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THE POLITICAL ROLE OF THE ITALIAN CONSTITUTIONAL COURT

Giovanni Bognetti

I. Introduction

A Court endowed with the power to pass on the constitutionality of statutes can exert a great influence on the political life of a country. On the one hand, it can interfere with the decisions of the state organs competent to translate into law the emerging wishes of society and thereby prevent, at least to a certain degree and for some time, the realization of new adjustments between social groups. On the other hand, it can originate new and beneficial developments in the legal system by striking down old statutes. It can overturn, at least to a certain extent, established relations between groups that have grown old and stale. It can help groups that were held out of the political process to be admitted to it. It can indirectly stimulate the Legislature and the Executive to take action to meet new social needs not yet sufficiently heeded. In short, for good or for bad, such a Court can contribute decisively, if it wishes so and the circumstances concur, to the shaping of the political line prevailing in a society in a given historical period. One need only think of the United States Supreme Court under Chief Justice Warren to realize the positive potential of judicial review in the political history of a country.

The Constitutional Court is a relatively new institution in the Italian scheme of government. It was activated in 1956 and has now been working for almost seventeen years. Its powers of review are in many respects comparable to those of the United States Supreme Court. Yet, its records do not show a will to participate actively in the political process that even remotely resembles the bold attitude and the firm determination of the Warren Court. Nothing like the rejuvenation of the legal system brought about by judicial decree in America during the last twenty years has taken place in Italy by the impulse of the Constitutional Court. Yet one may argue that in its own way and with regard to its own special problems, the Italian system was as badly in need of a change as the American system was before 1954, although for different reasons.

The attitude of the Italian Court can be described as one purporting to carry through the liberalization of the legal system and to promote the typical goals of a contemporary social democracy but within the narrow limits set by a very cautious view of the Court's own powers. In its seventeen-year history the Court has been able to discard not only statutory norms that had been enacted by the fascist regime but also norms of the old prefascist period that were patterned after ideas of justice no longer in accord with modern conceptions of individual rights. It has also been able to enforce rights to social equality that have found recognition side by side with the individual rights to liberty in general and specific provisions of the 1948 Constitution. The Court has in no instance dared to tackle a major social or political problem by trying to impose its own original solution vis-à-vis a strong coalition of opposing interests or a reluctant public

opinion. In particular it has never antagonized the political forces dominant at any one time. Its relationships with the legislature and the executive have always been substantially free of any serious tension. The Court has exercised only a discreet presence in Italian political life.¹

II. Development of Italian Case Law

In order to more specifically illustrate this general judgment on the performance of the Italian Court as a political agency in recent Italian history, it is necessary first to review the peculiar attitude the Court assumed with regard to some of the most important and delicate questions that were brought to its attention during the years of its activity. I have grouped the selected questions under nine headings, knowing that both the selection and the grouping are of necessity based on subjective preferences. The selection does not purport to include all, or even a representative sample, of politically significant issues which have come to the Court. The grouping of the questions is in terms of their political importance and not in terms of any systematic jurisprudential classification.

A. Freedom of Speech

After the collapse of the fascist regime, freedom of expression was substantially restored in Italy. Article 21 of the Constitution consecrates it as a fundamental principle of law. By invoking article 21, the Constitutional Court has declared illegal all sorts of censorship or prior restraint on the press (censorship for limited purposes is still considered constitutional as applied to moving pictures, theater shows, etc.).² Decisions concerning the limits of subsequent punishment have been more cautious. The Court has not yet defined the area of what can be constitutionally punished, for instance, as "obscene";³ but it has already taken a position with regard to the protection the Constitution grants to speech tending to bring about breach of the peace, disobedience of the laws, and disaffection toward the public authorities.

Provisions against these varieties of speech were already numerous in the

1 No thorough study on the role played by the Constitutional Court in Italian politics is yet available. A book by Nicola Tranfaglia, *STORIA POLITICA DELLA CORTE COSTITUZIONALE* is forthcoming (to be published by Laterza). Tranfaglia has anticipated in part the results of his work in a chapter of his recent book *DALLO STATO LIBERALE ALLO STATO FASCISTA*, at 185. Valuable political comments on the Court's work appear since 1970 in the free-lance review *POLITICA DEL DIRITTO*.

In English, see D. Kammers, *Judicial Power and Constitutional Democracy in Italy and West Germany*, 1971 *DEMOCRACY IN CRISIS* 33.

This article obviously does not purport to afford an adequate overall view of the subject, but aims simply at presenting some scattered piece evidence for the general thesis enunciated in the text. The paper does not share the point of view of those who believe the Court could be (and has been at times) an agency acting outside of, and even against, the fundamental tendencies of the political majorities in power. It sides rather with the descriptive evaluation of the Court's role contained in such writings as Pizzorusso, *Meriti e limiti del processo costituzionale*, 1972 *POLITICA DEL DIRITTO* 423 (not sharing, however, Pizzorusso's criticism of the role the Court has chosen to play).

2 Giur. Cost. No. 1 (1956); Giur. Cost. No. 121 (1957).

3 But see Giur. Cost. No. 9 (1965), *Rev'd*, Giur. Cost. No. 49 (1971); Giur. Cost. No. 120 (1968); Giur. Cost. No. 191 (1970).

criminal statutes of the prefascist period. Fascism simply added to their number and to their strictness.⁴ The Court has struck down as unconstitutional only the most oppressive of them (such as the statute prohibiting propaganda against the "national sentiment").⁵ It has upheld penal rules punishing verbal abuse of public authorities,⁶ the advocacy of violent subversion of the government,⁷ and incitement to illegal action in general.⁸ Provisions against the advocacy of violent and illegal action have served in the past to curb communist propaganda and are still used occasionally to suppress speech by small radical left-wing groups. The constitutional standard of punishment accepted by the Court is closer to the "bad tendency" test of *Gitlow v. New York*⁹ than to the "clear and present danger" test of *Brandenburg v. Ohio*.¹⁰ The Court has likewise validated a statute enacted in 1952 forbidding the reorganization of the Fascist Party and fascist propaganda on the basis of a similar standard.¹¹

Significant in connection with the subject of freedom of speech is a 1960 decision where the Court declared constitutional a statute establishing exclusive state ownership and management of radio and television stations.¹² The decision has left Italy with a less liberal law of modern communication media than the one in force today in the United States or Canada.

