Happy birthday, Constitution!
Italy – 1948-2008 –

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I am sincerely honoured for the opportunity of giving a lecture at the Italian Institute of Culture on the sixtieth (now sixty-first) anniversary of the Italian Constitution's entry into force, and express for this my deep gratitude to the Institute, to the Devolution Club and particularly to his Secretary General Prof. Alessandro Torre. At the same time, I am concerned for the responsability of such task, departing from the choice among a wide range of potential issues.

A choice is needed, at least, among issues concerning, respectively, the First Part of the Constitution, providing general principles and citizens fundamental rights and duties, and the Second Part, regarding the Republic's organization, in spite of their being equally important for the polity and mutually connected. Nonetheless, the former is generally deemed as depicting the core of Italian constitutionalism, thus affording a better understanding of its features. A further criterion of choice might consist in the different challenges which the two Parts are recently meeting. Contrary to the Second, affected by endless political debates, reform bills, referendum, or controversial reforms (see constitutional laws n. 1 of 1999 and n. 3 of 2001, revising Title V, devoted to regional and local government), the First Part is not officially challenged. Constitutional reform is in fact considered necessary for enhancing the functioning of public powers, without subverting principles. Beyond conventional political discourses, however, those principles might be affected from a more subtle, and more telling, crisis than that concerning organization. Hence derives another reason for focusing on the First Part, particularly for paying attention to its effectiveness on legal grounds and, on the other hand, to its perception from the people.

Historical Background And Content Of The 1948 Italian Constitution

In 1945 the Italian people was confronted with the moral and institutional disaster following the Second World War and the fascist regime's demise. Even the Crown was involved in that disaster, departing from King Vittorio Emanuele III's incapability of preventing the 1922 legal coming to power of Mussolini. The need for a new Constitution was widespread, and supported by the political parties which had struggled against fascism.

On the 2 June 1946, the Italian people decided through a referendum whether to maintain the Monarchy or to establish a Republic, and elected the members of the Constituent Assembly. The choice for the Republic obtained only a slight majority, but an overwhelming majority of the seats in the Constituent Assembly went to antifascist parties.

At the beginning, these parties appeared deeply divided on principles not less than on the institutional framework. The Communist and the Socialist Party, representing together roughly 40% of the Assembly, were driven by the Marxist ideal of equality, requiring strong State intervention and nationalisations, and on institutional issues followed Rousseau's view, vesting the core of public power in

a single assembly representing the people. Christian Democrats, provided with an equivalent numerical strength, were instead attached to the ideals of freedom and dignity sustained by communitarian theorists such as Jacques Maritain, and supported a parliament based on two chambers, representing respectively the political will of the people and professional cathegories.

Nonetheless, accommodations of these competing views were found at the Constituent Assembly even after the breach of the governmental coalition due to the impact of the Cold War. The very politicians searching in the morning for a common understanding on principles and general rules would engage bitter political struggles in the afternoon. This prevented the constitutional drafting from becoming a Penelope's web. Within a year and a half, a text was adopted which figures among the mature products of European constitutionalism, and as a masterpiece of Italian language, incomparable with that of recent amendments.

But why parties restrained themselves from muddling constitutional work with contingent politics? Does this prove an 'heroic' attitude, as it is sometimes depicted, and compared to the 'prosaic' of recent reformers? The political élite of the Constituent Assembly was composed of thoughtful and cultured men, but not of heroes devoted to the common good. Rather than their subjective qualities, historical circumstances need thus to be taken into account.

The Constitution was not only the product of hard times, a genuine reaction to a moral disaster. It was also written in a vacuum. Contrary to Japan's and West Germany's constitution-making process, Western Allies refrained from intervening in the Italian one. On the other hand, the pre-fascist tradition, authoritatively represented at the Constituent Assembly by Vittorio Emanuele Orlando and Benedetto Croce, appeared inadequate to the newly established democracy's challenges. Conversely, the major parties' legal and political cultures had grown outside, if not against, the old Italian State, and, at the same time, corresponded to fairly opposite ideologies, which was particularly troublesome given the beginning of the Cold War. The Assembly's workings, therefore, proceeded under a thick veil of ignorance about the major parties respective intentions. But this forced them to leave aside their own immediate objectives, and to play a a co-operative game focused on the Republic's future. In these exceptional circumstances, the Constitution's drafting became a unique opportunity for merging political positions on the ground of common principles.

