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John Clarke Adams
Syracuse University

Paolo Barile
University of Siena

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THE ITALIAN CONSTITUTIONAL COURT IN ITS FIRST TWO YEARS OF ACTIVITY

By

JOHN CLARKE ADAMS* AND PAOLO BARILE**

THE CONSTITUTIONAL SIGNIFICANCE OF THE CREATION OF THE CONSTITUTIONAL COURT

The Italian Constitution of 1948 was an attempt of a liberal-minded Constituent Assembly to preserve the structure and the organs of the octroi Constitution of Carlo Alberto of Piedmont, promulgated in 1848, and at the same time to protect Italy from future fascist (or communist) usurpation, by such innovations as a complete bill of rights and the creation of a Constitutional Court, with the power to overrule legislation at variance with the Constitution. Under the Italian system the executive is already controlled by the Consiglio di Stato and the regular courts, which are empowered to annul administrative acts at variance with the law.¹

As the authors have stated elsewhere,² the creation of a Constitutional Court was one of five major institutional reforms envisaged by the new Constitution.

The acceptance of a Constitutional Court by the Italian Constituent Assembly marked a fundamental break with the political philosophy of the French Revolution, previously followed by Italian liberals, according to which parliamentary supremacy was the basis of democracy. In establishing a rigid Constitution, one

*Visiting Professor of Political Science, Syracuse University.
**Professor of Constitutional Law, University of Siena.

¹ An extended bibliography would be out of place here. A group of some twenty of Italy’s leading constitutional lawyers edit a review called Giurisprudenza costituzionale that publishes all decisions of the Constitutional Court and other decisions pertinent to Italian constitutional law, along with analyses of the important decisions and of the problems raised by them. An older review, the Rivista trimestrale di diritto pubblico, contains additional important material, usually in the form of longer articles. Basic manuals include Giuseppe Guarino and Leopoldo Ellia, Codice costituzionale, Milano, Giuffre, 1957, and Marlo Battaglini and Mattia Mininni Manuale legislativo della Corte costituzionale, Padova, CEDAM, 1957. The Raccolta ufficiale delle sentenze e ordinanze della Corte costituzionale is published annually by the Istituto poligrafico dello stato. Recent articles by Mauro Cappelletti (“L’attività e i poteri del giudice costituzionale in rapporto con il loro fine generico,” Studi giuridici in memoria di Piero Calamandrei, Padova, CEDAM, 1957) and by Paolo Barile (“La Corte costituzionale organo sovrano: implicazioni pratiche,” Scritti in onore di Emilio Crosta, 1957) give the present “doctrine” of a number of the major jurists.

² John Clarke Adams and Paolo Barile, “The Implementation of the Italian Constitution,” American Political Science Review, XLVII (1953), pp. 61-83. The other major institutional reforms were the reorganization of the Senate, the creation of a National Economic Council, the creation of a High Judicial Council, and the establishment of autonomous regional governments.
that (1) can be amended only by a process considerably more difficult than ordinary legislation, and (2) is protected against acts of Parliament contrary to its provisions by a judicial proceeding designed to nullify such acts, the Italian Constituent Assembly decided to follow American and Australian precedents rather than the traditional European ones. The new Italian Constitution was in this respect liberal rather than democratic in that it established the principles of liberalism in the Constitution and sought to protect them against the democratic fervor of future parliaments by placing these liberal principles on a constitutional basis, that is, on a higher plane than that of ordinary legislation. According to this Constitution, members of future parliaments would still be the agents of the sovereign people, but their power would be limited by the general instructions their principals expressed in the Constitution, which are susceptible of changes solely through the complicated process of constitutional amendment.

THE IMPLEMENTATION OF THE COURT

Although the Constitution was promulgated 1 January 1948, the Constitutional Court was not established until more than seven years later. The successive Christian Democrat cabinets and the Italian Parliament must bear a major part of the responsibility for this delay. First there was a delay in passing the requisite enabling legislation and later another delay in selecting Parliament's quota of the judges to sit on the Court. The unwillingness or the inability of the cabinet and the Parliament to act with a decorous celerity in implementing so crucial a constitutional provision as that instituting the Constitutional Court has several partial explanations, the sum of which substantially accounts for this dereliction of duty.