B. *Freedom from Unjustified Arrest and Detention and Freedom to Move and Travel*

The most important decisions of the Court in this field are those concerning the constitutionality of restrictions on the personal freedom of people who, without having been convicted of any crime, are nevertheless deemed dangerous to public safety and order on the basis of mere suspicion.

Prefascist Italy used to subject such persons as idle vagrants, beggars, and people notoriously living on incomes derived from prostitution or smuggling or other illegal trades to special police surveillance. In serious cases they could be compelled to establish their residence in some distant and isolated town and not move from there.¹³ Fascism applied those measures also to political enemies of the regime, confining them into small islands off the Italian coast.¹⁴ Postfascist Italy has not entirely given up this practice of controlling and confining suspected persons as a means of preventing crime. Under a 1956 statute the power of the state to impose police surveillance and compulsory residence on persons dangerous to public safety and public order has been reaffirmed (except that the measures

4 See G. Boggetti, *Apologia di delitto*, 1971 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 18.

5 Giur. Cost. No. 87 (1966).

6 Giur. Cost. No. 109 (1968).

7 Giur. Cost. No. 87 (1966).

8 Giur. Cost. No. 65 (1970).

9 268 U.S. 652 (1925).

10 395 U.S. 444 (1969).

11 Legge June 20, 1952, n. 645. Giur. Cost. No. 1 (1957); Giur. Cost. No. 74 (1958).

12 Decreto legge August 23, 1949, n. 68. Giur. Cost. No. 59 (1960).

13 Public Security Law R. decreto June 30, 1889, n. 6144, Title 3 and in particular art. 117-132.

14 Public Security Law R. decreto June 18, 1931, n. 773, Title 6 and in particular art. 164-176 and 180-189.

can no longer be applied to mere political dissenters).¹⁵ A more recent statute has expressly extended the applicability of these measures to people suspected of being members of the *mafia*.¹⁶ The small islands that once hosted courageous antifascists as involuntary guests now have become the obligatory domicile of many an infamous *mafioso*. The Court has not had the courage to condemn as unconstitutional the statutes providing for restrictions on personal freedom grounded, not on ascertained facts, but on sheer suspicions. It has only requested that the restrictions be imposed not by police authorities, as they used to be, but by a judge (supposedly a more independent state organ, likely to apply more adequately the "audiatur et altera pars" rule).¹⁷

C. *The Rights of the Accused in Criminal Proceedings*

Criminal procedure in Italy was badly in need of reform. The law showed too little respect for the right of the accused to defend himself and be assisted by a lawyer in all phases of a criminal proceeding. In this field the Court has displayed more initiative in the exercise of its powers and has gone farther in reshaping the law than in any other it has examined. The Court has decided that the assistance of legal counsel is indispensable even in the preliminary phase of a criminal proceeding when the suspect has not yet been formally indicted by a judicial authority and the police are gathering evidence against him.¹⁸ In particular, a lawyer must be available if the suspect is questioned by the police.¹⁹ The Court has also decided that the assistance of counsel is always indispensable after impeachment. The rule holds with regard to summary as well as to normal proceedings.²⁰

It is highly doubtful that the Legislature would have reformed the law had not the Court chosen to intervene, but once the Court started moving, the Legislature did not try to resist. On the contrary, it proceeded to enact new legislation implementing the constitutional principles affirmed by the Court. After the promulgation in 1969 of statute 932 and of a series of decree-laws in 1970 and 1971,²¹ Italian criminal procedure has assumed a more modern outlook. It cannot perhaps compare in all respects with American procedure as reformed in the 1960's by the liberalizing interventions of the Supreme Court. Yet, it now offers an indispensable minimum of guarantees to the accused.²² Some believe that the Italian law of criminal procedure should be entirely reshaped and pat-

15 *Legge* December 27, 1956, n. 1423.

16 *Legge* May 31, 1965, n. 575.

17 *Giur. Cost.* No. 2 (1956); *Giur. Cost.* No. 11 (1956). The statute n. 1423 of 1956, mentioned above, issued to meet the requirements established by these Court's decisions, embodies the rule of the exclusive competence of the judiciary. The statute has been upheld by the Court: *Giur. Cost.* No. 27 (1959); *Giur. Cost.* No. 45 (1960); *Giur. Cost.* No. 12 (1962); *Giur. Cost.* No. 32 (1969).

18 *Giur. Cost.* No. 86 (1968).

19 *Giur. Cost.* No. 148 (1969).

20 *Giur. Cost.* No. 52 (1965). It must be remembered, in order to understand this ruling by the Court, that Italian criminal procedure follows prevalently the "inquisitorial" principle and that it contemplates both a normal inquiry preparatory to the trial, conducted by a judge (*istruttoria formale*), and a speedier inquiry for easier cases, conducted by the prosecutor (*istruttoria sommaria*).

21 *Decreto Legge* May 1, 1970, n. 192; *Decreto Legge* January 23, 1971, n. 2.

22 See, e.g., G. CONSO, *COSTITUZIONE E PROCESSO PENALE* (1969).

tered after the "accusatorial" model of the Anglo-Saxon tradition. Parliament is presently discussing the possibility of enacting a new code of criminal procedure. All this goes far beyond the principles fixed by the Constitutional Court, and could only be considered an indirect result of the Court's courageous decisions.

It is worth noticing that no section of Italian public opinion has reacted to the liberalizing of the law promoted by the Court in as violent a way as did sections of American opinion. Perhaps this may be accounted for (apart from the less incisive character of the Italian Court's interventions) by the fact that the problem of protecting persons and goods against the spreading wave of crime has not yet reached in Italy the level of seriousness it seems to have reached in the United States.