The result is mirrored particularly in the First Part. Far from identifying rival ideologies, liberty and equality are mutually reconciled in light of Article 3's reference to the "human person's full development", requiring from the Republic "removal of economic and social obstacles", rather than a paternalistic role, towards such development. Civil, political, social and economic rights are accordingly recognised and granted. Particular attention is paid to the rights of the individual within communities such as families, schools, unions, parties, churches. Social, not less than political, pluralism becomes part of the constitutional landscape.

The question was fully debated of whether these matters, particularly social rights and pluralism, should be considered in a constitutional text. In spite of the suggestion of Piero Calamandrei, a distinguished lawyer, to recognize social rights in a Preamble given their non-justiciability, a huge majority of the Assembly was driven by the conviction that only a direct insertion of these rights within the text would bind the future legislature to enforce the respective provisions as well as those concerning civil and political rights. The choice for

equating such rights was a crucial step for further developments of Italian law, and was also a premise for their consideration as indivisibile rights, later recognized in the 1993 United Nations Declaration and in the 2000 Charter of European Citizens Fundamental Rights.

As for the Second Part, its main achievement consists in sharing public power both among diverse institutions at the central level (Parliament, Government, President of the Republic, referendum, Judiciary and Constitutional Court), and among the State and local authorities, including Regions, Provinces and Municipalities. This articulation is more sophisticated than Montesquieu's separation of powers, reflecting not only the need for granting citizens liberties, but also a pluralistic view of democracy.

However, the Second Part's design is not without shadows. Contrary to those affecting the First, political arrangements tended here to safeguard the parties role and initiative, particularly with respect to the legislative-executive relationship. Institutional devices aimed at preventing governmental instability are usually provided from European Constitutions, wherever conventional assessments, given the multi-party structure of the political system, and proportional representation, are unlikely to drive towards the Westminster model. But the Assembly rejected analogous proposals, putting some premises of the frequent recurring of cabinet crises in the Republic's experience. Mere political bargaining was also at the origins of Parliament's structuring into two Chambers elected by the people and entrusted with identical functions (legislation, giving confidence to Government, scrutiny of governmental activities), which appears an almost unique solution in comparative constitutional law.

THE FIRST DECADES OF THE REPUBLIC

The Constitution's first years were hard and discouraging. Its legislative enforcement, whose terms where either fixed in the alleged Provisionary rules according to certain Titles, or otherwhise to be intended as immediate, was unduly delayed by the centre-right coalition of the time with implausible pretexts. Against this attitude, called 'majority's obstructionism', the opposition attempted a difficult 'fight for the Constitution'. On the other hand, ordinary judges denied the binding force of principles established in the First Part, which they deemed nothing more than a political document providing broadly framed objectives placed at Parliament's disposal. Accordingly, only Parliament, without being subjected to constitutional review, could change the legislation prior to the Constitution, including the 1931 Criminal Code enacted under the Fascist regime. The Constitution was not considered yet a 'rule of recognition' in the sense of Herbert H. Hart, both because judges denied its rules of legally binding force and because of political resistance to constitutional enforcement.

In its first decision (no. 1/1956), the Constitutional Court affirmed that all constitutional provisions were endowed with legally binding force, and extended constitutional review to the laws enacted before 1948. Ordinary judges were thus implicitly invited to refer to the Court questions of constitutionality of the laws, irrespective of their date of approval. That decision, together with the subsequent case-law, succeeded in gradually changing the general attitude towards the Constitution. Since such process was driven from an independent institution as

the Court, the 'fight for the Constitution' ended with the general acceptance from political parties of the Constitution as a rule of recognition for the whole legal order. In the following two decades, while the Court gradually struck down the legislation prior to the Constitution contrasting with constitutional principles granting civic liberties, Parliament enforced the Constitution on many respects, including provisions recognizing social rights such as health, education and pension rights.

