Penn State International Law Review

Volume 28
Number 3 *Penn State International Law Review*

Article 6

1-1-2010

Introduction of Judicial Review in Italy-Transition from Decentralized to Centralized Review (1948-1956)-A Successful Transplant Case Study

Louis Del Duca

Introduction of Judicial Review in Italy—Transition from Decentralized to Centralized Review (1948-1956)—A Successful Transplant Case Study*

Louis F. Del Duca**

Table of Contents

POST WORLD WAR II SEARCH FOR NEW REGIONAL AND NATIONAL INSTITUTIONS 358
PROVISIONS FOR A CONSTITUTIONAL COURT IN THE 1948 ITALIAN CONSTITUTION 358
EXPERIMENT WITH DECENTRALIZED JUDICIAL REVIEW DURING THE 1948-1956 TRANSITION PERIOD 359
Ordinary and Administrative Courts' Avoidance of Overt Constitutional Review—Deferral of the Programmatic or Peremptory Status of the Civil Rights' Provisions of the Constitution 360
CONSTITUTIONAL COURT'S REJECTION OF PROGRAMMATIC LISTING OF CIVIL RIGHTS IN THE CONSTITUTION AND ADOPTION OF THEIR PEREMPTORY STATUS 364

 I wish to express my appreciation to Patrick Del Duca, adjunct professor of law at UCLA and partner in the law firm of Zuber & Taillieu LLP in Los Angeles and Gianluca Gentili, *Dottore di Giurisprudenza*, University of Florence Law School, LL.M., the Dickinson School of Law of the Pennsylvania State University and presently a Doctoral candidate in Comparative Public Law at the University of Siena, School of Economics in Italy, for their valuable and gracious comments and assistance in the preparation of this paper.

** Edward N. Polisher Distinguished Faculty Scholar, the Dickinson School of Law of the Pennsylvania State University.

POST WORLD WAR II SEARCH FOR NEW REGIONAL AND NATIONAL INSTITUTIONS

In the aftermath of World War II, Europe searched for new regional and national institutions which would protect human rights and prevent reoccurrence of the massive tragic violations it had experienced. The Council of Europe with its innovative European Convention on Human Rights emerged at the European regional level.[1] At the national level, individual States adopted constitutions which included guarantees of human rights, and also created special Constitutional Courts from which courts facing allegations of violations of constitutional rights could obtain binding determinations of constitutional incompatibility. Italy and Germany led many European countries in adopting a "centralized" system of judicial review vesting the power to review the constitutionality of norms or actions in a single specialized court.

PROVISIONS FOR A CONSTITUTIONAL COURT IN THE 1948 ITALIAN CONSTITUTION

The 1948 Italian Constitution contains a provision for creation of a Constitutional Court with the power of *centralized judicial review*.[2] During a transitional period, the Italian 1948-1956 constitutional experience implemented a diffused decentralized judicial review system which permitted judges in the ordinary courts and administrative courts to decide constitutional questions. This experience and the associated

1. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

2. The previous system, under the flexible Constitution of the *Statuto Albertino*, did not provide for any judicial review of the constitutionality of laws.

Centralized (sometime also referred to as "concentrated") judicial review differs from decentralized (sometimes referred to as "diffused") judicial review). In a centralized judicial review system constitutional issues must be certified immediately to the Constitutional Court for resolution as soon as they arise in any court. The proceedings in the transmitting court are held in abeyance pending the decision of the Constitutional Court. In a decentralized system of judicial review, the court in which the constitutional issue arises renders its decision on the constitutional issue. Depending on the status of the court and the notion of stare decisis in the relevant legal system, the effects of decentralized determinations of constitutionality might be limited to the litigants at hand or have more general effect.

