

5. A republic of parties: the Italian constitutional order through the lenses of the constitutional regime

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1. REGIME THINKING IN CONSTITUTIONAL ANALYSIS

There can be several points of access to the question of constitution-making. One can be political history, which is focussed on the deeds of great political figures who forged the constitutional order. Another one is formalist: a textualist analysis of the drafting of the constitutional document or a reconstruction of the intentions of the drafters. The approach adopted in this chapter does not discard entirely these insights, but it focusses predominantly on a specific unit of analysis, the *constitutional regime*. A clarification has to be added immediately: the unity of the regime cannot fully overlap with the unity and the continuity of the State. The latter's political unity takes different forms through different regimes, but it still maintains a distinct identity. It is possible to understand the relation between political unity and constitutional order in many ways, but certainly the continuity of the State (or the relevant political units) does not necessarily dovetail with the continuity of the constitutional regime, as the example of the United States demonstrates convincingly.¹

The notion of constitutional regime is based on three ideas that, in the last few decades, have been prominent in Bruce Ackerman's comparative effort. It should be noted that these ideas are not alien to a certain stream of French political science and Italian constitutional scholarship.²

¹ In the Italian case, the chapter recognises the revolutionary origin of the republican constitutional order, but does not engage with the debate on the continuity of the State: in favour of the continuity of the State see Claudio Pavone, *Alle origini della Repubblica* (Bollati Boringhieri 1976); against it: Valerio Onida, *La costituzione ieri e oggi* (Il Mulino 2006)

² Cf Maurice Duverger, *Les régimes politiques* (PUF 1948). In Italy, the idea of political regime was developed first by Vincenzo Gueli, *Il regime politico* (La Scienza 1942).

First of all, it is important to highlight an insightful contribution which dates back to the first volume of *We the People*. In the first volume of the trilogy, Ackerman already made a claim for three pathways of constitution-making. Public lawyers (and especially US constitutional lawyers) were urged to stop inferring constitutional law ‘just’ from the case law of the Supreme Court and to adopt the more holistic point of view of the constitutional regime. The latter is defined by Ackerman as ‘the matrix of institutional relationships and fundamental values that are usually taken as the constitutional baseline in normal political life’.³ This is an invitation, in Ackerman’s view, to widen the perspective of the constitutional lawyer to include, at least, the *political dynamics* and cultures animating the relations between institutions of a particular regime (judiciary, executive powers, legislative chambers, but also, and crucially, collective subjects like political parties, and institutions like local government and even, by now, independent agencies or fourth branch⁴). Each regime is based on a set of principles of organisation which guide institutional relations and a set of fundamental values which *orient* the constitutional order.

Regime thinking is indebted to the American School of Political Development,⁵ which has studied closely presidential electoral cycles in the constitutional history of the US. The engine of constitutional transformation is first political (and in fact, in Ackerman’s account of revolutionary pathways, political elections are the main engine of constitutional development) but the focus extends to the formation of constitutional identity. The phases of development follow, according to the American School of Political Development, a certain logic which is organised according to the unfolding of political time, and it can be adapted to the phases of formation, consolidation, weakening and challenge of the constitutional regime.⁶

A second important intuition coming from Ackerman’s work concerns the intimate link between constitution-making and the nature of the regime. Famously, Ackerman makes of the origin of the regime the mark of its specific character. This resonates again with an Italian tradition of legal studies (legal institutionalism) according to which the organisation of a legal order carries

³ Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1991) 59.

⁴ On this branch, see Tarunabh Khaitan, ‘Guarantor Institutions’ (2021) 16 *Asian Journal of Comparative Law* 40.

⁵ The classic and founding text is Stephen Skowronek, *The Politics Presidents Make* (Harvard University Press 1993).

⁶ Bruce Ackerman, *Revolutionary Constitutions* (Harvard University Press 2019) 7, is indeed careful in drawing a clear difference between total revolution and revolution on a human scale: only the latter is compatible with the history and values of constitutionalism.

within itself its fundamental normativity.⁷ The political and social forces that organise and put into motion a new regime cannot withdraw from the constitutional order once this is created; rather, they have to consolidate themselves as the *bearers* of the new constitutional regime.

For this reason, constitution-making is carefully distinguished by Ackerman from constituent power. At one level, this is because Ackerman, inspired by Hannah Arendt, believes that the task of constitution-making is to create or change institutions. At another level, constitution-making is an activity of regime formation whose effects last longer than the original period of higher lawmaking. A constitutional moment, in particular in revolutionary (or dualist) style, might take up to 10 years as Ackerman maintains that the dynamic of consolidation of the regime is almost equally important as the beginning. The political forces that establish the new regime do not withdraw, but bear it through political time. Hence, the attention that should be deserved for the phases through which a regime develops and moulds the expectations of those who were educated in the previous constitutional regime. Ackerman himself has provided two criteria for tracking the success of a revolutionary change: at a more formal level, at least one aspect between a) rules of change, b) political practices or c) fundamental principles have to be subject to an important transformation; at a more material level, an essential sphere of social life has to be subject to a substantial makeover.

The third important insight concerns the subjects of constitution-making. Again, unlike several fellow US scholars, Ackerman does not succumb to the temptation of making the administrative powers or the judiciary the engine of constitutional development. He prefers to track the interaction between the *political subjects* that pushes for constitutional change and the institutions that are in charge of guarding the stability and the content of the regime. Both aspects are essential for the identification of the nature of constitution-making.