The expansion of the constitutional dimension within public life was successful, to the point that fundamental rights enshrined in the Constitution marked a watershed in Italian history. But did these achievements result from the execution of a plan corresponding to the Framers will, as presupposed by the political culture prevailing in the Republic's first decades, or rather from largely unforeseeable processes? For answering the question, an account is needed of the Constitution's impact on diverse legal sectors such as civil, criminal, labour and administrative law.

THE IMPACT OF THE CONSTITUTION ON NON-CONSTITUTIONAL LAW AND THE ROLE OF INTERPRETATION

Civil law – Many constitutional principles and rules are devoted to relationships between individuals, whose ultimate inspiration is to be found in the reference to the human person contained in Article 2, recognizing inviolable rights of man both as individual and within social settings where its own personality is developed. From this it follows that those rights are constitutionally protected not only from public but also from private powers (*Drittwirkung* doctrine).

Influence of constitutional provisions on civil law does not occur, however, with the same intensity, nor is granted through the same instruments, in diverse areas as family law, contract law and personal rights.

Contrary to the 1941 civil code, which presupposed a patriarchal conception of family, Article 29 of the Constitution recognizes the moral and legal equality of husband and wife, with the only limits established from the legislation for the family's union sake. The 1975 reform of family law adjusted, although with great delay, ordinary legislation to constitutional provisions, and encouraged the Constitutional Court in striking down further provisions violating the equality principle sanctioned from Article 29. That reform reflected the new relationships within the family demonstrated from the wide rejection of the 1974 referendum concerning the abolition of divorce. Constitutional enforcement coincided then clearly with modernization of social relationships. Recent phenomenons as requests of legal recognition of unions between persons of the same sex, and the development of biomedicine, to the contrary, challenge a strict interpretation of the text, although broadly framed principles such as those contained in Article 2 afford sufficient ground for treating the related issues in constitutional terms. The Court's case-law seems promising at this respect.

For what concerns contract law, the Constitutional Court has repeatedly deemed contractual autonomy as instrumental to freedom of economic initiative

granted under Article 41, and therefore as protected on constitutional grounds only indirectly, namely against undue legislative restrictions of that freedom.

An important evolution has instead characterized personal rights, whose protection was insufficiently ensured by the traditional civil law, regarding almost exclusively patrimonial rights, nor could be provided by criminal law, aimed at repressing behaviours believed to damage society as a whole rather than single individuals. An example is afforded from Article 2043 of the Civil Code, establishing compensation for injust damages, which ordinary judges and the Constitutional Court have reinterpreted in light of constitutional provisions with the aim of recognizing new legal notions such as that of biological damage. On the other hand, according to the Court's case-law, Article 32 of the Constitution, granting health as a fundamental right of the individual and as a general interest of the collectivity, is considered both 'absolute' in its intersubjective dimension and 'conditional' with respect to financial resources at the disposal of public powers.

A flourishing judicial activism has thus increasingly linked civil with constitutional law. But the connection is two-fold. While shaping directly, that is, without legislative intermediation, intersubjective relationships, constitutional law is likely to be intended more as citizens fundamental law than as the highest source of the State's will.

Labour law – In 1948 labour law was considered a province of civil law, given the dominating vision of labour contracts as mutual exchange of free wills. The Constitution gives instead particular protection to workers, on the presumption that labour market is affected by strong asymetries between parties. In this respect, immediately binding rules provide *inter alia* the right to a reward in proportion to the worker's service, and in any case sufficient to ensure a free and worthy life for him and for his own family (Article 36). On the other hand, trade unions are free to organize themselves, and the right to strike is granted within the related legislation (respectively, Article 39 and 40).