D. *Private Property and Free Private Enterprise*

The reports of the Italian Constitutional Court exhibit a concern for the rights of property and for freedom in economic matters that, although carefully circumscribed, may look at first sight a little out of tune with the trends usually prevailing today in judicial review elsewhere. In 1958 the Court voided a 1947 statute compelling farmers to hire unemployed laborers in proportion to the size of their respective farms.²³ In 1964 it forbade the state from establishing retroactive taxation meant to affect economic transactions already entered into and executed.²⁴ In 1968 it adjudged unconstitutional a 1942 statute empowering local authorities to deprive individual landowners of the right to develop land in view of a possible future expropriation for public purposes without providing for prompt and adequate compensation.²⁵ In 1972 it annulled a 1967 statute which drastically limited the rent an owner might lawfully ask for the lease of his land to farmers, practically destroyed the economic value of the leased property, and thereby violated a right the Constitution expressly recognized and guaranteed.²⁶ In a long line of decisions the Court has generally required compensation not only for all eminent domain expropriations of private property but also for all administrative limitations upon the uses of it, which, though authorized by statute, would amount practically to depriving the owner of the normal basic opportunities of enjoyment and exploitation.²⁷

These are probably the highlights of the Court's efforts to grant property and economic activities constitutional protection. In addition to them we can recognize numerous decisions where the power of the state to regulate property and to control private economic activities in view of the furtherance of such values as "social utility," "security," "health," "just social relationships," and

23 Giur. Cost. No. 78 (1958).

24 Giur. Cost. No. 44 (1966). Retroactive taxation of this kind is forbidden, however, only if it cannot be reasonably presumed that the prospective taxpayer is still in some way taking advantage of the outcome of the economic transaction he was a party to.

25 Giur. Cost. No. 55 (1968). More precisely, for the Court payment of compensation must not necessarily be immediate, but cannot be postponed indefinitely in the future.

26 Giur. Cost. No. 155 (1972).

27 See Giur. Cost. No. 6 (1966); Giur. Cost. No. 55 (1968); Giur. Cost. No. 56 (1968). On the other hand, the Court does not require the compensation to correspond with the full market value of the goods, a reasonable indemnity being sufficient.

the like, is clearly and solemnly asserted.²⁸ One is under the impression that at times the Court, when it sets aside statutory norms infringing upon the rights of property and economic freedom, does so because it tacitly assumes the legislature is no longer really interested in maintaining them (this usually occurs with old norms and was probably the case with the 1958 decision mentioned above).²⁹ Even when the Court strikes at more recent statutory enactments, which may reasonably be thought to correspond to policies still entertained by the legislature (as was the case with the 1971 decision on the leases of farmland), one suspects that the Court would not take such initiatives if it knew that its attitude would bring about a confrontation with a legislative power determined to carry out a policy it thinks vitally important.³⁰ In other words, the Court's readiness to defend property and freedom in economic matters is heavily qualified and is certainly not the sign of an intention to resist stubbornly incisive social reforms, should they ever be introduced by Parliament in pursuance of a precise political platform commanding the approval of a popular majority.

E. Equality Before the Law

An approximate equivalent of the United States fourteenth amendment's "equal protection clause" is contained in Article 3 of the Italian Constitution.³¹ The Court has made very frequent use of the clause—much more frequent use of it than the United States Supreme Court during the same years. However, it is certain that the significance for politics of the great majority of cases in which the principle of equality before law has been applied by the Italian Court is very limited.

In most of the cases the Court has utilized the principle of equality before the law to strike down details of the provisions of secondary statutes where it believed that a different treatment had been unreasonably prescribed for similar situations, or vice versa, that the same treatment had been unreasonably imposed on different situations.³² It has been wittingly said that when a court applies the constitutional standard of reasonableness, it sits as a commission of doctors to pass upon the sanity of the legislature. The reports of the Italian Court testify to numerous instances of insanity on the part of the Italian Parliament; but if it is

28 See, with regard to private property: Giur. Cost. No. 38 (1959); Giur. Cost. No. 64 (1963); Giur. Cost. No. 16 (1968). With regard to economic initiative: Giur. Cost. No. 29 (1957); Giur. Cost. No. 78 (1958); Giur. Cost. No. 30 (1965); Giur. Cost. No. 65 (1966); Giur. Cost. No. 60 (1968); Giur. Cost. No. 36 (1969).

29 The statute struck down in Giur. Cost. No. 78 (1958) was a remnant of the emergency legislation enacted in the immediate postwar years. Cf. C. Mortati, *Iniziativa privata e im-ponibile di mano d'opera*, 1958 GIURISPRUDENZA COSTITUZIONALE 1190, 1200.

30 This consideration should at least in part attenuate the worries of those who, believing in the necessity of radical reforms, have feared, and still fear, that decisions such as Giur. Cost. No. 55 (1968) and Giur. Cost. No. 155 (1952) may stand in the way of new legislation subtracting from private landowners; in a general way, the right to build on their land and giving to public authorities the exclusive initiative in the field of land development and building.

31 Article 3 reads: "All citizens have equal social dignity and are equal before the law, without distinction of sex, of race, of language, of religion, of political opinion, of personal and social condition. . . ."

32 On the use of the principle by the Italian Courts see C. Mortati, *ISTITUZIONI DI DIRITTO PUBBLICO* 934 (8th ed., 1969). But see L. PALADIN, *IL PRINCIPIO COSTITUZIONALE D'EGUAGLIANZA* (1965).

any consolation, they were instances of minor consequence, and apparently of little concern beyond the group of people immediately affected.

Fortunately, tragic and painful discriminations against minority groups—discriminations which poison the whole life of a community—do not exist in Italy (or at least, if they exist, they have not yet been felt as offending the prevailing sense of justice of the people). As a consequence, the Court has not been called upon to restore into the law that minimum of formal equality which is necessary to reconcile the common bond with groups angrily alienated from the community. There is no racial problem in Italian society. Discriminations on the part of the state and of state agencies on account of nationality and of political opinions have been practiced in the past (even after the fall of fascism) and in part are perhaps still practiced;³³ but they have never been so serious and unbearable as to disturb the country's conscience, and since they usually have not been consecrated in the letter of statutes, they would have been out of the Court's reach.³⁴ The most the Court has done to secure equality before the law within the legal system has probably been in the field of woman's rights and family relations.