These three methodological tenets for analysing constitutional regimes will be applied to the rest of the chapter. Yet, a few *caveats* have to be added for a proper understanding of regime thinking. First, in the Italian context, political parties (and trade unions, who played, at times, the role of political movements) were actually the bearers of the republican constitutional order and what allowed them to ‘constitutionalise’ society was their activities during the second and third decade following the enactment of the constitutional text in 1948. Second, it is impossible to provide a full explanation of the role played by mass political parties without linking it directly with the formation and development of the activist government.⁸ This means that by the time

⁷ Costantino Mortati, *La teoria del potere costituente* (Quodlibet 2020) 13.

⁸ See Marco Dani’s chapter in this volume.

of the first so-called ‘centre-left’ government (1960), the State had become heavily involved in productive (industrial) and distributive policies. This point reminds the fact that each constitutional regime is coupled with a specific political economy. Last but not least, the international context opened up a space for conflict organised around the constitution and its programmatic norms. The looming presence of the Cold War forced parties and trade unions to use the constitution as a point of reference for strategic conflict and advancement of the social question in key spheres (schools, factories, hospitals), in a way that parallels certain aspects of Ackerman’s analysis of the Civil Rights movement’s constitutional impact.⁹ In particular, the exclusion of the major opposition party (the Communist Party) from the possibility of getting into government, forced many political and social actors to invest energies in fields not directly related to the election of governmental offices.¹⁰

A final *caveat* will be introduced in the last section. Although Ackerman might be right about the nature of the Italian republican constitution, the origin of one constitutional regime might not automatically determine the pathway of the following regime. In the Italian case, as discussed in the last section, the end of mass political parties on one hand, and the bureaucratisation of the trade unions, on the other hand, has weakened the political Italian constitutional regime and opened it up to social and economic forces that would realise profound social changes in the years following the fall of the Berlin Wall. Whether these changes would amount to a regime change or to the simple recognition that the constitution is more porous than what the original drafters thought it to be¹¹ remains a controversial question.

2. ORIGINS: THE CONSTITUENT QUESTION

Italian constitutional history originates in a process of unification of the country led by one of its Northern kingdoms which came to a partial completion in 1861 (other parts, like the city of Rome, would be added later). The constitutional experience of the unitary State, from 1861 to the end of WWI, can be seen as the outcome of that top-down process of State-building. In particular, the political unity of the Italian State is an institutional expression of this centralising initiative. Although the question of constitution-making had been posed by certain political factions in 1848, the solution adopted by

⁹ Bruce Ackerman, *We the People: The Civil Rights Revolution* (Harvard University Press 2013).

¹⁰ On the features of this peculiar arrangement see the classic Leopoldo Elia, ‘Governo (forme di)’, in *Enciclopedia del Diritto. Vol. XIX* (Giuffrè 1970) 634-675.

¹¹ This framing of the question is inspired by Sergio Bartole, *Interpretazioni e trasformazioni della costituzione repubblicana* (Il Mulino 2004).

the political elite echoes what Ackerman defines as the establishmentarian pathway. Unlike what will happen after WWII, the construction of political unity was not framed as a constituent question.¹² In this way, the Statuto Albertino – the constitutional document of the Kingdom of Sardinia, conceded by King Charles Albert in 1848¹³ – could become the (flexible) constitution of the Italian State. The formation of the new State had been interpreted, even by the back then contemporary constitutional doctrine, as the annexation of all the other kingdoms to the Kingdom of Sardinia. In terms of constitution-making, this is an important point: the political elites perceived the pathway of a constituent liberalism as a danger for political unity rather than an opportunity. This point shall be borne in mind as a crucial point of reference for understanding the revolutionary character of the 1948 constitution-making process.

The first phase of the unitary State excluded the constituent assembly from the horizon of available options for constitution-making.¹⁴ As we shall see, the rejection of a constituent liberalism shaped the focus of public lawyers around the idea of ‘governing by administration’. This was a clear consequence of the rejection of the political model of constitutionalism, whereas by political one might mean the capacity for agency of a collective subject in a disruptive way against the previous political regime, and in a constructive way for the creation of a new political regime. The doctrine developed by public lawyers (headed by the influential work of Vittorio Emanuele Orlando) denied any role to constituent power and put the emphasis on the building of a central administration¹⁵ as the pathway to legitimacy for the constitutional order. The Statuto was mostly interpreted as a flexible constitutional document because it could be easily modified by a parliamentary majority.¹⁶ It should be added

¹² Paolo Pombeni, *La questione costituente* (Il Mulino 2016) ch. 1.

¹³ It is important to note that the Statuto was an instrument introduced to avoid a constituent model of constitution-making, which was deemed to be the equivalent of a revolutionary (and often Jacobin) style. The Statuto was explicitly framed as a concession of the King (and not as an act of popular sovereignty). Nonetheless, given its flexible nature, the Statuto accommodated a certain level of parliamentarisation of Italian political life. The ideal constitutional model of Italian political elites was, roughly, the British cabinet government.

¹⁴ Pombeni remarked that even the plebiscites organised locally were not designed to form a unitary popular will: Paolo Pombeni, *La Costituente* (Il Mulino 1993) 31-34. Note the difference with the 19th century experience in Spain, where the Cadiz constituent assembly and its 1812 constitution shaped the Spanish constitutional imagination.

¹⁵ For a reconstruction, see Guido Melis, ‘L’amministrazione’, in Raffaele Romanelli (ed.), *Storia dello Stato Italiano* (Donzelli 1996) 187-204.