In the first place, there was a disagreement among members of Parliament as well as among the leading law professors as to the best method of implementing the broad Constitutional provisions regarding the Court. In the second place, it is difficult for public officials to perform public acts that seriously curtail their own powers. With respect to the Constitutional Court the Italian Parliament was in a position analogous to that of the legendary Bertoldo, condemned to be hanged and then entrusted with the task of selecting the suitable tree. As it was to Bertoldo's interest never to find a suitable tree, so it was to the interest of Parliament never to find the correct formula for the implementation of a constitutional provision of which the principal function would be to limit its own power. In the third place, no political party or no important extra-parliamentary pressure group made a serious issue of setting up the Court. Here, as in other cases, the most apparent support for the Constitution came from the Communist party, but there is little doubt that the purpose of this support was to embarrass the Christian Democratic government rather than to implement an essentially liberal, and therefore anti-communist, Constitution.
The necessary enabling legislation was finally enacted on 11 March 1953. Not until two and a half years later, however, was the Parliament able to agree on the selection of its quota of judges. The law required a three-fifths majority, and the left, which controlled more than 40% of the votes, insisted on the Communists' right to designate one of the judges. The final compromise permitted the Communists to select a man who had never been politically active with the Communist Party. The futility of this kind of squabble is shown by the fact that the original Communist choice, Vezio Crisafulli, a distinguished jurist, has since left the party.

THE COMPETENCE OF THE COURT

The Italian Constitutional Court has limited and in some cases only indirect jurisdiction. It has replaced neither the Court of Cassation, the supreme judicial court, nor the three judicial sections of the Consiglio di Stato, the high administrative court. The Constitution gives the Constitutional Court three functions: that of (1) determining the constitutionality of statutes or other acts having the force of law, (2) settling conflicts of power between organs of the central government, between the central government and the regional governments, or between regional governments, and (3) impeaching the top executive officers of the government, the President of the Republic, the President of the Council of Ministers, and the Ministers. A subsequent law invests the Constitutional Court with a fourth function, the determination of the compatibility of a petition for a referendum with the constitutional limitations on the type of legislation subject to the referendum (treaties, tax and financial legislation, and amnesties are excluded).

Another law prescribes the procedures for bringing cases before the Constitutional Court. Two procedures are indicated for cases involving the constitutionality of legislation. The normal procedure is similar to certification from a judicial or an administrative court, on a motion by one of the parties, to the effect that the issue involved turns on a constitutional question. The courts are also empowered to "certify" a constitutional question to the Constitutional Court,

3. The constitutionality of this provision has been challenged. See Serio Galeotti, "Sull'elezione dei giudici della Corte costituzionale di competenza del parlamento," Rassegna di diritto pubblico, 1954.
8. Although the Consiglio di Stato has as yet certified no question to the Constitutional Court, at least one question has reached the Court from a specialized administrative court (in this case the Commission for Direct Taxes of Agrigento province (Sicily)). See Corte costituzionale, sentenza n. 42 (1957), in Giurisprudenza costituzionale, II (1957), 516-525.
on their own initiative. The act by which cases reach the Constitutional Court in this manner is called an \textit{ordinanza di rinvio}. This \textit{ordinanza} suspends the case before the remanding court pending the settlement of the constitutional question. A denial of such a motion by the ordinary courts, called an \textit{ordinanza di manifesta infondatezza}, must be reasoned and must show the patent absence of a constitutional question. The second procedure permits the central government or the regional governments to present a claim of unconstitutionality, called a \textit{ricorso}, directly to the Constitutional Court. The \textit{ricorsi} of the central government are necessarily against acts of regional government; the \textit{ricorsi} of the regional government are against acts of the central government or of another region. The central government must act within fifteen days of notification of the law; the region within thirty days against the central government and within sixty days against another region. It appears that after this time limit has elapsed the Court may still hear these questions if raised under the first procedure.\footnote{See \textit{Corte costituzionale, sentenza n. 85} (1957), \textit{ibid.}, 437-447, and Pietro Gasparri, \textit{`Questioni di competenza legislativa sollevate in via incidentale,'} \textit{ibid.}, 899-906.} 

When the Constitutional Court is examining the constitutionality of a law under the first procedure, that of the \textit{ordinanza di rinvio}, it is performing a function similar to that of the American courts when they are faced with a constitutional question, in that the issue of constitutionality arises out of a specific case in judgment. The Italian Constitutional Court has emphasized the limited constitutional jurisdiction granted it by an \textit{ordinanza di rinvio}, by refusing to consider constitutional questions not essential to the disposition of the case before the regular courts, and by deferring to the judgment of these courts in this matter, as expressed in their \textit{ordinanze di rinvio}.\footnote{\textit{Corte Costituzionale, sentenza n. 1} (1957), \textit{ibid.}, 1-5.} 

Under the second procedure, however, the Court must give an opinion on the general constitutionality of a law. Such an opinion somewhat resembles the advisory opinion that some American state courts are authorized to give top state legislative and executive organs. The Italian decisions, however, have the effect of invalidating the laws they hold unconstitutional.