F. *Woman's Rights and Family Relations*

The Court has moved slowly and cautiously away from the preexisting system of legally recognized male superiority towards the affirmation of a more balanced system conferring equal rights on the woman. The Court asserted the constitutional right of women to have access to all careers in the public service, including offices involving activities of a political nature.³⁵ (In response to the Court's decisions, the Legislature accordingly regulated *ex novo* the whole matter.)³⁶ It voided the laws punishing adultery³⁷ and adulterous relations³⁸ on the ground that they established different responsibilities and different penalties for men and women. The Court also vindicated the principle of equality between husband and wife in other respects.³⁹ It has repeatedly remarked that the law concerning their relations should be reformed to meet in a better way the aspirations, if not the binding precepts, of the Constitution.⁴⁰ In accordance with these suggestions Parliament is presently discussing a reform bill which would introduce more equality in the structure of the Italian family. The most important decision in this field is the one in which the Court (by a narrow majority, as rumors go) recently validated the Divorce Act of 1971—an act that for the first time in

33 I am referring in particular, with regard to discrimination on account of national origin, to the situation of the German-speaking people of the Bolzano province.

34 It must be remembered that, according to Italian law, there is no action before the Constitutional Court for wrongful acts of the Administration. The Court is entitled to pass only on the constitutionality of *statutes*, while redress of wrongs by public officers (including violations of the citizen's constitutional rights) must be sought with the ordinary and administrative courts.

35 Giur. Cost. No. 33 (1960).

36 Legge February 9, 1963, n. 66.

37 Giur. Cost. No. 126 (1968) *rev'g*, Giur. Cost. No. 64 (1961).

38 Giur. Cost. No. 147 (1969).

39 Cf. Giur. Cost. No. 9 (1964); Giur. Cost. No. 46 (1966); Giur. Cost. No. 143 (1967).

40 Cf. Giur. Cost. No. 101 (1965); Giur. Cost. No. 49 (1966).

Italian history, and after a long fight in Parliament, made it possible for married people to dissolve their wedlock.⁴¹

G. Workers' Rights

The Italian Constitution does not limit itself to promulgating equality before the law or formal equality. It makes it a duty for the Republic (in Article 3 and in other more specific provisions) to legislate and to act so as to "remove the obstacles of an economic and social order which, limiting in fact the liberty and equality of the citizens, prevent . . . the effective participation by all workers in the political, economic and social organization of the country."⁴²

Constitutional provisions aiming at the realization of some sort of "substantive equality" (as distinguished from the mere "formal" one) are in general the least apt to be enforced by the courts. Judges tend to treat them as political admonitions (as Judge Hand would call them) to legislators rather than as self-executing rules of law. Yet, even in legal systems where no such express provisions exist, discussion now exists as to whether "poverty," for example, should be made a criterion for the judicial decision of many constitutional questions. The Italian Court has used the "substantive equality" provisions of the Constitution, not only to uphold now and then statutes that cut deep into the rights of private property or of entrepreneurial freedom,⁴³ but also has occasionally used them to create new law more favorable to the workers when statutory law was lacking or stood in the way. The Court has decided, for example, that the Constitution empowers the judges to fix authoritatively a more equitable wage if the one the worker has agreed upon by contract is evidently insufficient to support him and is below the normal wage levels in his trade.⁴⁴ The Court has also decided that, pending his service with the employer, the worker cannot forgo by prescription any of his claims towards the employer.⁴⁵

H. Church-State Relationships

Church-State relations are one of the most sensitive areas of Italian politics. The influence of the Catholic Church on Italian life is enormous, and the Christian Democratic Party (holding the government since 1946) sees to it that no change in the law be made that may too deeply displease Catholic public opinion

41 Giur. Cost. No. 169 (1971). The Divorce Act had been promulgated six months before: *Legge* December 1, 1970, n. 898. It should be noted that the Italian law does not allow judges to file individual opinions and, in general, to make their votes known: this is why there is no official certainty as to the size of the majority that supported the decision.

42 The principle is enunciated in article 3. Article 4 proclaims "the right of all citizens to work" and the duty of the Republic to "promote the conditions that make this right effective." By article 36 "the worker has a right to a compensation proportionate to the quantity and quality of his labor and in any case sufficient to assure him and his family a free and dignified existence." By article 38 "laborers have the right to provisions and assured means adequate to their living requirements in case of accident, sickness, disability, old age and involuntary unemployment."

43 *See, e.g.*, Giur. Cost. No. 38 (1960); Giur. Cost. No. 55 (1961); Giur. Cost. No. 27 (1969). *See also* Giur. Cost. No. 43 (1963).

44 Giur. Cost. No. 156 (1971) (in application of art. 36).

45 Giur. Cost. No. 63 (1966).

or the ecclesiastical authorities. Moreover, the Constitution prescribes that the relations between State and Church must be ruled by the Lateran Pacts of 1929.⁴⁶ Thus far the tendency of the Court has been to secure for the other religious confessions as much freedom and protection of the law as possible without impairing the privileges granted the Catholic Church by Italian law.⁴⁷ Lately, the Court has taken a long and important step toward a possible judicial pruning of at least the most obsolete and disturbing of those privileges. It has established the principle that the reference the Constitution makes to the Lateran Pacts as the proper law between State and Church does not imply that all the provisions of the Pacts are, by this fact alone, constitutionally unassailable. Concordat provisions that look offensive to the very core of the ideals of liberty and equality enshrined in the Constitution will be declared unenforceable by the Court.⁴⁸ The Court has made use of this principle, up to now, only in one case and will probably proceed to apply it in the future with the utmost caution.

I. *The State and the Regions*

The republican Constitution, which in 1948 took the place of the century-old *Statuto Albertino*, envisioned a vast "decentralization" in the then strongly centralized state and set up 19 new local political-administrative units, the Regions, with special legislative and executive powers for that purpose.⁴⁹ The actual process of organizing the new local units was extremely laborious and was not completed until 1971. It was surreptitiously resisted and successfully delayed by many diverse forces including the state central bureaucracy. According to the Constitution, it is up to the Court to define the legislative and administrative areas respectively belonging to the jurisdiction of the state and of the Regions. A fair appraisal of the Court's job in this field must acknowledge that, in general, the Court has not been very responsive to the expectations of the Regions. It has usually preferred to enforce the claims of the central state over against the claims of the new units, limiting the scope of their powers and confining within narrow limits the political significance of the new experiment in "decentralization."⁵⁰

III. The Court's Cautious Self-Restraint

This short survey of some of the most important decisions of the Italian Court should help to clarify the meaning of what I have called above the Court's "discreet presence" in Italian political life. The Court has not completely surrendered its power as final interpreter of the Constitution. It has the power to

46 Constitution, art. 7.

47 Cf. Giur. Cost. No. 125 (1957), (a provision punishing gross abuse of the Catholic religion is constitutional even if it does not punish abuse of other religions as well); Giur. Cost. No. 59 (1958) (non-Catholic confessions can open their churches to the public and celebrate their rites without needing previous government authorization).