¹⁶ The debate on the extent of its flexibility has been quite rich. See Michael Mandel, *The Unbearable Flexibility of the Statuto Albertino* (Clueb 2006); the rigid nature of the Statuto is affirmed, though with different arguments by Alessandro Pace, *Potere costituente, rigidità costituzionale, autovincoli legislativi* (Cedam 1997).

that, at least according to the constitutional doctrine of the epoch, the Statuto's dispositions were neither judicially enforceable nor a yardstick of judicial review of legislation. Santi Romano, for example, stated in his Constitutional Law Textbook that 'it is out of question that judges (both ordinary and special courts) cannot judicially review the substantive legitimacy of statutes'.¹⁷ The same point was made in other fundamental textbooks.¹⁸ In brief, only the intermediation of parliament and the executive could make certain provisions of the Statuto legally binding.¹⁹

A turning point (and a revival of the constituent discourse) was initially represented by the Russian Revolution in 1917. The debate that was taking place in Russia around the legitimacy of a Constituent Assembly was followed with attention in Italy, in particular by the new popular forces that the introduction of the male suffrage (in 1913) had made more powerful and visible on the political scene.²⁰

At the end of WWI, two political phenomena made possible a new discussion on constituent power and constitutional change. Political parties had already become mass organisations whose role was to represent the needs of society and to mobilise social groups. It is not surprising that against the background of this increasing representativity, some of these political parties would campaign for abandoning the liberal model of the rule of law and parliamentary sovereignty in favour of a popular pathway for constitution-making. From their perspectives, it was not enough to increase government efficiency through public administration. Rather, a constituent process would have given legitimacy to the new political system.

In 1919, a compromise between the liberal model and the Constituent Assembly was struck with the idea of enacting an important institutional reform: a proportional electoral law. Following the approval of the latter, a new internal statute ('regolamento parlamentare') introducing the new organisation of parliamentary activities was enacted in July 1920.²¹ The importance of this passage cannot be overstated: the attempt at solving the legitimacy crisis of the old political regime by integrating the new political

¹⁷ Santi Romano, *Corso di diritto costituzionale* (Cedam 1933) 34.

¹⁸ See the brief but insightful analysis by Sergio Bartole, *La costituzione è di tutti* (Il Mulino 2012) 14-16.

¹⁹ Bartole noted (n. 18, 26-8) that sometimes courts would directly apply principles 'implied' by the text of the Statuto.

²⁰ This is the case, specifically, of the Socialist Party (which was not monolithically in favour of a Constituent Assembly) and the rising CGID trade union.

²¹ Orlando and his pupils expressed his opposition to the recognition of political parties as the main units of parliamentary groups: cf Massimiliano Gregorio, *Parte totale* (Giuffrè 2013) 78-106.

subjects in the parliament sanctioned the newly acquired centrality of political parties, but it also deflated the possibility of a constituent process led by the same political parties. Whether this partial failure paved the way to Fascism is beyond the scope of this chapter. But it is important to take stock of two points: 1) despite the fact that it did not culminate in a Constituent Assembly, the phase started in 1919 opened up, for the first time in Italian political history, a space for a potential constitution-making exercise by political parties; 2) the side-lining of the constituent question allowed the Fascist movement to avoid it as well and to proceed to a sweeping institutional change without resorting to a Constituent Assembly.

The lack of a constitutional solution to the legitimacy of the new political regime, coupled with the frustrated ambitions of mass political parties, paved the way for the rise of the Fascist movement. A few words on the emergence of this movement and its transformative impact are in order, as they will provide the background against which the republican constitutional moment has to be understood. The Fascist movement's affirmation soon led the movement to be organised as a political party and this transformation confirmed that the political subject bearing the constitutional order had to be the political party. Yet, the peculiarity of the Fascist experience is not exhausted by this fact. The Fascist movement presented itself as a revolutionary force which would bring about a clear break with the previous political phase, but, in the end, Mussolini and its supporters did not try to give explicit constitutional systematisation to the movement's institutional innovations. Only at the beginning of the Fascist era, before the turn to a fully-fledged authoritarian government, some political figures and academics posed the constituent question: was a constituent process necessary to codify the major changes brought about by the Fascist party?²² In 1925, Mussolini appointed a commission of 18 members (among whom Santi Romano, a moderate liberal who had an interest in the development of the Fascist experiment), but he had already delivered the famous speech of the 3rd of January where he hinted at the dictatorial qualities of the new Fascist regime. Needless to say, the conclusions of the commission, submitted very quickly, identified in the new powerful executive led by Mussolini the engine of regime-transformation.²³ The executive led by the Fascist party introduced many institutional reforms which went deeply into the organisation of society, from labour relations to education, from the electoral law and composition of parliament (which was not formally abolished) to the creation

²² See the detailed account by Alberto Aquarone, *L'organizzazione dello Stato totalitario* (Einaudi 1965) ch. 2.

²³ Pombeni (n 12) 50-1.

of a Great Council of Fascism as a legislative advisor, to mention only a few.²⁴ However, despite a few calls for the formalisation and systematisation of the new political regime, the Fascist party did not pursue any formal constitutional change, leaving the Statuto formally intact, but materially empty. Most likely, the main interest of the Fascist party was to occupy the State infrastructure and – in a quasi-totalitarian fashion – the public sphere.²⁵ A side effect of this decision (i.e.: not formalising the change of the political regime) was one of the factors behind the emergence of a generation of public lawyers interested not in the organisation of powers of the liberal State, but on the governing function and the constitution in the material sense.²⁶ Be that as it may, it is necessary to track why and how the constituent question reappeared when the Fascist regime collapsed.