The second type of case heard by the Constitutional Court is that involving conflicts of authority between government organs. These cases are classified into three categories, according to the parties involved. The first category comprises conflicts of authority between two organs of the central government. With respect to cases falling within this category, the Court makes a preliminary investigation to assure itself that a constitutional, and not purely an administrative, question is at stake. Only if the Court answers this question in the affirmative does it assume jurisdiction and proceed to hear the parties. No cases of this kind have reached the Court in its first two years of activity.

\begin{table}
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Conflict Type} & \textbf{Categories} & \textbf{Procedure} \\
\hline
Central government & Two organs & Preliminary investigation necessary
\hline
Regional government & Acts of one region against another region & Constitutional question at stake
\hline
Central government & Acts of another region against central government & Constitutional question at stake
\hline
\end{tabular}
\caption{Types of Conflicts of Authority in the Italian Constitutional Court}
\end{table}
Cases involving conflicts of authority between the central government and a regional government constitute the second category of conflicts of authority. The third category consists of conflicts of authority between regions. With regard to conflicts that fall within these two categories the Court reaches no preliminary determination of its jurisdiction in camera. In these cases, however, action must be initiated within sixty days from the date of notification or publication of the contested act. Numerous cases regarding conflicts of authority between the central government and the four constituted regions have arisen. So far none has arisen between two regions. It is unlikely that such conflicts can arise until the other regions begin to operate. The regions have all been formally established by the Constitution but, owing to the procrastination of Parliament in implementing the Constitution, all but four still lack organs. The four regions actually functioning, Val d’Aosta, Trentino-Alto Adige, Sicily, and Sardinia, are at such a geographical distance from one another that conflicts of authority are unlikely to occur.

For cases of impeachment, which are heard on a motion of Parliament, the bench is composed of the fifteen regular Constitutional Court judges and of sixteen additional members to be chosen by Parliament. So far no impeachment has taken place, and Parliament has made no serious attempt to select the additional judges who would join the bench of the Constitutional Court for impeachment trials.

The fourth and last type of case for which the Court is competent is one arising from a dispute over the constitutionality of a specific referendum. Parliament has yet to implement the Constitutional provision establishing a referendum; a fortiori Parliament has not been moved to determine the procedures before the Court in a referendum case.

The constitution that the Constitutional Court interprets consists of the original Constitution, promulgated 1 January 1948, and a number of amendments, known as constitutional laws, passed by Parliament since that time by the special procedure prescribed in the Constitution for amendments. None of the constitutional laws so far enacted has attempted to alter the Constitution; each has served to implement a constitutional provision. Examples of constitutional laws are the constitutions (charters) of the four autonomous regions so far set in operation, and the laws of 9 February 1948, n. 1, and of 11 March 1953, n. 1, implementing the Constitutional Court.

The Constitutional Court is concerned only with the relationship between the Constitution and the law. It is not competent to judge the legality of an administrative act. In the Italian system this power devolves on the ordinary courts and the administrative courts. The determination of the tribunal from which redress
against an administrative act is to be sought, therefore, depends upon whether the claimed invalidity of the act lies in its relation to the law or in the law's relation to the Constitution; in the first hypothesis redress is sought either in the ordinary or administrative courts; in the latter hypothesis, before the Constitutional Court.

THE PERSONNEL OF THE COURT

According to the Constitution there are fifteen judges on the Constitutional Court, of which five are to be selected by the career judges, five by Parliament, and five by the President of the Republic. These judges serve for twelve years and are not immediately reeligible. During this period they cannot practice law or be members of Parliament or of regional assemblies.

The laws of 11 March 1953, numbers 1 and 87, further stipulate that the judges cannot perform professional work for pay in industry, commerce, or government, and cannot retain any official positions of a public or a private nature (college professors and judges, however, will be returned to their former positions at the termination of their services with the Court); that the judges to be elected by Parliament must receive a three-fifths majority vote; and that of those elected by the judges three are to be chosen by the members of the Court of Cassation, one by the members of the Consiglio di Stato, and one by the members of the Corte dei Conti, a judicial body that examines the legality of government acts and maintains budgetary and financial supervision.

After the promulgation of the laws concerning the composition of the Court, the magistrates lost no time in nominating their third of the judges. Within little more than a week they had selected five of their own number, each of high rank and advanced age. Three of these men died during the thirty-two months' interval between their selection and the first sitting of the Court. The magistrates replaced their deceased nominees with candidates having similar qualifications within a short time after each death. Although not required to do so, the magistrates, in all cases in which they have nominated judges, have expressed a preference for elderly but not retired members of their own hierarchy. In this way they have not only honored their distinguished brethren by nominating them for the Constitutional Court, but they have also created a series of vacancies at the higher levels of their career service.