For a discussion of the differences between centralized and decentralized systems of judicial review, *see* MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 45 (1971); Louis Favoreau, *Constitutional Review in Europe*, *in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & A.J. Rosenthal eds., 1990); V.C. JACKSON & M. TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 464 (2d ed. 2006); N. DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 113 (2003).

politics of initiating the work of the Italian Constitutional Court[3] provide an interesting case study on the impact of transplants and the identification of conditions which facilitate or hinder the success of the transplant—in this instance the implementation of judicial review of the constitutionality of laws. Articles 134-137 of the Italian Constitution, as adopted in 1948, provide the basic structure, functions and features of the Constitutional Court.[4] Under Article 135, the Constitutional Court is composed of fifteen judges, five are appointed by the Parliament in joint session, five are appointed by the President of the Republic and five are appointed by the supreme ordinary and administrative courts (the Court of Cassation, the Council of State, and the Court of Accounts).[5] Article 137 of the Constitution left the details of launching the Constitutional Court to subsequent "constitutional" legislation, that is, legislation adopted by procedures to give the legislation the rank of the Constitution itself.[6] Transitional and Final Provision no. VII of the Italian Constitution specifies that: "[u]ntil such time as the Constitutional Court begins its functions, the decision on controversies indicated in article 134 shall be conducted in the forms and within the limits of the provisions already in existence before the implementation of the Constitution."[7]

EXPERIMENT WITH DECENTRALIZED JUDICIAL REVIEW DURING THE 1948-1956 TRANSITION PERIOD

Although the Constitutional Court was contemplated directly by the 1948 Italian Constitution, it became operative only eight years later, in 1956, after the adoption of the constitutional laws in 1948 and 1953

3. Disputes between private parties are handled by the so-called "ordinary" courts in Italy and in civil law countries generally. Disputes between private parties and the State are handled by the "administrative" courts in Italy and in other civil law countries that follow the inspiration of French administrative law. For a discussion of the "ordinary" courts and "administrative" courts in Italy, see Louis F. Del Duca & Patrick Del Duca, *An Italian Federalism?—The States, its Institutions and National Culture as Rule of Law Guarantor*, 54 AM. J. COMP. L. 799, 835 (2006). As indicated in the text, *supra,* Constitutional Courts with jurisdiction solely over constitutional matters developed in Europe after the Second World War, following the model of the Austrian Constitutional Court that was implemented between World Wars I and II.

4. Costituzione [COST.] arts. 134-37 (It.), *available at* http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

5. *Id.* art. 135.

6. *Id.* art. 137.

7. Disposizioni transitorie e finali della Costituzione VII [Transitional and Final Provisions of the Constitution] (It.). *See also* COST. art. 134 ("The Constitutional Court shall pass judgment on controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions.").

required for its implementation.[8] Under the above quoted provisions of the Constitution, and before establishment of the Constitutional Court, Italy briefly experimented (1948-1956) with a decentralized system of judicial review, pursuant to which ordinary courts and administrative courts could refuse to apply laws they deemed unconstitutional. During this eight-year period, every ordinary and administrative court had the opportunity to interpret the new Constitution and to decline to apply laws determined to conflict with the Constitution.

In the Italian legal system, then and now, a ruling by a higher ordinary or administrative court (as distinguished from the Constitutional Court)[9] does not constitute binding precedent. Each court decides according to its own interpretation of the law. Accordingly, during the transition period, decisions, even of a high court, that found legislation incompatible with the Constitution or other subsequent law were of equal value whether based on constitutional review per se or on the notion of statutory interpretation that the more recent law trumps the older law. The proponents of judicial review generally recognized that the fascist era judges would stumble on the notion of constitutional review for reasons including (i) a legal culture imbued with antipathy to any "*gouvernment des juges*," (ii) possible sympathy to the legislation adopted during the regime under which they had become judges, and (iii) reluctance to challenge actions of the transitional (and unelected) government that took power on the fall of the fascists.[10] In the period following the 1948 entry into force of the Constitution, discernable willingness to defer constitutional review to the Constitutional Court as and when created existed.[11]

Ordinary and Administrative Courts' Avoidance of Overt Constitutional Review—Deferral of the Programmatic or Peremptory Status of the Civil Rights' Provisions of the Constitution

Moreover, one Italian author, Bignami, suggests that the Italian ordinary courts widely ducked the issue of using the Constitution to invalidate the questionable legislation of the post-fascist government that held power in Italy prior to the implementation of elections under the

8. The laws that implemented Art. 137 Const. are Constitutional Law n. 1 of February 9, 1948, Constitutional Law n. 1 of March 11, 1953 and Law n. 87/ of March 11, 1953.