3. CONSTITUENT ASSEMBLY AND THE ROLE OF POLITICAL PARTIES

Although at times it might be overstated, one cannot deny that the formative period of a constitutional regime bears with it a mark of identity that will be hard to change once the regime is successfully established. Italy does not escape this rule. And the narrative that is told about the ‘new beginning’ is crucial for shaping constitutional commitments. If every constitution has its own epic,²⁷ then the Italian constitutional order’s epic is that of the Resistance that was enacted after the surrender of the Italian State during WWII and the relative occupation by German forces.²⁸ There is a lively debate, among historians and public lawyers, as to the real contribution of the Resistance to the creation of the new constitutional order. An influential constitutional lawyer had equated the sentence ‘the constitution was born from the Resistance’ to an empty slogan.²⁹ Other commentators have separated the phase of the

²⁴ For a reconstruction see: Paolo Pombeni, *Demagogia e tirannide* (Il Mulino 1984); Salvatore Lupo, *Il fascismo. La politica in un regime totalitario* (Donzelli 2000).

²⁵ Whether the Fascist State was totalitarian is controversial and beyond the scope of this chapter. For an affirmative analysis see Aquarone (n 22); more recently, and with plenty of supporting materials, Emilio Gentile, *La via italiana al totalitarismo* (NIS 1995); famously, Hannah Arendt, *The Origins of Totalitarianism* (Harcourt 2003) ch. 8, excluded the totalitarian nature of the Fascist State.

²⁶ See, most famously, Costantino Mortati, *La costituzione in senso materiale* (Giuffrè 1998, or. ed. 1940).

²⁷ Robert Cover, ‘Nomos and Narrative’ (1983) 93 Harvard Law Review 4.

²⁸ Cf Francesco Bonini, *Storia costituzionale della Repubblica* (Carocci 2007) 41; Giacomo DelleDonne, ‘La Resistenza in Assemblea Costituente e nel testo costituzionale italiano del 1948’ (2009) 10 *Historia Constitucional* 217, 219-29.

²⁹ Livio Paladin, *Storia costituzionale* (Il Mulino 2004) 35.

Resistance from the phase of constitution-making,³⁰ noting that constitutional plans during the 1943-1945 period were confused and did not have any impact on the Constituent Assembly. Be that as it may, the point that is made in this chapter is that the legitimacy of the constituent actors derived not only from the elections to the Constituent Assembly, but from participation in the Resistance. The fight against the Nazis and Fascists (who, in the meantime, had created, under the shadow of Germany, a Social Republic in the North of Italy), although limited to the North and Centre of Italy, was organised by a composite set of political cultures and forces.³¹ A majority of the actors supporting the Resistance was indeed organised and controlled by these three major political parties. A common anti-fascist glue bound together these forces, which were otherwise looking at different constitutional and political models.³² It is the exposure of partisans' lives to the dangers of a guerrilla type of fighting that accrued symbolic capital to the political parties.³³ It does not matter the fact that without the support of the Allies the occupying forces could not be defeated. It is crucial, for the formation of the constitutional epic, that a political commitment supported by a narrative of liberation from the occupants was openly stated.³⁴

A comparison with France highlights some of the peculiar traits of the Italian experience and strengthens the crucial function of political parties.³⁵ In fact, the three major political parties at the end of the War belonged to the same political families in the two countries: Christian Democracy, socialism, and communism.³⁶ But, historically, in France the resistance against Nazism

³⁰ Enzo Cheli, *Il problema storico della Costituente* (ESI 2008).

³¹ Piergiorgio Zunino, *La repubblica e il suo passato* (Il Mulino 2003).

³² For this reason, Massimo Luciani, 'Antifascismo e nascita della costituzione' (1991) 2 *Politica del diritto* 183, states that anti-fascism was the basis for an agreement between political forces, but that by the end of the war it would be necessary to find a substantial agreement and for this the common anti-fascist approach would not be enough.

³³ I build this point following Paul Kahn's work on the relation between political sacrifice and revolution: see Paul Kahn, *Putting Liberalism in Its Place* (Princeton University Press 2004) ch. 4.

³⁴ One could even concede that this is a constitutional myth, provided that the myth is not entirely fabricated for instrumental reasons. For the distinction between genuine and toxic legal myths see Santi Romano, *Frammenti di dizionario giuridico* (Quodlibet 2019); for an analysis of the Italian constitution which considers mythmaking see Daniele Piccione, *Effettività costituzionale e coscienza collettiva* (Mucchi 2021) 85-93.

³⁵ See the insightful analysis provided by Sandro Guerrieri, *Costituzioni allo specchio* (Il Mulino 2021).

³⁶ Two other parties should be added: for its active role also in intellectual activities, the Action Party (*Partito d'azione*) and, for historical reasons, the Liberal Party. With the demo-labour party, they made up the 'hexarchy' of the resistance.

and Fascism had been organised predominantly by General De Gaulle from his exile in London. The fact that he was from the military branch gave rise to a specific imaginary around the events: what was happening in France with the republic of Vichy was not perceived as a civil war, but a conflict between an illegitimate occupant (supported by national traitors) and *national* resistance organised from abroad. As they embodied a national institution like the army, De Gaulle and his team could claim to represent the nation. Moreover, the Republic of Vichy had been quickly removed from the collective memory of France because it was incompatible with its institutional history.³⁷ Of course, the political parties would negotiate with De Gaulle from the beginning, ‘quarrelling among themselves on the best constitutional design for their “new beginning”’.³⁸ The retreat of De Gaulle from politics in 1946 actually made him even more a representative of the nation rather than a partisan politician because it avoided his political figure becoming associated with the ordinary politics of political bargaining. His personal charisma was preserved and this will play an important role later in 1958.