48 Giur. Cost. No. 30 (1970); Giur. Cost. No. 31 (1970); Giur. Cost. No. 32 (1970).

49 Constitution, Part 2, Title 5.

50 Cf. PALADIN, *DIRITTO REGIONALE* 67 (1972). See also V. Crisafulli, *L'attuazione delle regioni di diritto comune e la Corte Costituzionale*, 1972 *POLITICA DEL DIRITTO* 665.

impress the mark of its ideological preferences on the development of the law and thereby to influence the vital aspects of the country's life. In the fields of criminal procedure, woman's rights, and family relations the Court has contributed, as noted above, to the reorientation and the reform of the law. With regard to private property and economic initiative, the Court has dared on occasions to interfere with the choices of the Legislature, putting an end to what it viewed as useless state mingling with private business or unjustifiable penalization of property rights. Nevertheless, the Court has done all this without ever coming to a real conflict with Parliament or the Executive. The limits of protection accorded by the Court to private property and the economic initiative have been pointed out before. As to the Court's attitude in the other two fields just mentioned, the Court started giving the law a more progressive turn only recently when the Italian political and cultural atmosphere began to change, and the socialists joined the Christian Democrats in the government, giving birth to a center-left coalition. (The criminal procedure decisions started coming out in 1965; the adultery decision was rendered in 1969 and the divorce decision in 1971.) It might be, as suggested above with reference to one of these new developments in the law, that without the Court moving first, Parliament would have remained still; but it is certain that the Court chose to move at the very moment when all signs showed that Parliament would not object to its initiative.

The tendency of the Court to respect carefully the prerogatives of the other state constitutional organs (and to pay great attention, therefore, in substance, to the general expectations of the political forces in power) is also confirmed by the other decisions mentioned in the survey above. The Court has scrupulously avoided depriving the state of the powers its political organs felt they must possess in order to silence dangerous speech if necessary and to restrict the personal freedom of certain dangerous persons. The 1960 television decision and the attitude of the Court towards the efforts of the Regions to assert themselves before the state bear witness to the intention of the Court not to disturb the privileged position of the central political class with regard to the control they exercise over the spreading of information through modern media and over the initiatives of peripheral social forces. Even the slightly more liberal attitude the Court has recently assumed in matters pertaining to the relationship between state and church can perhaps be explained against the background of the vastly changed outlook of the Catholics on moral and political problems after the Second Vatican Council. The change has made it possible to advance policies that twenty or even ten years before would have provoked sharp reactions and maybe a serious political crisis.⁵¹

With a Court so careful to avoid trespassing on territories that other state organs and the political forces behind them might consider their own, it is no

⁵¹ Decisions like those on the Lateran Pacts and on the Divorce Act have been calmly received in Catholic circles. The Divorce Act had passed in Parliament over mild opposition from the Christian Democrats, which never became obstructionism. These events would have been inconceivable before the Council.

For an opinion confirming the contention made here, that the political and cultural changes of the Sixties have greatly influenced the decisions of the Court, see G. Branca, *Corte Costituzionale: un anno di attività*, 1970 GIURISPRUDENZA COSTITUZIONALE, 2492. See also A. Pizzorusso, *Meriti e limiti del processo costituzionale*, *supra* note 1.

wonder that Italian public opinion does not envision the Court as one of the agencies playing a leading role in Italian politics. It is not—as was sometimes suggested—that the decisions of the Court are frequently resisted or disregarded by other courts, executive officers, and even Parliament.⁵² Such episodes have been secondary and relatively unimportant (and they probably cannot even be considered actual instances of non-compliance with the Court's *rulings* in the strict sense of the word).⁵³ The fact is, the Court itself has carefully seen to it that its profile should never loom too large and imposing. The Court itself has chosen not to bid for that share of influence on Italian political life that by a bolder exercise of its functions it could have obtained.

Empirical data—such as only opinion polling could yield—are not available, but if the daily press can be considered a reliable mirror of the different interest the public takes in facts, problems, and institutions, one could conclude the Court occupies a low place among the things which, as far as politics goes, are capable of attracting the citizen's attention. The fault does not rest with the citizen. To occupy a first-rank place in the attention of the public, a court must fire off explosive decisions such as *Brown v. Board of Education*,⁵⁴ *Baker v. Carr*,⁵⁵ and *Roe v. Wade*.⁵⁶ The Italian Constitutional Court has not done this so far.

IV. Motivation for the Court's Self-restraint

To what causes can be attributed the mixture of moderately liberal tendencies and of cautious self-restraint and respect for the rights of Parliament and of the Executive, which characterize the work of the Court? Many factors should be taken into account in an analysis meant to provide an exhaustive and satisfactory answer to this question. One factor would certainly be the influence exerted on the Court's interpretation of the Constitution by the traditional methods of Italian jurisprudence in which the judges have all been trained. Legal positivism and the structures of a codified legal system taught generations of Italian lawyers to deal skillfully with rules but did not give them an adequate awareness of the potentialities inherent in legal standards as tools capable of being used to promote reforms in the law. This training has also produced a peculiar deference for the Legislature, once believed the holder of an unlimited sovereign power, and a tendency to rely heavily in legal reasoning on the letter of the law and on its original meaning.⁵⁷ All this may have weighed in the choice the Court

52. The suggestion has been made, for instance, by N. KOGAN, *THE GOVERNMENT OF ITALY* 119-20 (1955), (who mentions, in particular, cases of friction between the Court and the government), and later by D. KOMMERS, *Judicial Power and Constitutional Democracy in Italy and West Germany*, *DEMOCRACY IN CRISIS*, 50 (citing supporting evidence also from ADAMS & BARILE, *THE GOVERNMENT OF REPUBLICAN ITALY* (1966)).