The selections of Parliament were the result of a political compromise, to the effect that two Christian Democrats, one Liberal, one left wing Socialist, and one nominee of the Communists would be chosen. It is hard to understand, however, according to what further criteria the particular members of these political tendencies were selected. Only two of the nominees, the Socialist Mario Bracci and the Christian Democrat Caspare Ambrosini, both of whom were active
members of the Constituent Assembly and are professors of law, possessed obviously outstanding qualifications. Although the other nominees, the Christian Democrat Giuseppe Cappi, the Liberal Giovanni Cassandro, and the Communists' nominee, Nicola Jaeger, were all eminent in their fields, the peculiar qualifications that led to their preferment by Parliament for this particular assignment are not obvious. One member of Parliament, Cappi, was chosen, while another nominee, Jaeger, had never been elected to Parliament. The other three had been members of previous legislatures or the Constituent Assembly. Four of the group were professors; the fifth, Cappi, was the former president of the Christian Democratic parliamentary group. At the time of nomination Ambrosini was 69 and Cappi was 72; Bracci was 55, Jaeger, 52, and Cassandro, 42. Parliament succeeded in mustering the required three-fifths vote for Bracci and Ambrosini on 15 November 1955, and fifteen days later selected the other three judges.

Three days later President Gronchi, who had previously been exerting pressure on Parliament to select its quota of judges, announced his five selections and thus completed the Court. Gronchi's choices in general met with approval. They were Enrico De Nicola, the former provisional President of Italy; Gaetano Azzariti, a retired career magistrate and outstanding jurist; two highly respected law professors, Giuseppe Capograssi and Tomaso Perassi, and a Christian Democrat politician and former magistrate, Giuseppe Castelli Avolio. To fill the vacancies caused by the death of Capograssi and the resignation of De Nicola, Gronchi appointed two law professors from the University of Naples, Biagio Petrocelli and Aldo M. Sandulli.

In recapitulation, of the sixteen judges who have taken part in the Court's decisions, seven (Azzariti, Battaglini, Castelli Avolio, Cosatti, Gabrieli, Manca, and Papaldo) are career magistrates; seven (Ambrosini, Bracci, Cassandro, Jaeger, Perassi, Petrocelli, and Sandulli) are full professors (professori ordinari) of law, and two (Cappi and De Nicola) are best known for their political activities. Of the professors, two teach administrative law, and one each constitutional law, criminal law, civil procedure, conflict of laws, and legal history.

The Procedure Before the Court

No useful purpose would be served by giving a detailed exposition of Italian procedure at this point. The authors will therefore limit themselves to a brief mention of the procedural matters that appear to them of most significance for an understanding of how the Court functions and of some of its major virtues and defects.

The Court does not divide into sections. The judges elect their president from among their own number. A quorum consists of eleven judges. The Euro-
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pean system of a relatore is used, by which one judge is designated by the Court to prepare a particular case and normally, but not officially, to write its decision. The decision is reached by a majority vote of the judges hearing the case. In impeachments a tie vote absolves; in other cases the President's vote breaks the tie. No concurring or dissenting opinions are permitted.

In the event that the Court is of the opinion that the constitutional question raised is patently ungrounded (manifestamente infondata), the Court may dispose of the case in camera without hearing the parties. (This procedure, although more limited in scope, is perhaps comparable with that of a denial of a petition for a writ of certiorari.) This is the regular procedure with respect to matters already decided by the Court in a previous decision. In the Court's own words:

Certifications to this Court for rulings on matters previously decided will be declared patently ungrounded, since if the rulings concern laws previously declared unconstitutional, the lack of grounds results from the fact that the laws no longer have any force and therefore no further problem can arise with respect to their validity; and if the rulings concern laws whose claimed invalidity was declared ungrounded, there are no grounds for further rulings unless reasons arise for adopting decisions different from those previously handed down by the Court.\(^\text{11}\)

In other circumstances the Court gives a decision after a full hearing. If the decision establishes the unconstitutionality of a law, that law ceases to have effect from the day after the official publication of the decision.

The state and the regions, and in certain cases the two provinces of the Trentino-Alto Adige region,\(^\text{12}\) may intervene in cases in which they have an interest. In accordance with general Italian procedure, however, no petitions for filing amicus curiae briefs are entertained that come from private persons.

THE DECISIONS OF THE COURT

The Italian Constitutional Court convened for the first time on 23 January 1956. The first three months of its activity were taken up in preparing its rules of procedure and in getting physically organized.