The Italian context was different because Italy went into the war with a Fascist government allied with Germany; as soon as the Allies had freed half of the country (starting from Sicily), Italy experienced a harsh civil war, for one year and a half, between the Republic of Salò (headed by Mussolini) and the government based in Salerno, with political and civil resistance upscaling the conflict in the North of the country.³⁹ In the French case, the narrative of two competing governments claiming final authority was not available. In the Italian case, the foundational myth that supported Italian constitution-making marginalised the role of the monarchy and of the generals⁴⁰ and put the emphasis on the coalition of different political parties united by the shared rejection of Fascism and the mutual commitment to create a new constitutional order with the primary objective of avoiding a Fascist comeback. The government based in Salerno and supported by the Allies was named ‘government of

³⁷ An interesting twist on this constitutional narrative is put forward by Le Pillouer, in his chapter on France in this volume: he suggests reading the new beginning of the fourth Republic not against the Vichy regime, but against the failures of the Third Republic.

³⁸ Ackerman (n 6) 136.

³⁹ To the picture of the armed Resistance, it should be added a series of mass strikes that happened in some of the major industries of the North: cf Edmondo Montali (ed), *1944. L'anno della svolta* (Futura 2015).

⁴⁰ General Badoglio, a major figure in the events following Mussolini's fall and president of the council after July 25, 1943, had been Chief of the General Staff for 15 years. In that role, he had been involved not only in the war, but also in the most hideous colonial adventures of the Italian army, such as the ones in Eritrea and Ethiopia; cf Emanuele Ertola, *In terra d'Africa* (Laterza 2017).

national unity', with a formula that, albeit at times with different purposes, would remain a constant in the history of the Italian republic.⁴¹ It is important to insist on this crucial difference with the French case. Although Italy had many political activists who could claim a coherent personal history of opposition to Fascism and personal meaningful sacrifices, there was no equivalent to what De Gaulle represented for France. Not even De Gasperi, with all his political capital and his connection with the Vatican, could embody only by himself the cross-party dimension of the resistance.

4. THE BEARERS OF THE CONSTITUTION: MASS POLITICAL PARTIES

One of the most interesting aspects of the Italian case is the impact of the Fascist experience in consolidating the new role of the political party and in providing a new generation of political scientists and constitutional lawyers with an awareness of the ordering properties of the party. The advent of Fascism had created a new constitutional regime and the bearer of that constitutional order was the Fascist party. The tragic failure of the Fascist regime sparked a return to a regime of political pluralism, but it did not affect the role of the political party as the main platform for political organisation. The collapse of the Fascist institutions after decades of authoritarian government coupled with the legitimacy of the other political parties which were, during the Fascist regime, ostracised or simply expelled from the political system, maintained the party at the centre stage of the political scene. The political parties' prominent role in the organisation of the resistance in the North and Centre of Italy consolidated their function as the main constitution-making force.⁴² Togliatti's famous turn in Salerno (27 March 1944) and the support of the Communists to the Badoglio's government in 1944, represented the first crucial change in that context. The second step was the enactment of the so-called 'temporary constitution' with the Decree of 25th of June 1944. Calamandrei⁴³ would identify in this formal act 'the birth of the Italian democratic order'. Article 1 of the temporary constitution formulated a strong commitment to let the Italian people decide on fundamental constitutional questions and for this reason a Constituent Assembly had to be elected.

⁴¹ See the experiences of the national unity government between 1976 and 1978, and the 'experts' executives' of Ciampi (1993-1994), Monti (2011-2013) and Draghi (2021-2022).

⁴² Vezio Crisafulli, 'I partiti nella costituzione' (1969) 1 Jus 111, spoke of political parties as the fathers of the constitution.

⁴³ Piero Calamandrei, *Scritti e discorsi politici. Vol. II* (La Nuova Italia 1966) 420.

Equally important was the fact that, at the end of 1944, a new government was installed and declared transitional until the liberation of the Northern part of the country. The coalition of the six parties forming the CLN (Committee of National Liberation)⁴⁴ signed then a document with the executive delegating to the CLN the representation of the government in the occupied part of the country.⁴⁵ This document marked the recognition of the public role of political parties and of their status as governing forces as well. It is difficult to overestimate the importance of this passage: the political parties of the resistance were recognised by the surviving institutions as the legitimate representative of the government and they were given formal governing powers. The events that unfolded after this decision paved the way for the recognition that political parties had already become constituent subjects as well (and a hint of self-awareness of their role was already visible in the congress of the CLN in Bari, in January 1944, where the constituent question was put on the table). Finally, in April 1945, two legislative decrees (146 and 168) set up a national 'Consulta nazionale' who had the task of acting as a temporary kind of parliament. The government had the duty to consult this organ for the drafting of many of its acts. Out of 304 members, 156 were directly appointed by the six parties of the CLN.⁴⁶ At this point in time, political parties had occupied the parallel channels of constitutional and ordinary politics. By exercising their authority on both levels, they asserted to be the main bearers of the new constitutional order.