Article 39 adds that unions whose statute establishes "internal democratic order" are provided with legal personality, and may stipulate collective contracts whose binding force is extended to workers of each category irrespective of their adherence to unions. This provision, however, was never enforced, given the unions suspicion that the mechanism for acquiring legal personality, and, therefore, a formally public law figure, might give public powers the opportunity to check their own conduct. The question of extending collective contracts concerning wages to workers not adhering to unions was resolved by judges through immediately enforcing Article 36, which does not differentiate workers with respect to economic treatment. Such an interpretative device, albeit not provided from the Constituents, if not contrasting with their own will, succeeded in giving full protection to workers rights and in coping with the unions resistance to acquire a public law figure. This engendered the conviction that labour law consists essentially in arbitrating social conflicts through informal rather than formal regulative instruments.

This assumption, however, was denied in areas where legislative regulation of the labour market was needed in the absence of direct constitutional provisions. While founded on the principle of workers dignity within firms, the "workers rights statute" (law n. 300 of 1970) does not correspond to constitutional

enforcement on formal grounds. The same occurs for law n. 146/1990, which regulates strikes concerning public services with the aim of protecting consumers constitutional rights. These rights, albeit not explicitly granted, were affirmed by the Constitutional Court in connection with strikes endangering the exertion of fundamental rights within public services such as health and education. Since Article 40 protects the workers' right to strike, a regulation was needed for balancing public services consumers with workers rights.

An intensive reinterpretation of constitutional provisions affecting labour, rather than their enforcement, was therefore the basis both for shaping labour law, and for rendering it autonomous from civil law.

Criminal law – Art 25 of the Constitution fully adheres to a longstanding liberal tradition embedded within constitutionalism, conditioning the definition both of crimes and of penalities on respect for the rule of law (*nullum crimen, nulla poena, sine lege*). This does not imply, however, that legislative choices are absolutely free. Principles as those of personal liability and of humanity of penalties (Article 27) are in fact imposed over Parliament, thus restricting its discretionary powers. Moreover, the Constitutional Court has inserted the individual's inviolable right of defense at every stage and instance of trials (Article 24), which appears crucial in criminal trials, among the core fundamental rights which Parliament is bound to respect even while modifying constitutional provisions.

According to the Court's case-law, the content of criminal conduct remains instead at Parliament's disposal within the limit of reasonableness. Theoretical attempts at justifying criminal law to the extent that it seeks to protect constitutional goods have not reached political consensus. Even the doctrine of criminalization of conducts as *extrema ratio* of legislative choices, although affirmed in some decision of the Court, has never been implemented. It is worth adding that the 1930 Criminal Code is partially still in force, both because of the case-law making void provisions violating fundamental rights, and because of Parliament's preference for amending single rules, or for defining crimes falling outside the Code.

Administrative law – During the Republic's first decades, the provision that administration is organized by law according to the principles of impartiality and good performance (Article 97) was believed to confirm the administrative judges case-law ('Consiglio di Stato'), and the then widely held consideration of legislative execution as being at the core of administration's activity. The legacy of the past remained alive also on the ground of organisation. According to the Napoleonian model introduced by Cavour into the Italian Kingdom, central administration was structured into uniformly driven departments, and local government was deeply regulated from national legislation, providing *inter alia* heavy checks over administrators.

However, apart from the provision requiring Ministers political accountability for actions committed within "their own departments" (Article 95), the Constitution is far from presuming that administrative activity should be exhausted in the mere execution of the laws or political directives. Such

execution is in fact unlikely to lead to partial or inefficient conduct, which is exactly what the principles of impartiality and good performance tend to avoid. On the other hand, the Constitution provides public intervention into economic and social relationships, where administrative action might imply the exertion of discretionary powers and the inherent need for impartial administrative behaviour.

Notwithstanding these elements, the conviction that the Constitution had just confirmed the hierarchical model of administration persisted for a longwhile, and was not without consequences on the developments occurring from 1970 onwards. The creation of Regions, of the National Health Service and of other welfare services determined not only an expansion of the public sphere but also a differentiation of administrative models, clearly distinct from the traditional State-centered. Given their previous connection to that model, even constitutional principles were then left aside. While organizing new public services, legislation was rather influenced from current emphasis on civic participation to administration, with the unintended consequence of opening the road to parties and unions intrusions into administrative management, and to maladministration.

