

**Sabino Cassese**

**The Italian Constitutional Architecture: from  
Unification to the Present Day**

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Paper delivered at the International Conference on “The Unification of Italy and American Independence”, organized by the Italian Cultural Institute of New York, in collaboration with the Luiss School of Government, on the occasion of the 150<sup>th</sup> anniversary of the Unification of Italy, New York, 20 September 2011.

Sabino Cassese, Justice, Italian Constitutional Court. He has been professor at the Universities of Urbino, Naples and Rome and visiting scholar at the Universities of Paris I, Nantes, “Institut d’Etudes Politiques” in Paris, Stanford, Oxford, New York. In 1993-94 he was a member of the Italian Government. Sabino Cassese has received a doctor *honoris causa* degree from seven Universities: Aix-en-Provence (1987), Cordoba (1995), Paris II (1998), Castilla-La Mancha (2002), Athens (2002), Macerata (2002) and European University Institute (2010). His most recent works include: *Il mondo nuovo del diritto* (2008, Laterza), *Il diritto globale* (2009, Einaudi), *Massimo Severo Giannini* (2010, Laterza), *Il diritto amministrativo: storia e prospettive* (2010, Giuffrè), *Lo Stato fascista* (2010, Il Mulino), *When legal orders collide: the role of courts* (2010, Global Law Press).

## **1. A Constitution or a Religion?**

In an important article on “Constitutional History: Chance or Grand Design”, the great Belgian legal historian R. C. Van Caenegem, wrote that “the American Constitution is not just a legal text, but more like a religious revelation. The First Amendment bans established churches, but the adoration surrounding the fundamental law amounts to an established civil religion, a substitute for a state church. The law turned into religion is the bedrock that binds all Americans together. The constitution is a “holy book” and as such the object of deep veneration [...]”<sup>1</sup>.

The 150 years of the Italian State tell a different tale, one which I shall describe as being of mild constitutionalization.

I shall examine two issues: first, the process of constitutionalization, or the way in which the new political entity gave itself constitutions and renewed them, the features of its constitutions, and the effectiveness they enjoyed; the second issue shall be the executive’s instability, i.e. governments’ uncertain position and powers, and their brief duration over these 150 years.

## **2. A mild form of constitutionalization**

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<sup>1</sup> R. C. Van Caenegem, *Constitutional History: Chance or Grand Design?*, in “European Constitutional Law Review”, 2009, 5, p. 447 *et seq.*

Italy has had two constitutions: the *Statuto albertino* of 1848 and the Constitution of the Republic of 1948. The first was in force for 85 years, from 1861 to 1944; the second for 63 years, from 1948 to today. Both founding acts were weak and played a secondary role in the country's "living constitution", albeit in different ways.

United Italy did not give itself a Constitution. Rather, it inherited the document that had been in force in one of the seven previous States, the Kingdom of Piedmont-Sardinia – the dominant State, which had led the process of unification.

The *Statuto albertino* (thus called after King Alberto, the sovereign who granted it) preceded unification by thirteen years and was adopted in the aftermath of the European insurrections of 1848, so as to pre-empt requests for a veritable constitution. Borrelli, King Carlo Alberto's Minister for Home Affairs, declared that "*il faut la donner, non se la laisser imposer, dicter les conditions, non les recevoir*"<sup>2</sup> (we must grant [a "statuto"], and not let one be imposed on us; dictate conditions, not submit to them). The Minister of Justice, Avet, stated that the constitution had to "preserve, for the Crown, the broadest degree of autonomy compatible with the representative system"<sup>3</sup>. Therefore, the *Statuto* was not a true constitution. It had not been enacted by a popularly-elected assembly. It had not been put forth to the representatives of the people for their approval. It had simply been "*octroyé*", granted

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<sup>2</sup> F. Bonini, *Lezioni di storia delle istituzioni politiche*, Torino, Giappichelli, 2002, p. 104.

<sup>3</sup> P. Colombo, *Storia costituzionale della monarchia italiana*, Roma – Bari, Laterza, 2003, p. 13.

by the King. It did not establish any procedures for its amendment, and could thus be modified by means of ordinary laws. It was afflicted, therefore, by an inherent weakness<sup>4</sup>.

The document was not given the name of “constitution”, as that term evoked the French Revolution and traumatic events such as the constituent assemblies that were being convened in Paris in those very months<sup>5</sup>; “statute” was a more neutral term, which recalled Italian municipal tradition. As for its content, the drafters of the *Statuto* drew inspiration from the French Charter of 1814, the French constitution of 1830 and the Belgian constitution of 1831 – that is, from the acts of the Restoration.