This brings us to a consideration of the type of charisma deployed during the constituent phase. Ackerman puts a lot of emphasis on the charismatic leadership of De Gasperi because of his sacrifices and his fights during the Fascist regime. In light of the previous remarks, it is safer to say that what we see in the Italian case is indeed constitution-making centred around organisational charisma.⁴⁷ This is not to say that De Gasperi did not play a key role during the foundation of the republic. Indeed, as it has been noted by one of the major experts of Italian Christian Democracy,⁴⁸ one of De Gasperi's main aims was to consolidate the republic. This meant, for him, to lead two distinct but related processes: bringing the conservatives, who were prone to support the monarchy, to embrace the republic and its democratic ethos; to manage the always loaded relation between the Italian State and the Catholic Church by making sure that the Republic would not endorse a form of State-religion and,

⁴⁴ These parties were (roughly) those who left the Chamber of Deputies in 1924 after the assassination of the Socialist leader, Giacomo Matteotti.

⁴⁵ Pombeni (n 12) 187.

⁴⁶ For an overview of these events see Cheli (n 30) ch. 1.

⁴⁷ Ackerman (n 6) 35.

⁴⁸ Pombeni (n 12) 184.

at the same time, providing a channel of representation for infusing Catholic values into Italian politics. It should be said that De Gasperi's political culture was influenced by the British model of constitutionalism: parliamentary sovereignty and the rule of law. But it should also be noted that part of his strategy concerned the future role of Christian Democracy in governing Italy during the reconstruction of the country.

De Gasperi had already headed the government of national unity from December 1945 and it would maintain the same role after June 1946, when a referendum⁴⁹ and an election established the republican form of the Italian State and selected the representatives for the Constituent Assembly.⁵⁰ His role in the Constituent Assembly was marginal, as he was more concerned with governmental activity (cf Cartabia 2021).⁵¹ But other major political leaders played an equally foundational role before and during the Constituent Assembly. Giuseppe Dossetti and his group (Moro, Fanfani, Luzzati, Mortati), known as the 'professorini' (a mock expression standing for 'young professors'), were among the most active outside and inside the Constituent Assembly.⁵² Other leaders and major intellectual figures played a central role in framing the founding principles of the republican constitution: from the communist Togliatti to the socialist Basso, not to mention the charismatic figure of a leading and progressive lawyer like Piero Calamandrei. Note that Italian republican constitution-making unfolded in virtue of the convergence of the parties of the resistance around the common anti-fascist motive. The outcome has usually been dubbed a 'constitutional compromise', but its ground was more solid than what it is implied by the idea of compromise. Certain constitutional commitments were memorialised not only in the constitutional text, but became immanent to the culture of the main political parties.⁵³ The Christian-Democrat group led by Giuseppe Dossetti thematised these convergences not as compromises, but as formulations (coming from different philosophical stances: socialist, communist, Christian, liberal) of shared

⁴⁹ Of course, these events were initiated by the political parties' decision that going back to the Statuto was not an option.

⁵⁰ Ackerman rightly notes that another important difference with France concerns the outcome of the elections for the Constituent Assembly: The Christian Democrats came out as the first political force in Italy, while in France it was the Socialist Party. Italian Christian Democrats would remain the major political party for more than 40 years.

⁵¹ An exception is his interest in the regulation of State-Church relations. See Marta Cartabia, 'Ricostruzione e Costituzione nel pensiero e nell'azione di Alcide de Gasperi' (2021) 1 *Quaderni costituzionali* 69.

⁵² For an accurate reconstruction, see Paolo Pombeni, *Il gruppo dossettiano e la Fondazione della democrazia italiana* (Il Mulino 1978).

⁵³ Enzo Cheli, *Nata per unire* (Il Mulino 2012) ch. 1.

values, whose recognition had been (so to say) forced upon parties by the then recent historical events.⁵⁴

5. CONSOLIDATING THE CONSTITUTIONAL ORDER: PARTIES BEFORE INSTITUTIONS

Ackerman is right in looking at the delayed creation of the Constitutional Court as a moment of consolidation of the constitutional regime. After all, the new Constitutional Court could have remained an institution on paper (like other parts of the constitution) and the unity of the Italian legal order could have been managed by the Court of Cassation for civil and criminal issues, and by the Council of State for administrative controversies. The creation of the Constitutional Court had been made possible by the intricacies and the complexities of the political system. Ackerman tracks the turning point in the crisis following from the second parliamentary election in 1953 and the relatively disappointing performance of the Christian Democrats. The dynamics of this political crisis, engendered by the failure of the so-called scam-law ('Legge Scelba')⁵⁵ showed the emergence of one of the constant features of Italian republican political life: the struggle for creating and maintaining a stable executive. The scam-law was ushered in by De Gasperi as a means to consolidate Christian Democracy as the centre of Italian political life for years to come. The reaction of the political opposition and the disappointing outcome of the 1953 general elections defeated this first attempt at institutional reform. It is in the vacuum left by the lack of an alternative political solution to De Gasperi's succession that the statute for the organisation of the Constitutional Court would be approved. It was not the unitary spirit of constitutional patriotism which brought about the creation of the court, but a politics animated by rational actors who wanted to introduce a potential insurance against future losses. Nonetheless, from its first decision the Constitutional Court started forging a new legal conception of the constitution and of constitutional rights as principle,⁵⁶ aided by its relationship with increasingly more activist lower courts.⁵⁷

⁵⁴ Pombeni (n 52) 180.

⁵⁵ This was a proposal for a change of electoral law from a proportional to a more majoritarian system. Allegedly, this new electoral law would have favoured the Christian Democrats.

⁵⁶ Augusto Barbera, *Costituzione Italiana* (Giuffrè 2016) 159ff.

⁵⁷ The ordinary channel for presenting a question of constitutionality involves lower courts. The dialogue between the Constitutional Court and ordinary judges has strengthened the legal force of constitutional principles: Bartole (n 11) 420; Enzo Cheli, *Il giudice delle leggi* (Il Mulino 1996) 35-37.