53. A short discussion of this point is afforded in this paper *infra* at section VII.

54. 347 U.S. 483 (1954).

55. 369 U.S. 186 (1962).

56. 409 U.S. 817 (1973).

57. For a valuable description and appraisal of the traditional methods of Italian jurisprudence see Merryman, *The Italian Style I: Doctrine*, 18 *STAN. L. REV.* 39 (1965); Merryman, *The Italian Style II: Law*, 18 *STAN. L. REV.* 396 (1966); Merryman, *The Italian Style III: Interpretation*, 18 *STAN. L. REV.* 583 (1966).

made to side with a restrictive interpretation of its own powers.

This is not the place to carry out an exhaustive inquiry into the problem of causes, and so I go straight on to the factor that, in my opinion, has contributed more than any other to the above-mentioned attitude of the Court: the methods for selecting the judges.

The Italian Constitutional Court is composed of fifteen judges. They are to be chosen from the magistrates of the superior courts, ordinary and administrative (Court of Cassation; Council of State; Court of Accounts); from regular university professors of law; and from lawyers who have had twenty years of practice. Five of them are named by the Court of Cassation, the Council of State, the Court of Accounts; five by Parliament in joint session; and five by the President of the Republic. They all serve for only nine years.⁵⁸ All this clearly accounts for the Court's judicial prudence and self-restraint.

The superior courts, ordinary and administrative, always choose magistrates when naming the five judges which they are entitled to name. Therefore, these judges have usually been men of mature age, with a distinguished career in the judiciary behind them. Having begun their careers in the pre-fascist or in the fascist period, they have been generally of upper- or middle-class extraction, have come mostly from southern or central Italy, and have been educated in the tradition of an abstract, literary humanism. They have consequently tended to be of a prevalently conservative outlook, with a strong leaning toward a deferential attitude vis-à-vis the Legislature.⁵⁹

The group of judges appointed by Parliament and the president has been less conservative, on the whole. By virtue of the qualified majority necessary for the election,⁶⁰ two of the five seats to be filled by Parliament are reserved for men indicated by the left-wing parties (socialists and communists).⁶¹ The president, in turn, seems to have chosen his appointees so as to make room also, at times, for men with clearly progressive ideas.⁶² But it is evident that, in general, this group of judges must have reflected a scale of political values not too distant from the one shared by the majority in Parliament. They too, like the judges appointed by the superior ordinary and administrative courts, must have been men keenly responsive to the need of keeping the Court from interfering too much with the political process. This is probably due, in their case, to more than the traditional legal training they have received in common with the judges elected by the Courts. Some of them had at least a partial experience as active members in one or the other political party, and must have drawn from it the

58 For all the provisions above: *Costituzione*, article 135; *Legge costituzionale* November 22, 1967, n. 2, art. 1.

59 For this appraisal of the attitude of the judges elected by the Courts, see N. Tranfaglia, *Elementi sulla formazione e sulle tendenze della politica della Corte Costituzionale in Italia*, 1972 *POLITICA DEL DIRITTO* 451 (he draws his conclusions from personal interviews he had with the judges).

60 Two-thirds of the members of the Chambers in the first three ballots; three-fifths of them after the third ballot. *Legge costituzionale* n. 2 1967, article 3.

61 Parliament elected to the Court, for instance, socialist professor G. Brance, who as President from 1969 to 1971, led the court to some of the most "progressive" decisions of its history (among which the ones on the Lateran Pacts and on divorce).

62 Such as, for instance, Professor C. Mortati, an influential member of the Court in the Sixties.

conviction that basic political decisions rest best with the executive bureaus of parties and with Parliament.⁶³

V. Evaluation of Judicial Restraint

What has been said before in no way implies a criticism of the choice of the Court to keep its influence within the boundaries of a political "discreet presence." On the contrary, speaking in general and with no intention of discussing single judicial rulings (as to which of course dissent may be in some cases fully justified), the most grounded conclusion is that the Court's choice corresponds, on balance, to the prevailing needs of the social and political situation in which the Court has had to act. For many years Italian society has been divided into two parts by a social and ideological fracture. The fracture has deep roots in Italian history and culture. After the Second World War the contrast between the majority of the people who were willing to accept the present social system and to proceed only to partial and slow changes of it and a very strong minority who believed the system was oppressive and tyrannic again became acute. The Christian Democratic Party and the Communist Party confronted each other as the representatives of two radically different conceptions of the polity. Fortunately, the confrontation did not degenerate into an open clash; with time and economic progress it was possible to make moves aimed at narrowing the cleavage and at reconciliation of the "two nations" into which Italy was divided. The admission of the socialists into the governmental area and the center-left coalitions of the Sixties were perhaps the most conspicuous of these moves.

Under these circumstances, it would have been reckless of the Court to try to impose clear-cut solutions for delicate social and political problems on the basis of an ideology not clearly shared by a large majority of the country. The attempt, no matter what the Court's ideology had been, probably would have increased the political tensions already harassing the country. The structures of the democratic system were and are still rather weak in Italy. The entrance of the Court into the political arena, as an autonomous power ready to fight for an ideology of its own, could have added to the perils to which democracy was exposed. It was probably beneficial for Italy that the Court, while correcting the law in a great number of minor details, did not venture to swim against the stream on major issues and instead followed, more or less, the prevailing trends of the country as reflected in the action (or in the inaction) of Parliament.

Fortunately the Court did not embody in the Constitution (as some at the

63 P. Ungari *Giurisprudenza e politica*, 1972 *POLITICA DEL DIRITTO*, 341, 346 has noticed an increasing tendency of Parliament to name to the Court men who, while in possession of the required qualifications, are at the same time — or have been — members of Parliament. After the nine-year term on the Court they are likely to go back to active politics (judges of the Constitutional Court are barred from a second term). This tendency cannot but reinforce the deferential attitude towards Parliament of the judges named by it.