Unification was ultimately accomplished without consideration for the ideal espoused by Giuseppe Mazzini, who “intended for the Italian People to express itself freely, directly and completely, as a national community, on its own political regime; he called for a “national pact” established by a constituent assembly”<sup>6</sup>. The Italian national-popular cause turned into a monarchical-governmental venture<sup>7</sup>.

In such a context, it becomes possible to perceive the distance that separates “a constitution that is the act of a government” from “a constitution of a people constituting [its own] government”: that is, the “enormous difference in power and

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<sup>4</sup> G. Rebuffa, *Lo Statuto albertino*, Bologna, Il Mulino, 2003, esp. p. 7 *et seq.*

<sup>5</sup> F. Bonini, *Lezioni*, *ibid.*, p. 104 – 105.

<sup>6</sup> L. Salvatorelli, *Pensiero e azione del Risorgimento*, Torino, Einaudi, II ed., s.d. (ma 1944), p. 41.

<sup>7</sup> According to Mazzini’s point of view: L. Salvatorelli, *ibid.*, p. 186.

authority between a constitution imposed by a government upon a people and the constitution by which a people constitutes its own government”<sup>8</sup>.

Therefore, while, a few years earlier, the French people gave itself constitutions approved by popular assemblies and, some years later, the German Reich was to receive the constitution adopted by the Reichstag (in 1867 and amended in 1871), the Italian people did not participate at all in the choice of the structure that its new State was to assume.

According to the *Statuto*, “the State is ruled by a monarchic-representative government” (Article 2). “The King’s person is sacred and inviolable” (Article 4). “Executive power is vested solely in the King” (Article 5). Matters relating to foreign affairs and the command in chief of the armed forces are reserved to the monarch. He appoints senators (Article 33), summons the two Houses of Parliament, and may extend the mandate of, and dissolve, the lower House (Article 9). Of the 84 Articles composing the *Statuto*, 22 seek to ensure the King’s supreme position; only 8 are devoted to regulating (moreover, in generic terms) citizens’ rights and freedoms (which, further, do not include the freedom of association). The judiciary does not take the form of a State power, but its function is, rather, entrusted to civil servants who enjoy special guarantees (namely, the benefit of irremovability), but whose careers depend to a great extent upon the executive (the Minister of Justice). The

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<sup>8</sup> H. Arendt, *On Revolution*, London, Penguin Books, 2006, p. 136.

*Statuto* does not mention the executive. It simply states that “ministers are accountable” (Article 67), but no reference is made regarding to whom they are accountable. Finally, the *Statuto* presented a major gap: it failed to indicate which State body had policymaking powers, and did not regulate the relationship between the legislative and executive branches<sup>9</sup>.

While the *Statuto albertino* was in force, the King’s prerogative powers had great influence. The executives that succeeded each other from 1867 to 1869 were “executives of the King”. From 1880 to 1883, three governments were reconfirmed despite having tendered their resignation; in one case, the reconfirmation was accompanied by a royal decision to dissolve the lower House of Parliament. Throughout the twenty years from 1880 to 1900, the King’s will dominated the executive. In 1922, the King, rejecting alternative solutions, appointed Mussolini as President of the Council of Ministers. Likewise, it was the King who decided to remove him from authority in 1943. Despite having been progressively deprived of some of his powers during the Fascist period, the King remained a decisive actor on the political scene, if only because of his role as head of the armed forces<sup>10</sup>.

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<sup>9</sup> M. S. Giannini, *Lo statuto albertino e la costituzione italiana*, in C. A. Jemolo e M. S. Giannini (ed.s), *Lo statuto albertino*, Florence, Sansoni, 1946, p. 44.

<sup>10</sup> P. Colombo, *Storia costituzionale*, *ibid.*, p. 77 *et seq.*; F. Bonini, *Lezioni*, *ibid.*, p. 119 e 139; C. Mortati, *Dallo Statuto Albertino alla Costituzione della Repubblica*, in “Amministrazione civile”, 1961, n. 47 – 51, April – August, p. 81 e 83. Also, see P. Colombo, *La “ben calcolata inazione”*. *Corona, Parlamento e ministri della forma di governo statutaria*, in *Storia d’Italia*, Annals 17, *Il Parlamento*, edited by L. Violante, Turin, Einaudi, 2001, p. 67.

The *Statuto albertino* endured throughout three regimes – the parliamentary oligarchic rule, the liberal democratic system and the Fascist period – by virtue of the very sparseness of its precepts and its flexibility. The sovereign played a significant part in all regimes, as executives had to enjoy the confidence of both the Parliament and the King.

For the length of its duration, whenever proposals to broaden suffrage would periodically arise, the “shadow of the Constituent Assembly” would also materialize. However, the idea that the Italian people could ultimately be empowered to give itself a Constitution did not find much resonance<sup>11</sup>.