At this juncture, it is crucial to add to the picture two other important events. First, the economy of the country was undergoing a process of quick industrialisation and expansion which triggered the so-called ‘economic miracle’: a prolonged period of intensive economic growth with an apex between 1959 and 1962. A crucial feature of this period was the rise of State-based industries and of nationalisation of previously privately-owned enterprises. Some of the most important economic sectors (oil, telecommunication, electricity) were nationalised and they became a central staple of the Italian republic’s political economy. The second event is the election of President Gronchi in 1955 whose political culture was closer to the centre-left Christian Democrats. His election was not only instrumental in the creation of the Constitutional Court, but the beginning of what would become, within a few years, a new political phase of the Italian republic during which political parties pushed for the implementation of certain programmatic parts of the constitution. The end of the alliance between social democrats and communists after the events in Hungary in 1956, opened the path for the first centre-left executive of the republic as the socialist parties decided to form a coalition with the Christian Democrats. This period marked also the beginning of social movements’ activism, especially students, workers and feminists. The social conflicts brought into the political stage by these new actors was functional to the setting into motion of many constitutional principles. Legislation, rather than constitutional amendment, case law or executive decree, was the main legal channel for major institutional reforms.⁵⁸ The pivotal moment is the approval of the Workers’ Statute (*Statuto dei lavoratori*) in 1970, a statute which was approved consciously as a realisation of the constitution’s programmatic norms, but other important legislative measures were also approved.⁵⁹ It is worth remembering the institution of the regions, the reform of the school system, and the creation, later in 1978, of the National Healthcare system (all these reforms were understood as enactment of specific constitutional norms). But if the 1970s represented a decade of expansion of constitutional principles, the first signals of constitutional fatigue already emerged at the end of that decade and would become more evident in the following one.

⁵⁸ Diletta Tega, ‘Constitution of the Italian Republic: Not Revolution, but Principled Liberation’ (2019) 17 *ICON* 690.

⁵⁹ For an analysis of some successful claims by the feminist movement of Maud Bracke, *Women and the Reinvention of the Political: Feminism in Italy, 1968-1983* (Routledge 2014).

6. THE END OF THE FIRST REPUBLIC: ANOTHER CONSTITUTIONAL REGIME?

The end of the expansive phase of the constitution also marked the end of a cycle driven, with intermittent intensity, by the founding political parties and based on a mixed economy (with publicly and privately owned means of production) and an activist State. As already said, signs of fatigue were already visible by the end of the 1970s and not only because of the terrorist challenge brought by extreme left- and right-wing groups. It is not surprising that the first projects for a constitutional reform were presented at the beginning of the following decade (1980s) from different sides of the political spectrum. These projects will become a regular exercise of constitutional engineering and will lead to two proposals for the systematic re-organisation of powers in 2006 and then 2016, both rejected by constitutional referendums.⁶⁰ It is possible to read these failed attempts as ‘updates’ of the republican constitution which pay homage to its basic structure, showing a political system still committed to the constitution’s fundamental principles. Given their failures, one might therefore conclude that, although there have been several small changes to the formal constitution, the constitutional regime did not undergo a substantial transformation and it remained the same.

The hypothesis that is presented in this final section is that the notion of regime, as previously introduced, can provide a helpful frame in tracking the development of the Italian constitutional order. The mutation amounted not to a complete transformation, but a change in the political regime and in the international context. One could say that the dignified constitution remained intact, but crucial parts of the efficient constitution changed.⁶¹

Compared to the sweeping transformation brought about by the Fascist regime a major difference is immediately detectable: most institutions created by the republican constitution (the Constitutional Court, the council for the judiciary’s self-government, the regions) are still in place and accepted by all major political actors. Even some of the foundational commitments are still supported as key constitutional features of Italian political life. Yet, it is also quite evident that many aspects of the republican constitutional orders have drastically changed.⁶² Think, first, of the historical and geopolitical context.

⁶⁰ But it should be added that other three parliamentary committees (the first one in 1983-1985, the second in 1992-1994, and the third in 1997) had produced organic proposals for constitutional reform in previous years.

⁶¹ The distinction between dignified and efficient constitution is taken from Walter Bagehot, *The English Constitution* (Oxford University Press 2001, or. ed. 1866) 10-11.

⁶² As noted in Alessandro Mangia, ‘Moti della costituzione o mutamento costituzionale?’ (2020) 4 *Diritto costituzionale* 75, 98-99, although the principles and the practices of the constitution remained formally the same, their understanding mutated.

The fall of the Berlin Wall, the end of the Cold War and the ratification of the Maastricht Treaty changed Italy's international position rather sensibly.

Second, the bearers of the constitutional order mutated dramatically. And this is not only because almost all founding parties collapsed or morphed into other parties: Christian Democrats, republican, liberal and socialist parties were swept away between 1992 and 1993 by virtue of a massive investigative operation called Clean Hands (Mani Pulite), while the Communist party lost traction because of the end of the Soviet Union and it morphed into a progressive political party. In fact, it is also the case that other substantial transformations impacted on the political system. A new electoral law approved in 1993 changed the electoral system from proportional to majoritarian with the aim of stabilising executives and to contain the proliferation of political parties. Pushed by the emphasis on governability, by the beginning of the 1990s the form and the organisation of the political party had noticeably changed. Not only had parties tended to become cartel-parties but they had centralised their organisation, weakening the connection with territories and concentrating the power in smaller groups.⁶³ This profound transformation has affected the representative capacity of political parties and have made their elite more 'co-optable' by other centres of power.⁶⁴