9. *See supra* notes 3, 7.

10. *See*, among the many, Cappelletti, *supra* note 2, at 63-64. *See also* P. Calamandrei, *Come si fa a disfare una costituzione*, *in* DIECI ANNI DOPO: 1945-1955 209-316 (A. Battaglia, P. Calamandrei, E. Corbino, G. de Rosa, E. Lussu, M. Sansone, L. Valiani eds., *Laterza,* 1955).

11. *See* Calamandrei, *supra* note 10, at 251 *et seq.*

1948 Constitution (and that accordingly had no democratic legitimacy) by relying on the notion of statutory interpretation that the more recent law trumps the older law.[12] This, Bignami suggests, was the technique preferred in lieu of overt constitutional review in order to start the process of revisiting objectionable aspects of the fascist era legislation.[13] Moreover, Bignami finds leaving the constitutional questions about the legislative actions of the unelected interim government to the then imminently anticipated initiation of the Constitutional Court to be a prudent strategic choice in the perspective of the political consequences associated with any challenge to the post-fascist government.[14]

Bignami also considers the willingness, insofar as it existed in the lower courts in the period 1948 to 1956, of the ordinary courts' to consider prior law, specifically decrees of the transition government, invalid on grounds of incompatibility with later law (when the later law is understood as the constitution itself) as a salutary reassertion of the judiciary's independence from the executive, particularly at a time when no parliament existed. The political battles over control of the government in fact delayed the creation of the Constitutional Court.[15] Bignami alludes to the initial support of the Christian Democrats for the Court when they feared a communist majority, and their subsequent waffling on the desirability of the Court as they realized that they themselves, rather than the communists, would control the government.[16] Bignami understands the rulings of the lower courts as asserting judicial autonomy from the political issues of the other branches of government.[17]

Constitutional review, centralized or not, was alien to the Italian legal system.[18] The post war years through 1956 are an example of laying the foundations for successful rooting of a transplant. They illustrate the political developments and process associated with a successful transplant. The institution of the Constitutional Court as an entity for the conduct of centralized review was a clever way to overcome the limitations of training and appointment of the ordinary and administrative judges. Selected on the basis of their performance in competitive examinations and functioning under the *Statuto Albertino* Constitution (which was changeable at the whim of the ruling majority

12. *See* MARCO BIGNAMI, COSTITUZIONE FLESSIBILE, COSTITUZIONE RIGIDA E CONTROLLO DI COSTITUZIONALITÀ IN ITALIA (1848-1956) (Giuffrè 1997).

13. *Id.* at 165.

14. *Id. at* 177.

15. *Id.* at 149-150.

16. *Id.*

17. *Id.* at 151.

18. The former Italian Constitution, the *Statuto Albertino*, enacted on March 4, 1848, was a flexible Constitution which had not established a system of judicial review.

party under the direction of a Prime Minister appointed by the King), some judges during this period were unreceptive to the innovative constitutional principles embedded in the new Italian Constitution.[19]

In a decision issued within six weeks of the effective date of the 1948 Constitution, the Court of Cassation declared that the bulk of the civil rights provisions of the new Constitution could not be considered self-executing or peremptory (*precettive*) but were merely programmatic (*programmatiche*) and therefore had to be implemented by the legislature, before they could be applied by a court.[20]

In *Marcianò*, the instant case, nine men, of whom four were fugitives, challenged their convictions pursuant to Decreti Leggi Luogotenenziali no. 119 of July 27, 1944 and no. 142 of April 22, 1945 for the crime of "military collaboration with the German invader" that had led to death and serious injuries.[21] The collaboration with which they were charged occurred prior to April 22, 1945, that is before the issuance of the Decreto Legge Luogotenenziale no. 142 that was an essential element of the formal definition of their actions as criminal.[22] As part of the same decision, an additional man challenged his conviction of murder pursuant to Decreto Legge Luogotenenziale no. 159 of July 27, 1944 for a 1921 murder of an antifascist man of which he had been absolved in 1922, but which absolution had been disregarded for purposes of the post-war conviction on grounds of the "moral coercion imposed by fascism" at the time of the absolution.[23] In each case, the challenge was to decrees of the unelected government that followed the collapse of the fascist state.[24] The defense of the accused was that since the alleged actions occurred prior to the passage of the military collaboration law, the prohibition against *ex post facto* laws in the Italian Constitution was a bar to being convicted of the crime.[25]