On 23 April 1956 the Court held its first public session. At this time its

\(^{11}\) Ordinanza, 21 luglio 1956, ibid, 1024.

\(^{12}\) The special treatment of the provinces of Bolzano and Trento is based on specific provisions of the regional constitution of Trentino-Alto Adige, by which these provinces are exceptionally empowered to challenge the constitutionality of acts of the regional government of Trentino-Alto Adige or of each other, but not of the central government. See Corte costituzionale, sentenza n. 17 (1956), ibid., 641-646.
President, Enrico De Nicola, gave a sober and moving address on its function. Immediately thereafter the Court proceeded to hear the cases on its docket.

Exactly a year later, on 23 April 1957, the new President of the Court, Gaetano Azzariti, summed up its achievement as follows: Number of cases certified to the Court from all sources up to 31 March 1957, 469; number of cases finally disposed of, 381; number of cases remaining on the docket, 88. He then went on to assure his audience that the remaining 88 cases would be dealt with before the Court’s summer recess. The 381 cases disposed of by 31 March 1957 were taken care of in only 84 decisions and ordinanze. As over half the cases disposed of during this period were disputes between the regions and the central government, an average of about ten “civil liberties” cases were joined in a single decision. The number of identical “civil liberties” actions to reach the Court will probably be reduced in the future as the regular judges and counsel acquire the habit of checking on “certifications” as they appear in the Gazzetta ufficiale, for instead of certifying questions already before the Constitutional Court, other courts need only suspend action on cases involving the same question, pending the Constitutional Court’s decision.

The majority of the Court’s decisions concern conflicts between the central government and the regions. These are cases either of conflicts of powers or of the constitutionality of national or regional laws. The fact that each of the four constituted regional governments has its own charter increases the work of the Constitutional Court in this field. In these cases the Court is mainly concerned with the strictly judicial function of interpreting laws. Only occasionally must it consider broad principles such as local autonomy and the general welfare.

Most of the rest of the cases are of a civil liberties nature and concern in good part the alleged incompatibility of some of the provisions of the Criminal Code, the Code of Criminal Procedure, and above all the Police Regulations, with the extensive bill of rights in the Constitution. It is these cases that are generally considered the vital ones for the future of the Italian Republic.

In this field the Court has proceeded cautiously but firmly. Like our own Supreme Court in most periods of its history, the Italian Constitutional Court has so far shown great moderation in the use of its power to annul legislation. In its two years of activity, however, it has invalidated a certain number of the more obnoxious fascist laws, such as the requirement of a previous authorization to post notices; the delegation to the police of the power to restrict liberties without

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a trial\(^{15}\) or to send people back to their place of origin on mere suspicion,\(^{16}\) and the requirement of a police permit to hold religious services in public or in private.\(^{17}\) On the question of the delegation of legislative power the Court reached a decision that might have been based on the *Panama Refining* and the *Schechter* cases,\(^{18}\) in which it invalidated a law that permitted the Provincial Tourist Offices to assess taxes on whatever economic groups it determined would benefit from an increase in the tourist trade. Although it did not use Cardozo's words, the Court said in effect that this delegation of legislative power was unconfined and vagrant.\(^{19}\)

Where possible, however, the Court appears to have given the law the benefit of the doubt. Among the laws held valid were those requiring registration of newspapers before publication,\(^{20}\) licensing of peddlers,\(^{21}\) the possession of a passport or an equivalent document before leaving the country,\(^{22}\) and the requirement that laborers must be hired through the government employment agency of their place of residence.\(^{23}\) The latter decision, in particular, has serious implications for civil liberties.

The most socially significant as well as the most time-consuming cases the Court handled in its second year were concerned with the various phases of the land reform legislation.\(^{24}\) These were complicated cases where the constitutional issues were not always clear. Basically they dealt with the fact that the laws delegated legislative power to the government, which was empowered to expropriate unused or poorly used land under certain circumstances. The fact that this power was considered legislative denied to the owners the possibility of an administrative appeal. The Court in the main declared the constitutionality of this legislation. Had the decisions gone in large measure against the government, Italy's land reform program would have received a serious and possibly a fatal setback.

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19. *Corte costituzionale, sentenza n. 47* (1957), *ibid.*, 598-607. "The Court holds that since the law in question states neither who will be subject to the tax nor by what criteria administrative discretion is to be limited, the law is patently incompatible with ... the Constitution."
The basic problem of the Italian Constitutional Court is that it is grafted on a traditional constitution of which it is not a natural part. The new Italian Constitution is an attempt to preserve the traditional Italian constitutional set-up, which is not in itself anti-liberal, and to reinforce it, particularly by means of a bill of rights and a constitutional court, so that it will be able to serve as the basis of a liberal democracy.