It is perhaps convenient to remember that all the statements made here on the ideological and political leanings of the Court's judges are necessarily only inferences from facts mostly pertaining to the judges' lives and activities prior to their appointment to the Court. Indeed, as already mentioned, in Italy no judge is allowed to file an individual opinion or make known his vote.

beginning urged it to do) a philosophy of strict economic individualism. It was equally fortunate that the Court did not read into the Constitution an uncompromising liberal and democratic philosophy (as many ardently hoped). If the task of Italian politics in the present historical period is to help the national community to develop gradually and without violent shake-ups towards a greater economic prosperity and a more democratic and liberal way of life, the care of the task must be essentially entrusted to the political parties. They must be free to determine, on the basis of the shifting balance of their respective forces and of the consequent government programs, when and how much of the traditional involvement of Church and State, of religion and law, should be set aside; when and how much of the existing limits to freedom of speech and to personal freedom, meant to serve state security and the prevention of crime, should be removed; when and how much of the old social and economic structures or the country should be abolished to make room for new and more equitable structures. The process is a very delicate one, involving at each step a laborious compromise, which should not be disturbed lightheartedly.⁶⁴ The Court can of course step in to support the process (and maybe to correct occasionally some reforming measure that has sacrificed too severely the interest of a particular group); but it cannot dream of accelerating significantly the process. To try to do so would probably be counterproductive; it would at least be imprudent.

VI. Significance of the Court's Role

Although the Court has adopted a prevalent attitude of self-restraint, its role in Italian politics has not been superfluous. On the contrary, it has been quite important. From the founding of the Republic to 1960, Italian politics were dominated by a clearly conservative line, the government being entirely concerned with the tasks of furthering the nation's economic reconstruction and industrial development. The prevailing climate of opinion in Parliament was not conducive to more vigorous protection of civil rights or of checking the powers of government. In the following decade, this changed. The idea of reforms designed to make life more civil and just, as well as economically prosperous, began to take hold; but the coalition of political forces, formed for the purpose of carrying through that idea, was too divided within itself to be able to be really active and efficient. The Italian government fell in a state of prolonged passivity and of irresolution, which is not yet entirely over.⁶⁵ Finally, some reforms were enacted, but they concerned primarily the problems of labor (for instance in 1970 the "statute of workers" was enacted).⁶⁶ Less attention still was paid to problems related to the classical freedoms of man and to his position and needs as man in a contemporary society (although it must be remembered that in 1970 Parliament also approved, for instance, the Divorce Act).

64 I tried to show how delicate and precarious were the compromises on the basis of which the various cabinets operated in the Sixties in a paper read at a 1970 conference at Notre Dame University: G. Bognetti, *The Crisis of Parliamentary Government in Italy* (now in *DEMOCRACY IN CRISIS* 111).

65 See G. GALLI, *IL BIPARTITISMO IMPERFETTO* (1966) and G. GALLI, *IL DIFFICILE GOVERNO* (1971).

66 *Legge* May, 1970, n. 300.

The Court has performed a valuable job in both periods. First, by striking down some of the worst features of surviving Fascist legislation, it was able to secure a minimum of protection to fundamental freedoms, making it clear that they too must count for something in a democratic republic. Second, it adopted an interpretation of the principle of formal equality that potentially will serve in the future as an important check upon the discretionary powers of Parliament. It vindicated, in other words, at a rather unfavorable time, the idea of the "rule of law."

In the second period (and in particular after 1965), the Court proceeded to foster changes in the law which it had not ventured before—changes that would, perhaps, no longer meet with hostility from Parliament but that Parliament was not able to start on its own initiative. It affirmed the rights of the accused in the criminal proceedings and established a more modern conception of family relations which Parliament in part followed. It affirmed the superiority of the basic constitutional principles of freedom and equality over possibly contrasting provisions of the Lateran Pacts. Moreover, it gave its constitutional confirmation to such innovative statutory measures as the Divorce Act. During this time, therefore, the Court acted as a useful agency of the very slow, yet vast movement for reforms which was swaying the country. In this way, the Court undoubtedly contributed to social progress.

VII. Compliance With Court Decisions

There is a fairly widespread feeling (especially among foreign scholars) that the Court's work is seriously prevented from having a direct effect upon society by a pattern of non-compliant behavior on the part of other state organs—Legislative, Judicial, and Executive. It was even stated some years ago that the Court's "major problem" is the "enforceability" of its own decisions.⁶⁷ In my opinion, this feeling is not grounded. To put the problem of compliance in its proper terms, one must first remember what is the real function of the Italian Constitutional Court and within what limits its decisions are binding on other state authorities.

The Italian Court is a Court with a special jurisdiction. Its function is not to define in a final way the whole law of the nation. It is simply to test the constitutionality of statutes and to nullify statutes that it finds in conflict with the Constitution. Correspondingly, its decisions are binding insofar as they nullify a statutory provision. If a statutory provision has been found unconstitutional and has been voided, in full or in part, by the Court it is no longer "law" and cannot be acted upon as such by any state organ or agency. All other language contained in the Court's decisions is not legally conclusive upon anybody.⁶⁸

It can thus be safely said that no clear and prolonged episode of non-compliance with the Court's *rulings* has occurred thus far. Parliament has practically

67 N. KOGAN, *supra* note 52, at 119.

68 See MORTATI, *ISTITUZIONI* 1283. See also J. Merryman & V. Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 AM. J. COMP. L. 665, 667 (1966-1967); V. VIGORITI, *Italy: The Constitutional Court*, 20 AM. J. COMP. L. 404; C. MORTATI, *Sull'efficacia delle sentenze della Corte Costituzionale*, ACC. NAZIONALE LINCEI 1973, quaderno 185.

never tried to reenact (not even covertly) norms the Court had nullified. It is known that on a few occasions some judges and prosecutors have been hesitant to discontinue the application of provisions of the Criminal Procedure Code the Court had declared unconstitutional,⁶⁹ but their reluctance did not last long.⁷⁰ Probably executive officers and agents have behaved similarly, on a larger scale and with reference also to other nullified provisions. The episodes must have been limited, because no serious reaction at a national level ever arose.

If we consider only the really *binding rulings*, no problem of enforceability, therefore, exists—the commands of the Court are by and large obeyed. In the Court's decisions, however, there is usually much more than binding rulings; and with regard to this different kind of language (that we may perhaps call "hortatory," in order to distinguish it from the other) the response of Parliament, of the government, of ordinary courts, and of public officers in general, has undoubtedly been different.