In rejecting this defense argument, the United Criminal Chambers of the Court of Cassation considered two grounds to abstain from invalidating the convictions.[26] Its first was to conclude that the criminal code prohibitions on retroactive definition of criminal conduct did not

19. Judges of the ordinary and administrative courts were and currently still are selected on the basis of their performance in competitive examinations. For a discussion of these selection processes, *see* Del Duca & Del Duca, *supra* note 3, at 831.

20. *See* Cass., sez. un. pen., 7 Feb. 1948, *Marcianò ed altri—P.M. e De Biase ricorrenti,* Giur. It. 1948, II, 129.

21. *Id.* at 131.

22. *Id.*

23. *Id.* at 132.

24. *Id.* at 131-132.

25. Cass., sez. un. pen., 7 Feb. 1948, Giur. It. 1948, II, 133. *See also* COST. art. 25, cl. 2 (providing that "[n]o punishment may be inflicted except by virtue of law in force at the time the offence was committed").

26. Cass., sez. un. pen., 7 Feb. 1948, Giur. It. 1948, II, 133-134.

apply to norms of an "exceptional and temporary" nature such as the challenged measures and in fact prohibited any decriminalization of such conduct once defined as criminal.[27] Its second was to label the new Constitutional provision prohibiting retroactive definition of criminal conduct as merely "programmatic" (*programmatica*) in nature, thereby serving only as guidance for legislative action, but not as susceptible of judicial application.[28] The Court of Cassation accordingly showed itself unwilling to be party to exculpation of collaborators with the then occupying German forces or of an adherent of the fascist party. It was likewise unwilling to be party to invalidation of the legislative decrees of the post-fascist government.

The Council of State is the supreme administrative court under the Italian system. In a decision also reached in 1948, within five months of the effective date of the 1948 Constitution, its Fifth Section had to decide whether a decree of the unelected transitional government that followed the collapse of the fascist state, violated the Constitution.[29] The decree provided that no judicial challenge could be made against an administrative decree concerning the award by a prefect of concessions to use uncultivated agricultural land.[30] The Council of State ruled the challenged article of the decree to be unconstitutional because it conflicted with the provision of Article 113 of the 1948 Constitution that an act of the government is "always" subject to judicial challenge.[31] The Council of State acknowledged the transitional provisions (discussed *supra*) of the new Constitution that gave it the power to assess the conformity of laws with the Constitution.[32] It also noted the relevant provision of the Constitution concerning the right to bring judicial challenges against governmental acts to be an example of "norms already complete and perfected in all their elements" and hence to be applied by a court without the need of any further legislative enactment.[33] So ruling, it stated that there are "undoubtedly programmatic declarations" in the Constitution, which could not as such be applied in the exercise of

27. *Id.*

28. *See id.* at 133-134 ("Il quesito se la Costituzione contenga, per sua natura, soltanto norme direttive va risolto negativamente. Giacché la Costituzione è un complesso di norme giuridiche che sono principalmente precettive, ma che possono pure essere soltanto direttive o programmatiche . . . nel senso che pongono principi di cui il legislatore deve curare l'attuazione.").

29. Cons. stato, Decision no. 303, Section V, 26 May 1948, *Prefetto di Avellino e Cooperative Agricole "La Proletario" e "La Popolare" di Aquilonia*, Giur. It. 1948, III, 81.

30. *Id.* at 83.

31. *Id.* at 87.