The new Italian Constitution, as one of Italy's most distinguished and most respected judges has written, "... was conceived at a time when, because of the proximity of the Resistance period, spiritual values were still deeply felt and all institutions that would tend to assure the liberty and independence of thought suppressed by the fascists were held in esteem."\(^{25}\)

Although this passion for freedom had undoubtedly the passive support of a great part of the Italian people, a generation of fascism, and a limited earlier experience in constructive political action, coupled with a traditional distrust of government and a disinclination to cooperate with it, have led the Italians to do remarkably little to implement the liberal principles of their new Constitution. As has been stated, the Constitutional Court, which is the keystone of the entire constitutional set-up, was only established in the new Republic's ninth year. During those nine years the Italian Parliament violated the spirit and the letter of the Constitution by making only inadequate attempts to implement the new basic law, in part because the Italian people either directly or through their political leaders, put little pressure on Parliament in favor of the Constitution.

Although public apathy to the Constitution has been great, the most effective opponents to the Constitution are found in the power hierarchies of Italy, the public administration, the judiciary, and the clergy. In the broadest sense of the word, the men who serve these institutions are professional administrators. They have been trained in one way of doing their job, a way that gave them great discretionary power in dealing with private individuals and gave the latter few rights, privileges, or immunities against the authorities. One of Italy's greatest liberals and an influential member of the Committee of 75 that wrote the Italian Constitution, later explained his delusion, particularly with the judges, in pointing out that one cannot expect, except from the greatest men, the capacity to change a philosophy of life in the midstream of his professional career.\(^{26}\) A man who learned to be a judge under fascism, when it was considered unethical to assume

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the innocence of an accused because such an attitude would be disrespectful to the state, which had indicted him, can hardly be expected to apply the very same criminal code today with the respect for the individual and the spirit of fair play that are traditional with the British judge. The police officer who has been trained under a system that gave him vast powers to arrest on suspicion, to interrogate virtually at will, to place under semi-permanent police surveillance, and to exile without a judicial proceeding is not likely to support with enthusiasm a Constitution that denies him these powers. A Roman Catholic priest who has been able to suppress an "unauthorized" Protestant sect upon reporting its existence to the police will not be favorably impressed with a Constitution that establishes freedom of religion.

Had Parliament taken adequate measures to implement the Constitution by rewriting the Criminal Code and the Police Regulations and by establishing the handful of new institutions envisaged by the Constitution, had the public demanded such action by Parliament, then the administrators could be blamed more severely for their obstruction of the new order. As it is, they can share the blame with a much larger segment of the population.

The politicians and the general public, however, can claim the same excuse as the administrators. Except for the small percentage of Italians who were converted to the liberal faith, usually as a reaction to fascism, the generation that grew up under the tyranny has little understanding of the liberal state. The many deputies and senators who do understand are for the most part men who because of their anti-fascism have lacked professional training and experience in politics and are therefore not effective politicians.

There is one group in Italy, however, that merits mention for its generous support of the Constitution and of the Constitutional Court. The leading Italian jurists have devoted much of their energy to understanding and interpreting the Constitution. Every pronouncement of the Constitutional Court has been studied and many have been commented on at length. Although these jurists have

28. Large sections of Italian bureaucracy systematically flout not only the Constitution but the law as well. After both the Parliament and the Constitutional Court took from the police the power to commit "undesirables" to confino (confinement to a remote village), Il Ponte reported that "in spite of the Constitution (and of the decisions of the Constitutional Court) twelve more persons were sent to confino by the Palermo Provincial Police Commission." (XII 1956, p. 1845). In spite of a law forbidding the government to require the inclusion of the father's name in the majority of documents and records, this information is still normally demanded in many government offices.
29. See, for example, Peyrot, Borghi, Magni e Capitini, La libertà religiosa in Italia, Firenze, La Nuova Italia, 1956.
30. The Italian Parliament has been guilty not only of inaction, but it has legislated in violation of the spirit of the Constitution; for example, by granting courts martial jurisdiction over reservists in inactive status for acts committed in inactive status.
naturally expounded somewhat different interpretations of the Constitution, there has been a remarkable consensus among them on many of the fundamental issues. As opposed to the anti-Constitution bias of the groups mentioned earlier, the general attitude of the jurists is pro-Constitution. Almost without exception Italy's greatest lawyers have appeared before the Constitutional Court as defenders of the constitutionally protected civil liberties of Italians.

