ultimately set aside in favor of a model that

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<sup>34</sup> F. LANCHESTER, *La costituzione tra flessibilità e rottura*, Milano, 2011.

<sup>35</sup> On this category, from Bryce onwards, see A. PACE, *Costituzioni rigide, costituzioni flessibili*, Padova, 2000.

<sup>36</sup> L. ROSSI, *La "elasticità" dello statuto italiano*, in «*Scritti giuridici in onore di Santi Romano*», Padova, 1940, vol. I, pp. 25-43.

<sup>37</sup> C. MORTATI, *La costituzione in senso materiale*, Milano, 1940.

was the result of a compromise and, as such, was a hybrid between a judicial and political model, also of parliamentary origin.

Once the constitution came into force with the provision for a Constitutional Court, eight years passed before the Court issued its first ruling. I will not go into the reasons why so much time passed between the first ruling of the Court and the delays in implementing the Constitution, which can be interpreted in different ways<sup>38</sup>. I will simply note a fact and its consequences. Thus, in the eight years following January 1, 1948, the review of the constitutional legitimacy of laws was carried out in a widespread manner by the judge with jurisdiction at the time, both for defects of formal legitimacy and for those of substantive legitimacy, according to previous practice.

In general, one of the main problems that emerges during the liberal rule of law is linked, when discussing the connection between constitutional justice and the democratic nature of the state, to the fact that constitutional justice is understood primarily as aimed at maintaining the balance between powers and protecting the hierarchy of sources. During the decade of bloodshed between 1894 and 1898, the Court of Cassation ruled contradictorily on the constitutionality of the so-called liberticidal decrees (these were the early days of social rights claims): in 1894, it ruled in favor of a constitutional review, while in the second case, in 1898, it declared itself incompetent. The situation here is further complicated by the use of decree-laws, which altered the balance of power in favor of the executive, which held a concentration of power (legislative and executive).

The identification of the political guardian of the constitutionality of public acts is therefore, prior to the 1948 Constitution, an important issue and not a secondary one.

As can be seen, the examination of constitutionality did not focus so much on the content of rights or the emergence of social rights (in this case, the first guarantees relating to work), but on the process by which the decree-law had been arrived at, on the instrument itself, on its constitutional existence (there was no ad hoc provision as in the 1948 Constitution) and on its compatibility with the provisions of the Constitution concerning the separation of powers.

In the immediate post-war years, the Court of Cassation performed the task of constitutional review:

We have already seen how the conservative resistance of the Supreme Court had shielded the economic rights of citizens from the encroachments of the fascist state. This attitude was maintained after the end of the Second World War, but took on a different form in the democratic context: the protection of property rights, in fact, provided the Court of Cassation with an opportunity to take on the task of constitutional review during the transitional phase, not only in relation to the subjective rights of individuals, but also with regard to one of

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<sup>38</sup> A. MENICONI, *Storia della magistratura italiana*, Bologna, 2012, pp. 287-288, this phenomenon was denounced by Piero Calamandrei. However, observations of a different nature can be found in A. SIMONCINI, *L'istituzione della Corte costituzionale e la sua affermazione: una lezione dalla storia*, in *Giornale di Storia costituzionale*, XI, 2006.

the fundamental principles of the new constitutional order, namely respect for the limits of intervention by each branch of the state. The opportunity arose with the adoption by the government of a legislative decree (the so-called De Gasperi decree) which gave retroactive effect to two decrees of the Minister of Agriculture, Fausto Gullo, which had already been disapplied by case law: the Court of Cassation, in its ruling of July 28, 1947, declared the De Gasperi decree unconstitutional. The Court of Cassation distanced itself from the past and assumed an important role in the process of constructing the new constitutional order. After the referendum of June 2, 1946, several appeals were lodged with the Court of Cassation challenging the provisional results announced first by the Minister of the Interior, Giuseppe Romita, and then by the Court itself in an interlocutory decision. Behind the delay in announcing the results—which gave rise to a transitional regime that assigned the functions of head of state to Prime Minister Alcide De Gasperi—was in fact uncertainty about how to count the votes<sup>39</sup>.

Even today, with a rigid constitution and a fully functioning Constitutional Court, the problem of indirect protection of rights persists, through the link to a general constitutional interest. Added to this problem, especially during the gestation of the Constitutional Court, was that of the autonomy of the Court itself, with all the related repercussions.

As regards the history of constitutional review, specifically of decree-laws, which gave rise to the problem of whether or not to create a guardian of the constitution, at least in the Italian debate, the problem remained complex even in the republican era. The issue of the remedial effectiveness of the conversion law has in fact removed from the Court's control the verification of the conditions of necessity and urgency referred to in Article 77. The control of compliance with Article 77 was therefore carried out by Parliament, at least until judgment no. 29 of January 27, 1995, in which the Court declared that the prevailing doctrine had not taken into account the fact that the situation representing the prerequisite of necessity and urgency for which the decree-law was enacted was a requirement for the constitutional validity of the act, the obvious lack of which caused a real defect in the constitutional legitimacy of the act itself<sup>40</sup>.

The Constitutional Court is the judge of the admissibility of referendums, partly because it was probably not conceived as an authoritative and independent body. Perhaps only a parliamentary minority believed that the Court would be an

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<sup>39</sup> B. SBORO, *Il volto costituzionale della cassazione, origini e trasformazioni*, [https://amsdottorato.unibo.it/id/eprint/12094/1/sboro\\_beatrice\\_tesi.pdf](https://amsdottorato.unibo.it/id/eprint/12094/1/sboro_beatrice_tesi.pdf)

<sup>40</sup> A. LO CALZO, *La Corte torna sulla materia dei decreti legge dopo la "svolta" della sentenza n.22/2012: alcune considerazioni sulla sentenza n. 237/2013*, [https://www.cortecostituzionale.it/documenti/file\\_rivista/25227\\_2013\\_220.pdf](https://www.cortecostituzionale.it/documenti/file_rivista/25227_2013_220.pdf); A. CONCARO, *Il controllo di costituzionalità dei decreti-legge*, Milano, 2000, 84 ff.; S. VENEZIANO, *La decretazione d'urgenza nella prospettiva della Corte costituzionale*, in N. Lipari (a cura di), *Giurisprudenza costituzionale e fonti del diritto*, Napoli, 2006, 411; E. MALFATTI, S. PANIZZA, R. ROMBOLI, *Giustizia costituzionale*, Torino, 2011, 102. A. CELOTTO, *C'è sempre una prima volta... (La Corte costituzionale annulla un decreto legge per mancanza dei presupposti)*, in *Cass. pen.*, 2007, 3600.

impartial guardian of the Constitution (Calamandrei used to conclude La Pira's metaphor, according to which the Court would be the roof of the Constitution, by observing that it was still raining in that house).<sup>41</sup> .

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<sup>41</sup> G. AZZARITI, *Osservazioni sull'accesso e sull'estensione del sindacato della Corte costituzionale*, in A. Anzon – P. Caretti – S. Grossi (a cura di), *Prospettive di accesso alla giustizia costituzionale. Atti del Seminario di Firenze svoltosi il 28-29 maggio 1999*, Torino, 2001, pp. 425 ff.