After a succession of provisional constitutions in the period between 1944 and 1947, the Constitution of the Republic entered into force in early 1948. The Constitution had been drafted, discussed and approved by an elected Constituent Assembly, and introduced a democratic constitutional system, featuring two elected assemblies having equal functions, an executive held accountable to the assemblies, a President whose term of office (lasting 7 years) exceeds that of the Parliament and who has a harmonizing and guaranteeing role (is a “*pouvoir neutre*”), an independent judicial order (with its own Council to regulate the appointment and career paths of judges), a Constitutional Court, and 20 regions with legislative and executive power.

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<sup>11</sup> B. Croce, *Storia d'Italia dal 1871 al 1915* (1928), Bari, Laterza, 1956, p. 16.

The 1948 Constitution contains, in Part I, a long enumeration of rights and freedoms granted to all persons, or to citizens alone.

While Part I led to great developments, Part II, regarding the organization of the Republic, showed signs of weariness. On one hand, Part II did not ensure sufficient stability for the executive. On the other, it concentrated an excessive degree of power in the continuum comprising the popular majority, the parliamentary majority, the government and the President of the Council of Ministers.

In the 1948 constitution, the system of checks and balances is inadequate, being limited to the independence of the judiciary, the power to review laws entrusted to the Constitutional Court and to the configuration of the President of the Republic's role as that of a neutral body. In other words, the Constituent Assembly did not treasure Madison's observation that "[i]t is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part"<sup>12</sup>.

Although the republican Constitution legally entered into force on January 1st, 1948, it did not produce concrete effects immediately. Its implementation was

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<sup>12</sup> J. Madison (1788), in A. Hamilton, J. Madison, J. Jay, *The Federalist*, No. 51, available at <http://www.constitution.org/fed/federa51.htm> (last accessed on: 28 July 2011)

protracted over almost forty years, to the extent that it was defined as a “promised revolution” and “non-revolution”<sup>13</sup>.

According to the Constituent Assembly’s plans, five years would have sufficed to put into practice the constitutional provisions and to review legislation enacted during the Fascist period that ran counter to the Constitution. However, the first Parliaments failed to consider the constitutional precepts at all. Rather, these were classified, as being provisions of immediate application, deferrable application, or merely programmatic provisions: implementation of the latter two categories could wait<sup>14</sup>. The Regions were effectively created only in 1970.

In 1974, the constitutional law scholar Leopoldo Elia observed that “in the name of the continuity of the State [...], De Gasperi committed as much an excess of “continuism” as of indulgence towards the staff employed under the Fascist period”<sup>15</sup>.

In 1981, over thirty years after the entry into force of the Constitution, the administrative law professor Massimo Severo Giannini, (who, in 1946, had played an important role in the preparatory works for the Constitution), noted that the State “is as yet a building under construction, in some parts, rather, badly done; in others even

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<sup>13</sup> F. Bonini, *Lezioni*, *ibid.*, p. 175.

<sup>14</sup> On the subject of constitutional non-implementation and on the distinction of constitutional provisions in several categories, see P. Calamandrei, *La Costituzione e le leggi per attuarla*, Bari, Laterza, 1955, re-published by Giuffrè, Milan, 2000, especially pp. 26 – 27.

<sup>15</sup> L. Elia, *De Gasperi e Dossetti*, in “Nuova Antologia”, A. 109, 1974, August, *fasc.* 2084, p. 465. See, for another perspective, M. Fiorillo, *La nascita della Repubblica italiana e i problemi giuridici della continuità*, Milano, Giuffrè, 2000.

resembling beautiful ruins, such as those of an imperial palace on the Palatine. To say that the political ideals espoused by the Constituent Assembly are still alive is tantamount to trickery, or deceit, depending on the speaker”<sup>16</sup>. The Constitution of the Republic was, therefore, “adjusted”, adapted to the incremental and parceled development of the Italian State, so that its unitary strength was dispersed.

In 1861, the Kingdom of Italy had postponed all decisions on the constitutional structure to be adopted, by relying upon the *Statuto albertino* of 1848. The Republic of 1948 adopted a constitution, but diluted its implementation over time.

Some of the Constitution’s most important precepts are yet to be implemented. Article 4, placed among the “fundamental principles”, establishes that “[t]he Republic recognizes the right of all citizens to work and promotes those conditions which will make this right effective”. Article 34 provides that “[c]apable and deserving pupils, even without financial resources, have the right to attain the highest levels of education”. According to Article 39 “[n]o obligations can be imposed on trade unions other than registration at local or central offices, according to the provisions of the law. | A condition for registration is that the statutes of the trade union confirm the democratic basis of the internal organization. | Registered trade unions are legal persons. They may, through a representative unit proportional to their members, enter into collective labor agreements having mandatory effect for all

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<sup>16</sup> See M. S. Giannini, *La lentissima fondazione dello Stato repubblicano* (1981), now in M. S. Giannini, *Scritti*, vol.VII (1977 – 1983), Rome, Giuffrè, 2005, p. 657.

persons belonging to the categories referred to in the agreement”. Article 46 establishes that “[w]ith the objective of economic improvements and the social betterment of labor and in harmony with the needs of production, the Republic recognizes the rights of workers to collaborate, in the ways and within the limits established by law, in the management of enterprises”. The right to work, the right to education, trade union democracy and co-determination were among the constituent ideals: ways to implement them were carefully studied and were “promised” by the Constitution. The same rights were put into practice in other legal systems (as the German model of co-determination), but not in Italy.