The Italian Constitutional Court has therefore operated under difficult conditions and has been faced with the apathy or the hostility of many individuals and institutions from which it would normally have expected support. As a result of this situation, the Court has been called on to perform a function somewhat different from that originally envisaged for it. The Court was intended to act as a conservative institution, whose primary function would be to preserve the liberal democracy established by the Constitution from encroachment on the part of the legislative power. Since a liberal democracy has in fact not been effectively established in Italy, the basic function of the Court is a radical one, that of changing the law, and not the conservative one of preserving it. Thus, paraphrasing a learned American justice who characterized the function of the American Supreme Court as that of expressing the sober second thought of the nation, one might say that the function of the Italian Constitutional Court is that of expressing the first passionate impulse of the nation. For a judicial body, the latter is the more difficult task.

This situation appears to have encouraged the Court to bend over backwards in its attempt to consider valid some of the fascist laws still in effect in Italy, by reinterpretation if necessary, and has also led it to seek to soften the effect of its declarations of unconstitutionality by proffering suggestions to Parliament as to how the invalid laws might be rewritten so as to be compatible with the Court's interpretation of the Constitution.

The task of the Constitutional Court was made unnecessarily difficult by the

31. See, for example, Sentenza n. 8 (1956), Giurisprudenza costituzionale, I (1955), 602-607, where the wide “emergency” powers of the Prefect were considered administrative rather than legislative in nature. The validity of action taken under them would therefore be judged by the ordinary and administrative courts (on the basis of the validity of the action with respect to the new Constitution) and not by the Constitutional Court, which is empowered only to judge the constitutionality of laws and acts having the force of law (not administrative acts).

32. See, for example, Corte costituzionale, sentenza n. 1 (1956), ibid., 1-10, where the Court, after declaring that the articles of the Police Regulations that require prior permission before posting notices violate the constitutional guarantee of freedom of expression, goes on to say, “This declaration of the unconstitutionality of the articles in question does not imply that they cannot be replaced by others ... which, without interfering with the right to freedom of expression, guaranteed by Art. 21 of the Constitution, would regulate its exercise so as to avoid abuses.” See also Corte costituzionale, sentenza n. 3 (1956), ibid., 568-575, and Vezio Crisafulli, “La Corte costituzionale tra magistratura e parlamento,” Il Ponte, XIII (1957), 835-837.
continued existence of the High Sicilian Court, which got under way in 1948, eight years before the Constitutional Court started to operate. This court, composed of three judges elected by Parliament, three judges elected by the Sicilian legislature, and a president chosen by the six judges but not from their number, was empowered to determine the constitutionality of Sicilian regional laws, as well as of national laws, with respect to any alleged infringement on the local autonomy granted Sicily by her charter. It was also empowered to try the top Sicilian officials in impeachment proceedings. From 1948 until 28 October 1955 the High Sicilian Court had handed down 91 decisions. The other regional charters have not established similar courts.

There arose an obvious conflict of jurisdiction between the High Sicilian Court and the Constitutional Court as soon as the latter went into operation. Despite a good deal of local enthusiasm for the High Sicilian Court, in 1957 the Constitutional Court, three of whose members were past or present members of the High Sicilian Court, in a carefully reasoned opinion deprived the High Sicilian Court of all its jurisdiction except that over impeachment.

Another difficulty, and one the Court is not in a position to solve itself, has to do with the procedure by which civil liberties cases reach the Constitutional Court only on the sufferance of a regular magistrate, who is always free to refuse a motion to refer a constitutional question to the Constitutional Court on the grounds that a constitutional question is patently nonexistent. It is obvious that the ordinary magistrate must be empowered to refuse such a motion, for otherwise every unscrupulous lawyer wishing to delay the conviction of his client would move a constitutional question, thus flooding the Constitutional Court with impertinent cases and delaying still further the slow course of justice in Italy. The present system, however, is also liable to abuse. For example, within a period of only eight days two different one-judge courts in Brescia were asked to seek a decision of the Constitutional Court on an identical constitutional question. On 10 January 1956 the first judge agreed to the motion. On 18 January 1956 the second judge refused the motion as patently unfounded. On 3 July 1956 the Constitutional Court declared the law unconstitutional. Therefore, if both cases had come before the second judge, the Constitutional Court might not have had the chance to invalidate an unconstitutional law because an inexperienced magistrate thought that the future opinion of the majority of the Constitutional Court was not only wrong (which was certainly his right) but totally unreasonable. This is

33. These decisions are found in *Alto Corte per la regione siciliana*, Milano, Giuffre, Vols. 1-3, 1954, Vol. 4, 1956.
35. The question would have reached the Court, anyway, because a Trieste court accepted a similar motion on 28 January 1956. The same thing occurred at Perugia, where on 24 November 1955 one judge held that the claim of existence of a constitutional question was patently unfounded, on a motion identical to one that another Perugia judge had accepted six days earlier. See *Giurisprudenza costituzionale*, II (1957), 541-542.
not an isolated case. On the four occasions when the Constitutional Court during its first year of activity declared a law unconstitutional, some court or courts had taken it upon themselves to settle the constitutional questions by refusing a motion to refer the case to the Constitutional Court, on the grounds of a patent absence of a constitutional question. The judges who took such action were not always young and inexperienced; they included one section of the Court of Appeals of Rome. Even the Court of Cassation has declared a claim of the existence of a constitutional question to be patently unfounded, in a meticulous, lengthy, and carefully reasoned opinion that itself belied the patent unreasonableness of the opposing point of view.