At the beginning of the Nineties, reaction against these phenomenons and the widely recognized need for enhancing public performances regarding citizens rights and expectations inspired an intensive process of administrative reforms, and the resulting rules included devices aimed at distinguishing administrative functions from political direction. But these rules were soon contradicted. The rise of the political system resulting from the 1993 electoral reform became the occasion for adopting measures labelled as 'spoils system', unduly strenghtening and extending Ministers appointing power of civil servants. Laws providing popular election of the heads of the executive at the local and regional level produced the same effect. Once again, the impartiality principle was overturned.

The 'is'/ 'ought' dichotomy appears therefore particularly acute in the field of administrative law. Hence derives an heavy burden on the Constitutional Court. The scrutiny of such legislation is traditionally more deferential than that concerning fundamental rights, on the presumption that legislation is provided with discretionary powers in shaping the politics-administration relationship. Nevertheless, the Court has recently struck down measures introducing the spoils system due to the violation of the impartiality principle (see decisions nn. 103 and 104/2007), thus putting a necessary, although insufficient, premise for adequate limitations on politicians' appointing powers of civil servants.

The above made inquiry may suffice to reveal not only the pervasive, although various, influence of constitutional principles on the legal landscape, but also that it depends on continuous processes of interpretation and adaptation of the text to circumstances which the Framers could not usually foresee. Further examples might be useful at this respect. While granting freedom of expression, Article 21 devotes four of its six paragraphs to the press and none to the television, for the simple reason that it was wholly unknown in 1947. But the first paragraph grants that freedom "through speech, writing and any other means", thus paving the way to legislative and judicial statements including television

among such means. While providing under Article 11 "limitations of sovereignty necessary for an order ensuring peace and justice among Nations", and enhancement of "international organizations pursuing that end", the Constituent Assembly referred that order to the United Nations, and not to the European Community, which was then an utopia cultivated by a slight political élite. But when it was established, the Constitutional Court extended the meaning of Article 11 to the new organisation.

Awareness that the intent of the Framers is a poor tool for interpretation is widely shared from scholars and judges, being driven by the conviction that adaptability of constitutional principles to circumstances which might be unknown at the time of their adoption is the condition for their enduring through different ages, and for giving a minimum common ground to the respectively occurring political choices and values emerging from an open society. The Constitution is supposed to stand at the roots of a robust tree.

FATHERS AND SONS: THE NEW CHALLENGES AFFECTING THE CONSTITUTION

During the first period of the Republic, the Constitution was instead intended as standing at the top of a pyramid, dictating a plan of progressive social transformation which ordinary laws were expected to put into practice. It is worth reminding ourselves that an optimistic view of the future was then widely spread in liberal democracies, social progress being strictly connected with modernisation of the economy, which, in turn, wasn't considered incompatible with an active role of the State[1]. These current ideas and practices coincided in Italy with the first enforcement of the Constitution, on the presumption that it could provide any changing in social and political life. The past and the future of the country seemed thus to be harmoniously connected.

This vision was shared from the centre-left coalition, leading government, with few interruptions, for thirty years (1963-1994), and from the Communist Party, and, together with the need for somewhat compensating the latter for its permanent exclusion from government, might explain why laws enforcing the Constitution were frequently approved by majorities which were far larger than those sustaining the cabinet.

Meanwhile, these very parties concurred decisively in shaping the memory of the country. After the 1943 armistice, not only the war was fought on the Italian territory, but Northern Italy was the theatre for a civil war between anti-fascist "partigiani" and militians belonging to the Salò's Repubblic established by Mussolini. The majority of the population, however, was not involved in it, apart from the fact that the South of the country and part of the Centre were already under the military control of Western Allies. Democratic parties called the civil war "Resistenza" with the aim of depicting popular hostility against the totalitarian regime, adding the claim that it was conducted almost unanimously by the Italian people. In the first years of the Republic, that claim corresponded

[1] This is inter alia demostrated from the success which T.H.Marshall's collection of essays on *Citizenship and social class* (1950) met in continental Europe (on this see D.Renard, *Les trois naissances de l'Etat-providence, Pouvoirs,* 2000, n. 94, at 22.)

to the need for a common feeling beyond the Constitution, which, in turn, risked to appear a mere sheet of paper both in Parliament and in the courts. But it continued to be affirmed in the following decades, in spite of the increasing strenghtening of the Constitution's legitimacy.