Therefore, due to delays in implementation and non-implementation, the Constitution was disfigured: constitutional reality does not correspond to the principles and structure established by the Constitution.

In the meantime, new problems have arisen: persistent “appeals to the people”, the decline of Parliament, the rejection of negotiated decisions, conflicts between politics and the judiciary, and the contraposition of the “electocracy” to the “juristocracy”.

In conclusion, Italy’s process of constitutionalization has been highly imperfect, due to the intrinsic weaknesses of the *Statuto albertino* and to the inherent shortcomings of, and external vicissitudes surrounding, the 1948 Constitution.

### 3. A void center

As previously observed, the executive was not even mentioned in the *Statuto albertino*. Reference was made to ministers, who were ministers of the King. The position of President of the Council of Ministers was recognized in 1867, in a decree which was, however, subsequently revoked. The office became established only as from 1876 and, finally, in 1901<sup>17</sup>.

In the early 20th century, “Italy had neither a representative Parliament, nor a strong executive”<sup>18</sup>, due to the frequent parliamentary crises, the weakness of the figure of the President of the Council of Ministers, and the logic of party and faction coalitions. Thus, executives were feeble and dependent upon the Parliament. This combination of negative factors brought about the practice of issuing decree-laws, which would be approved *en masse* by the Parliament. Reliance upon these peaked in the period following World War I, when, through laws enacted in 1925 and 1927, 2,368 decree-laws were approved.

In its first few years, Fascism consolidated the executive branch and regulated the position of the head of government, rendering it hierarchically superior to that of other ministers.

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<sup>17</sup> C. Mortati, *Dallo Statuto albertino*, *ibid.*, p. 84.

<sup>18</sup> S. Cassese – G. Melis, [\*Lo sviluppo dell'amministrazione italiana \(1880-1920\)\*](#), in “Rivista trimestrale di diritto pubblico”, 1990, n. 2, p. 337.

Partly in reaction to these innovations of the Fascist period, the 1948 Constitution did not introduce any mechanisms to stabilize or strengthen the executive. Each executive's average life was less than a year. They have had a longer lifespan only as from 1994, pursuant to the change of the electoral system, but only in one case did an executive last as long as the parliament (i.e., for five years).

Despite the twenty years of the Fascist regime, with executives led by Mussolini, and the relative stabilization witnessed in recent years (since 1994), throughout the 150 years of its history as a unified State, Italy had 121 governments, each lasting averagely just over one year. The French Third Republic, which is comparable in terms of governmental instability, lasted less than 80 years.

Governmental instability was balanced in several ways, in both the pre- and post-Fascist era: during both periods, by means of the continuity of politicians, who, despite changing ministries, remained in power; during the second period, by means of the exceptional continuousness of a single political party, the *Democrazia Cristiana*, which was the pillar of governments for fifty years, from the fall of Fascism until 1994 (a feature which led to Italy's inclusion among the "uncommon democracies"<sup>19</sup>).

However, this instability led to continuous policy changes. Even when politicians such as Giolitti, Orlando, De Gasperi, Moro or Fanfani moved from one

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<sup>19</sup> T. J. Pempel, *Uncommon Democracies: the One-Party Dominant Regimes*, Ithaca, Cornell University Press, 1990.

ministerial position to another, or from one executive to another, governmental activity would nevertheless be disrupted, notwithstanding the continuity of its men.

In conclusion, in Italy, the driving force of the State, the executive, was weakened by its precariousness. This made it difficult to ensure the continuity of public policies.

As a general conclusion, I shall remark that, despite the great differences between them, the two Italian constitutions of 1848 and of 1948 did not provide the country, in these 150 years, with an efficient or workable legal architecture. The 1848 “Statute” provided too soft an architecture and left too many choices open, thus allowing the establishment of several different political experiments and governments of oligarchic, the liberal-democratic and Fascist forms. The 1948 constitution, in turn, promised too much to achieve too little, thus allowing the living constitution to take a course which was quite different from that envisaged by the enacted Constitution. The “fil rouge” linking the two constitutions (disrupted by the interlude of the Fascist “ventennio”) consists of the weak, short-lived executives.