32. *Id.*

33. *Id.* at 84.

judicial review of the constitutionality of laws.[34] This observation did not, however, prevent the Council of State from upholding the challenge to the constitutionality of the challenged act of the transitional government.[35]

CONSTITUTIONAL COURT'S REJECTION OF PROGRAMMATIC LISTING OF CIVIL RIGHTS IN THE CONSTITUTION AND ADOPTION OF THEIR PEREMPTORY STATUS

The restrictive interpretation of the new civil rights contained in the 1948 Constitution as merely "programmatic" in nature was rejected by the newly created Italian Constitutional Court in 1956 in its very first decision. In that case, 30 cases involving criminal prosecution of alleged violations of a statute requiring individuals to obtain permits from local authorities authorizing them to distribute leaflets, use public loudspeakers, attach posters to walls in public places etc., were consolidated and referred to the Constitutional Court for ruling on whether the statute and the criminalization of its violation violated the free speech Article 21 of the Constitution. Interestingly, the requirement of a permit was contemplated in provisions of article 113 of the Testo Unico delle Leggi sulla Pubblica Sicurezza (unified text of the laws on public safety) that had been adopted in 1931,[36] while the measure providing for criminalization of the violation of the permit requirement was adopted by a legislative decree of 1947 that modified the Criminal Code. The Constitutional Court declared both the 1931 and 1947 provisions unconstitutional in light of Article 21 of the Constitution which provides:

> Everyone has the right to freely express their thoughts in speech, writing, or any other form of communication.
>
> The press may not be subjected to any authorization or censorship.

The Constitutional Court ruled that, irrespective of whether the free speech provision of the Italian Constitution is defined as programmatic (*programmatica*), the Constitution was violated. It stated: "The well-known distinction between *precettive* [peremptory] and *programmatiche*

34. Cons. stato, Decision no. 303, Section V, 26 May 1948, *Prefetto di Avellino e Cooperative Agricole "La Proletario" e "La Popolare" di Aquilonia*, Giur. It. 1948, III, 83.

35. *Id.* at 87.

36. More specifically, Art. 113 of the Testo Unico delle Leggi di Pubblica Sicurezza (TULPS), a consolidation of laws dealing with public safety issues, adopted by Royal Decree no. 773 of June 18, 1931.

[programmatic] constitutional provisions ... cannot be considered decisive when dealing with the constitutional legitimacy of a statute."[37]

So ruling, the Constitutional Court assumed the role of invalidating, with general effect, legislation from the fascist era and from the post-war government that violated provisions of the new Constitution, thereby affirming its power of judicial review.

The relationships among the lawyers and constitutional judges involved in the Constitutional Court's first decision are of interest in understanding how the Court's jurisprudence and Italian constitutional doctrine evolved in harmony to support the institution of judicial review of constitutionality in Italy. The lawyers involved in the case included Italy's leading lawyers at the time, and many of them later become members of the Constitutional Court. Many of the various lawyers and judges involved in the case also became recognized as leading authors of Italian doctrinal writings on constitutional matters.[38]

37. Corte cost., 14 June 1956, n.1, Giur. Cost. (1956), I, 1 (in Italian: "[. . .] la nota distinzione fra norme precettive e norme programmatiche [. . .] non è decisiva nei giudizi di legittimità costituzionale, potendo la illegittimità costituzionale di una legge derivare, in determinati casi, anche dalla sua non conciliabilità con norme che si dicono programmatiche, tanto più che in questa categoria sogliono essere comprese norme costituzionali di contenuto diverso: da quelle che si limitano a tracciare programmi generici di futura e incerta attuazione, perché subordinata al verificarsi di situazioni che la consentano, a norme dove il programma, se così si voglia denominarlo, ha concretezza che non può non vincolare immediatamente il legislatore, ripercuotersi sulla interpretazione della legislazione precedente e sulla perdurante efficacia di alcune parti di questa; vi sono pure norme le quali fissano principi fondamentali, che anche essi si riverberano sull'intera legislazione").

38. Among them it is worth mentioning Gaetano Azzariti, Gaspare Ambrosini, Ernesto Battaglini, Piero Calamandrei, Giovanni Cassandro, Vezio Crisafulli, Massimo Severo Giannini, Costantino Mortati, and Giuliano Vassalli.