A third crucial (and possibly the most important) aspect of regime change should be identified in the mutation of the political economy. Processes of financialisation have deeply shaped the organisation of economic production and distribution of wealth⁶⁵ on such a scale that it would unavoidably impact the political system. In order to understand the dimension that was affected by this upheaval it is helpful to borrow the notion of the economic constitution.⁶⁶ This notion concerns the organisation of fundamental aspects of the economic organisation and of the institutions that are tasked with steering and regulating economic interaction. Even when institutions and principles of economic activity are not codified in the written constitution, their strategic role makes them subjects of constitutional relevance. From the perspective of institutional change, the signalling phase started with an event which went almost unnoticed by public lawyers: the separation between the Treasury and the Italian Central Bank in 1982.⁶⁷ Formally speaking, the separation was achieved by an

⁶³ Cf Piero Ignazi, *Forza senza legittimità* (Laterza 2013) ch. III.

⁶⁴ For an incisive analysis see Salvatore D'Albergo, *L'organizzazione del potere nei rapporti tra diritto e Stato* (Cedam 1997).

⁶⁵ The literature on these phenomena is vast and cannot be referenced here. For the Italian case see Luciano Gallino, *Finanzcapitalismo* (Einaudi 2011).

⁶⁶ For a few essential titles see Giovanni Bognetti, *Costituzione economica italiana* (Giuffrè 1995); Sabino Cassese (ed), *La nuova costituzione economica* (Laterza 2021).

⁶⁷ Mangia (n 62) 94-95.

exchange of letters between the Minister and the Central Bank and this might perhaps explain why the event did not catch the attention of constitutional lawyers. But the independence of the Central Bank was functional to a move toward a different modality of State financing and a major exposure of the Treasury to market pressure and imperatives.

The second major institutional change was again adopted outside the formal text of the constitution and it came mostly from Italy's EU membership. Key staples of the legalisation of the new political economy were, first, the adoption of the new EC discipline of freedom of capital,⁶⁸ then the ratification of the Maastricht Treaty with the launch of the monetary union and the associated pact of stability and growth, followed by a series of privatisation or liberalisation of public services and industries which *de facto* entrenched an austerity-inclined economic constitution. The entrenchment was guaranteed not by formal constitutionalisation, but by two factual aspects: the difficulty of disentangling from European integration because of its spread throughout vital parts of the Italian economy and the wide consensus among political parties about the necessity of reforming the political economy of the country toward a neo-liberal direction.

It is time to take stock on this most recent development of the Italian constitutional order and to point to a grounding aspect of its transformation. There is something peculiar to Italy about the collapse of the political system between 1992 and 1993, but under other aspects, Italy is no exception: between the 1980s and the beginning of the 1990s, many constitutional orders underwent profound material changes because of the overhaul of international relations, the rise of a different type of political economy with the move from a mainly industrial base to one deeply intertwined with finance, the structural changes affecting political parties' organisation. Yet, if there has been a change, it has not been revolutionary in the participatory and self-conscious sense advocated by Ackerman. Rather, the change has been driven by forces (economic, financial, and only indirectly political) which have profited from the failure of the political system. Although the new constitutional regime is not the outcome of a rupture, the change has affected some of the fundamental political aims and the bearers of the constitutional order. Resorting once again to Ackerman's work, these changes have partially transformed how fundamental principles and rules contained in the first part of the constitution are interpreted and put in a hierarchical relation. Although there is no unanimity on the scale of the

⁶⁸ As reconstructed by Agustin Menéndez, 'The Terrible European Constitution', in Marco Goldoni & Michael Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023) ch. 25.

transformation,⁶⁹ there is enough evidence of a regime change, though one realised through a non-revolutionary (perhaps elitist) pathway.

7. CONCLUSION

During the ‘short century’, Italian constitutional history has been animated mainly by political parties. They have organised the entrance of the masses on the political stage and they have been the mediating actors in the relation between society and the political system.⁷⁰ These functions have been performed both in authoritarian fashion (during the Fascist age) and democratically (during the republican era). The chapter intended to show why and how political parties were essential for the legitimacy of constitution-making in three different ways: first with an authoritarian role, then one of democratic participation, and finally one of governance. The constituent phase of the Italian republic was the zenith of parties’ democratic legitimacy. Their role is still central in contemporary political life, but political parties’ capacity for mobilising citizens has been severely undercut, as well as their autonomy vis-à-vis other social sub-systems. For this reason, when they tried to have a formal constitutional transformation ratified by a constitutional referendum in 2006 and 2016, they failed. And for the same reason, systemic pressures on constitutional orders have pushed them (wittingly or not is a different question) to lend their electoral weight in support of the transformation of fundamental parts of the constitutional order without an explicit constitution-making process. Yet, as the change was not totalising, the new constitutional regime has not superseded the previous one, but it has produced an intergenerational synthesis with the previous regime.⁷¹

⁶⁹ Several commentators affirm the continuity of the fundamental principles of the constitution and, even when they refer to a ‘wounded constitution’, they speak mostly of a change of interpretation, not of substantial transformation: see Bartole (n 18) ch. 3; Alessandro Pizzorusso, *La costituzione ferita* (Laterza 1999).

⁷⁰ For reasons of space, it has not been possible to address the role of trade unions, which for a long time have been a lively component of the republican constitutional order: cf Gino Giugni, *Introduzione allo studio dell'autonomia collettiva* (Giuffrè 1960).

⁷¹ See, for this notion, Bruce Ackerman, *We the People: Foundations* (n 3) ch. 6.