Furthermore, historians supported the myth of the Resistenza as a massive movement, with the effect of rendering more and more unlikely, in the people's perception, that a civil war had ever been fought. It was in fact only after the fall of the Berlin's wall that a democratic historian dared to entitle "A civil war" an essay on the Resistenza, with the explicit intention of preventing fascists from exploiting for their own purposes the acknowledgment of an historical event as the civil war[2]. That essay, albeit accurate and passionate, was published too late for restoring the sense of the origins of the Republic which was removed from the memory of successive generations.

In the public discourse, the wind had already changed. During the Eighties, the mobilizing effects of the Constitution's enforcement and of the Resistenza ended, respectively, with the approval of the laws deemed to put into practice the First Part's principles and with the passage of generations. On the other hand, the increasing importance of the European Community and of a market-based economy, together with the emancipation of social groups from party ideologies, appeared the main factors of modernisation. And, since these changes required well-functioning institutions, political discourses on the Constitution shifted from the great ends characterising its First Part to the need for reforming the Republic's organisation as provided in the Second.

In terms of constitutional history, these elements appear even more important than better known events occurring between 1992 and 1994, namely the discovery through judicial investigations of a huge political corruption, the following resignation of the majority's party leaders, the referendum abolishing the proportional system for the Senate's elections, viewed as the symbol of political parties dominance on society, and the new electoral law founded on the majority system. Destruction of old parties was due to corruption not only in modern criminal law's sense, but, even more, to corruption as intended from Aristotle. Their cultural not less than political resistance in adjourning the democratic tradition to the new challenges occurring in society and at the institutional level was fatal to the survival of consolidated beliefs and assessments.

It is not a casualty that, when the media depicted the rise of the political system resulting from the 1994 elections as the advent of a 'Second Republic', as if it corresponded to the establishment of a new constitutional order, the formula obtained immediate success even in the centre-left wing, in spite of its gathering the political sons of the Framers. Although respectful of the 1948 Constitution, these parties were attracted from the confused quest for a new order encapsulated in the 'Second Republic' formula. They resembled to aristocrats so frightened for the people's mounting protest under the windows of their old castles, to be ready to disguise themselves with the aim of melting with the crowd. Vis-à-vis this ambivalence on one side of Parliament, a clear attitude towards the 1948 Constitution's spirit affected the other side. Centre-right leaders felt themselves wholly alien to it, either because of their fascist legacy (in the case of *Alleanza Nazionale*), or because of their parties' recent birth (in the

[2] C.Pavone, *Una guerra civile. Saggio storico sulla moralità nella Resistenza*, Bollati Boringhieri, Torino, 1991, XI.

cases of *Forza Italia* and of the *Lega Nord*). One of them asked even, candidly, why should he be bound from a document written before his own birth.

The question of why sons should maintain a Constitution written by their fathers goes back to the XVIII century's debates among Jefferson and Madison in the United States, and among Sieyès and Barnave in France, receiving diverse answers according to various epochs and countries. At any rate, the term "fathers and sons" is referred in those debates to the people, rather than to its representatives, whereas in the Italian Republic parties entrenched themselves for decades behind the Constitution, with the effect that people got used to look at it through the parties intermediation. Nor the impressive Constitution's impact on the legal system, and on citizens rights particularly, was sufficiently considered in the public discourse.

After the 1994 elections, to the contrary, only one side of Parliament could claim a political descendance from the Framers. And, for the above mentioned reasons, even that side was quite reluclant in answering the question of who where the Framers sons, and, therefore, of whether a constitutional tradition had ever appeared in the countrry. For the first time since 1948, people's attitude towards the Constitution was thus directly at stake.