The high administrative court, the Consiglio di Stato, has yet to approve a motion for certifying a constitutional question to the Constitutional Court, despite the fact that the Consiglio di Stato has consistently maintained an attitude in its decisions that is free from subservience to the administration's views. Yet when, for example, the Consiglio di Stato refused to certify the question of whether or not the Constitution in its clause on the equality of the sexes gave women the right to seek a career in the judiciary, it took upon itself (and decided in the negative) a decision that would certainly appear to fall within the competence of the Constitutional Court.

In comparison with the American Supreme Court the Italian Constitutional Court is at a disadvantage in civil liberties cases. In America the majority of the provisions conflicting with civil liberties are either state laws or local ordinances; in Italy they are almost exclusively national. For reasons of policy and because of the prestige of the state, it is harder for a court to invalidate a national law than it is to invalidate a local ordinance. More serious than this, however, is the fact that the state regularly acts as the advocatus diaboli through the intervention of the President of the Council of Ministers, represented by the Avvocatura dello Stato (the government's legal counsel). Thus the Parliament for enacting the law or for not having repealed it, the President of the Council of Ministers for approving its enforcement, and the administration are generally lined up against the Constitution, which is defended only by plaintiff's counsel. This situation generally prevails even when the law under attack is fascist legislation, predating the Constitution and patently in contrast to it. It is possible, of course, that the government may not care to defend the validity of the law in question. In that case it need not appear in court.

37. Corte di Cassazione, Sezione Prima Penale, 16 aprile 1956, reported in Rivista di diritto processuale (1956), 164-174. See also the comment of Piero Calamandrei, "Sulla nozione di manifesta infondatezza," ibid.
38. Consiglio di Stato, sentenza 18 gennaio 1957.
39. See, for example, Sentenza n. 48 (1957), reported in Giurisprudenza costituzionale, II (1957), 525-528, where the President of the Council of Ministers did not defend the police practice of committing persons to confino without a judicial process.
Another serious procedural problem faced by the Italian Constitutional Court concerns the interpretation of laws. In its attempt not to invalidate legislation, the Court has followed the practice of interpreting the law where possible so as to give it a meaning and an effect that does not violate the Constitution. The problem that arises here is that the regular courts are not bound by the Constitutional Court's interpretation. So long as the Constitutional Court does not invalidate the law, the regular judges can interpret it at will and the Constitutional Court is powerless to review their interpretation.\textsuperscript{40} Perhaps the Italian Constitutional Court in some future day will come to the conclusion of the American Supreme Court in the segregation cases (or earlier, for instance, in \textit{Yick Wo v. Hopkins})\textsuperscript{41} and invalidate laws not for their intrinsic unconstitutionality but for their susceptibility to unconstitutional interpretations.

The Court has been successful in keeping reasonably abreast of its docket and has managed to contain the length of its decisions within modest proportions. Decisions are generally handed down within months of their certification and often consist of no more than five or six printed pages.

The judges of the Constitutional Court, like many of the lawyers that appear before them, seem to be truly devoted to effectuating the Constitution. Owing to the considerable inertia of other government and private groups, they must bear more than their share of the load. So far the Constitutional Court has displayed sobriety and courage in the exercise of its high function. It has shown sobriety in the moderation with which it has made use of its vast powers; it has shown courage in resisting the Vatican in its decisions for religious freedom and in resisting the southern landowners in its land expropriation decisions. So long as it continues in its present path liberal democracy in Italy may in some future time be metamorphosed from dream to reality.

\textsuperscript{40} See Vezio Crisafulli, "Questioni in tema di Interpretazione della Corte costituzionale nei rapporti con l'interpretazione giudiziaria," \textit{ibid.}, I (1956), 928-949; Carlo Esposito, "Nota alla sentenza 10," \textit{ibid.}, II (1957), 72-76, and Sentenza n. 24 (1957), \textit{ibid.}, II (1957), 373-387.

\textsuperscript{41} 118 U.S. 356 (1886).