THE CONSTITUTION OF LAWYERS AND THE CONSTITUTION OF THE PEOPLE

Symptoms of such attitude are likely to be caught both through the electorate's responses to constitutional referendums, which, since 1994, were summoned twice, and through popular reactions to legislation strikingly contrasting with constitutional provisions.

As for the first point, a preliminary account is needed of the rules concerning constitutional referendum. According to Article 138, the Constitution is amended by both Chambers through a double approval procedure within an interval of not less than three months. If the second approval is given by a majority of two-thirds of each Chamber's members, the constitutional act enters into force. If it instead reaches only the majority of these members, either 500.000 electors, one fifth of the members of each Chamber, or five regional Councils may request submission of the relevant act of Parliament to a referendum.

While until 1994 the Constitution was always amended with a two-thirds majority, and on marginal points, recent constitutional revisions rarely reached such majority and sometimes do involve important and huge sections of the text, thus demonstrating that political tensions are now far from sparing the Constitution.

The first example is given from constitutional act n. 3/2001, reorganising the centre-periphery relationships, which obtained only the absolute majority of votes in each Chamber, and was then submitted to a referendum. The act was approved by a large majority of voters, with a turnout of 34,1% of the electorate.

But the most far reaching attempt to change the Constitution was made in 2006. It consisted in amending 53 Articles of the Constitution out of 139, which corresponded to almost the entire Second Part. The act revealed striking contradictions and, at the same time, a dangerous conception of democracy. A 'federal' Senate was proposed, notwithstanding the fact that its members were still elected by the people. Attempting to demonstrate its federal nature, the act

entrusted the Senate with the task of legislating on a list of issues concerning regional competences, leaving national issues to the Chamber of Deputies and providing shared competences for the two Chambers on a further list of issues. Conflicts deriving from such provisions were likely to paralyse parliamentary work. Moreover, the act centered on the Prime Minister powers connected with the functioning of the parliamentary system, including the dissolution of Parliament. In the Italian context, characterised by coalition cabinets, such power is conferred to the President of the Republic not only on formal grounds, but also for ascertaining, after a cabinet's crisis, whether another cabinet might obtain the confidence from the Chambers in their current political composition. In this context, trasferring to the Prime Minister the power to dissolve Parliament would amount to give him a blackmail device against his own majority. At the same time, the opposition was clearly marginalized. For these reasons, abandoning its traditional self-restraint in hotly debated constitutional issues the Association of constitutional lawyers evaluated the constitutional reform as dangerously close to a Constitution's breach.

Passed in Parliament with the absolute majority of votes, the act was submitted to a referendum, which took place on the 25 and 26 June 2006, and was rejected by 61,3% of voters, with a turnout of 52,3 % of the electorate.

The result was surprising both for the high participation of citizens and for the fact that rejection of the reform was shared by a significant section of the electorate supporting the parliamentary majority in charge at the time of the act's approval. Had that referendum reached the opposite result, the question of whether we would be today in the condition of celebrating the 1948 Constitution's birthday would remain doubtful. It does remain instead doubtful whether the reform's rejection was, *a contrario*, the proof of a popular attachment to the Constitution overriding the political divide occurring from 1994 onwards. The answer is not easily discernible, since the reform appeared to many electors a leap in the dark, driving the country to a destination unknown to contemporary democracies.

On the other hand, popular reaction to gross violations of constitutional principles needs to be taken into account. These violations are unfortunately abundant in recent years. One example is afforded by statutes generally deemed contrasting with the principle of equality before the law for giving the Premier, together with the President of the Republic and the Presidents of the Chambers, full judicial immunity while being in charge (see law n 140/2003 and, after its being repealed from the Constitutional Court (decision n. 24/2006), law n. 124/2008). Regulation of conflicts of interests affecting Ministers and other public officers as provided by law n. 215/2004 raises also serious doubts of constitutionality on the ground of reasonableness, to the extent that it does not prevent these officers from remaining owners *inter alia* of broadcasting companies, and, therefore, from concentrating into one single person the control of a huge part of the national mediatic system.

It is worth adding that most part of the legislation doesn't derive from parliamentary discussion and approval of governmental bills, but rather from Parliament's confirmation, within sixty days, of legislative decrees, in spite of the fact that Article 77 of the Constitution enables the Cabinet to enact such decrees only "in extraordinary cases of necessity and urgency". The Cabinet's encroaching of this constitutional entitlement is not a novelty in the Republic's experience, being supported by the claim that parliamentary rules appear inadequate in

ensuring the legislation's approval within reasonable terms. However, the practice of legislative decrees has recently reached an alarming level.

These violations of constitutional rules and principles, being seldom brought, for technical reasons, before the Constitutional Court, are likely to be questioned to the extent that they provoke popular dissent. Apart from judges and scholars, however, sensibility to such issues and, more generally, respect for the rule of law, appear affecting only slight sections of the electorate.

In further cases, campaigns in the media exacerbating, if not creating, popular feelings are organized from above, with the aim of exhibiting the goverment's capacity of giving the just answer irrespective of its compliance with the Constitution. An example is afforded from the recent legislation on immigrants, resulting from a media driven politics of fear, rather than from a response to citizens need for security. These measures, already stigmatized by the European Parliament for violation of immigrants human rights, might be subjected to judicial scrutiny and eventually repealed. But we are thus led to the question of whether judicial interventions suffice to ensure the Constitution's maintainance.

My answer is negative, not only because of the technical limitations inhering to these interventions, but because popular legitimacy is a necessary, although not exclusive, condition of a democratic constitution's maintenance. At the same time, however, a practice of democracy exhausted in electing for five years the 'ruler of the country', and in looking at his image on the television for the rest of the time, appears at odds with the premises on which constitutional democracies are grounded, affecting rather the now widely diffused 'illiberal democracies', where fundamental rights and the rule of law are neglected notwithstanding free elections[3]. The risk of Italy's half-conscious shifting from the former into the latter category is not entirely implausible.

Hence derives the following dilemma. On the one hand, the 1948 Constitution has demonstrated an enduring capacity of shaping the legal system, thus orienting political, economic and social developments of the country, including those affecting citizens ordinary life. At this respect, we might end our celebration by testifying the Constitution's effectiveness, which corresponded to the main objective of the Framers.

On the other hand, following the dictum *Amicus Plato sed magis amica veritas*, we are forced to admit the intimate fragility of such conclusion even while celebrating a birthday. To the extent that the above mentioned achievements are well known only within the cercle of lawyers, the Constitution appears to the greatest part of the population too remote from its needs and feelings, if not wholly ignored. The distance between 'the Constitution of lawyers' and 'the Constitution of the people', although partly inevitable, and, to a different extent, not unkown elsewhere, appears thus particularly deep and troublesome for the Italian 1948 Constitution's future.

Rather than venturing on prophecies, I will pose, and tentatively answer, the question of what should constitutional law scholars do in these circumstances.

Thirty years ago, while drawing a picture of the 1931-1981 Italian legal experience, Massimo Severo Giannini invited young scholars to continue in their own studies as if the world was perfectly quiet and ordered[4]. It was a paradoxical, but not a pharisaic, invitation. While abandoning the pretention of

[3] F.Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad*, Norton, New York, 2003.

[4] M.S.Giannini, *Diritto amministrativo*, in *Cinquanta anni di esperienza giuridica in Italia, Messina-Taormina 3-8 novembre 1981*, Giuffrè, Milano, 1982, 379.

changing events, it contained the simple condition for accomplishing scholarly tasks. Following such approach, our attention should be driven, both on legal and on historical grounds, to frequent misunderstandings of the Constitution's content, with the aim of clarifying its enduring value as well as its transformative virtues. Why are misunderstandings so frequent? After all, as the end of the so called "First Republic" demonstrates, the connection, and therefore the compatibility, between tradition and change is exactly what we miss more in our country. And this, as a British audience may easily realize, is far from depending on a single document called Constitution.

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