The Constitutional Court has often upheld statutory provisions as constitutional, specifying, however, that a certain interpretation of them should be adopted to avoid constitutional doubts.⁷¹ The Court itself recognizes that the interpretation of statutory provisions on the basis of which its decisions are rendered, are not, strictly speaking, legally compulsory for the ordinary courts and the other state authorities.⁷² Nevertheless, the Court assumes that they will usually be followed.

This has not always been the case. On a few important occasions the Court of Cassation has openly disregarded the interpretation of statutory norms suggested by the Constitutional Court (giving rise to what has been called—perhaps with some impropriety of legal language—"conflicts" between the two Courts).⁷³ Generally, statutory provisions upheld by the Constitutional Court on the basis of a certain interpretation have been given, sometimes covertly, a different mean-

69 L. Elia, *Nota sulla Corte Costituzionale*, 1917 *POLITICA DEL DIRITTO*, 277. The episode was subsequent to 52 *Giur. Cost.* (1966). An exception to this generalization is perhaps provided by some laws passed by Parliament after the Court's decisions in *Giur. Cost.* No. 55 (1968) and *Giur. Cost.* No. 155 (1972), respectively, nullifying certain statutory provisions concerning the law of land development and the lease of land to farmers, *supra* notes 23 and 24. It would be difficult to maintain that these laws (*Legge* November 19, 1968, n. 1187, *Legge* November 30, 1973, n. 756; *Legge* August 8, 1972, n. 462; *Legge* December 18, 1973, n. 814), enacted by Parliament to take care of the consequences brought about by the above-mentioned decisions, have not at least partially circumvented, in fact if not intentionally, the rulings of the Court."

70 See L. Elia, *supra* note 69. Hesitant judges and prosecutors were probably convinced to comply with the Court's rulings also by the fact that Parliament promptly enacted new statutory provisions incorporating the principles affirmed by the Court.

71 See MORTATI, *supra* note 68, at 1297. Decisions of this kind are designated as "sentenze interpretative di rigetto" (interpretative decisions rejecting the claim of unconstitutionality). See also Merryman & Vigoriti, *supra* note 68, at 680.

72 See statement by Judge Azzariti, second President of the Constitutional Court, in an official speech reproduced in 1957 *GIURISPRUDENZA COSTITUZIONALE* 878, 885.

Italian constitutional lawyers almost unanimously agree that the interpretations of statutes contained in the Constitutional Court's "sentenze di rigetto" have no binding force upon anybody. Cf. MORTATI, *supra* note 68, at 1299; Merryman & Vigoriti, *supra* note 68, at 668, 680.

It is worthwhile remarking that the Italian law differs on this point from West German and Yugoslavian law. In West Germany and in Yugoslavia the interpretation of statutory provisions laid down by the Constitutional Court is always conclusive for all state authorities and citizens.

73 On these decisions of the Court of Cassation cf. MORTATI, *supra* note 68, at 1299.

ing and a different scope by the ordinary courts called upon to apply them.⁷⁴ Executive authorities must also have profited, openly or covertly, by this right to deviate from the non-binding advice of the Court.

The Court, while upholding statutory provisions, has sometimes added that the provisions were not fully satisfactory from a constitutional point of view and that the Legislature had better enact new statutes more consonant with the "spirit" of the Constitution. The Court has also hinted, at times, that new legislation would be welcome in view of the changing needs of society and of the duty of Parliament, under the Constitution, to meet them. The Court has so spoken, for instance, with regard to the law of public security,⁷⁵ the law of family relations,⁷⁶ some rules of the Criminal Code,⁷⁷ the statute providing for free legal counseling for indigent persons,⁷⁸ and so on.

Parliament has been, in general, sluggish in following the Court's admonitions. Apart from a few cases of a prompt response (as in the case of the criminal procedure decisions where the new legislation was meant to back *binding rulings* of the Court and with which some judges and prosecutors seemed hesitant to comply), the government and the Chambers have usually been extremely slow in legislating according to the Court's suggestion. Parliament has not yet revised, as a whole, the code of public security regulations, which dates from the fascist period. It is still discussing the reform bills concerning family relations and free counseling for indigents—almost ten years after the Court's initial admonitions. Especially at the beginning, the Court seemed to have expected the government and Parliament to comply promptly with its suggestions. The passivity and "lack of cooperation" on the part of Parliament and the government were owing mainly to well-known episodes of minor friction between them and the first two Presidents of the Constitutional Court.⁷⁹

If we consider the Court's "hortatory" language, we can speak of difficulties the Court experienced in obtaining compliance with its admonitory decisions.

74 This could be the case, for instance, of the application made by ordinary courts of penal rules punishing speech. Probably the application was stricter than the interpretation of the rules suggested by the Constitutional Court would have requested it to be. Cf. G. Boggetti, *supra* note 4.

75 See Giur. Cost. No. 8 (1956).

76 See Giur. Cost. No. 101 (1965); Giur. Cost. No. 49 (1966).

77 See Giur. Cost. No. 3 (1956).

78 See Giur. Cost. No. 114 (1964).

79 See Kogan, *supra* note 52, at 120.

The first President, De Nicola, a notoriously touchy person, resigned in 1957, officially for differences arisen within the Court itself (1957 *Giurisprudenza Costituzionale* 890), in fact also, as rumors went, for the failure of the government to promote new legislation apt to implement principles affirmed by the Court. The second President, Azzariti, officially lamented the fact that government and Parliament were not "cooperative" enough in enacting new laws according to the suggestions directly or indirectly emerging from the Court's decisions. He claimed that the Court was one of the two true "pillars" of the Italian state (the other being the President of the Republic) and that government and Parliament occupied, in the picture, a subordinate station (1959 *GIURISPRUDENZA COSTITUZIONALE* 951; 1961 *GIURISPRUDENZA COSTITUZIONALE* 351). This meant, by implication, that government and Parliament would not only have to comply with the binding rulings of the Court, but also to accept its lead in the field of legislation. Azzariti's claim was promptly rebuked by the President of the Senate, Merzagora, who affirmed the full independence and sovereignty of Parliament and the government in the spheres of their respective jurisdictions (1961 *GIURISPRUDENZA COSTITUZIONALE* 352).

These skirmishes were not, however, real acts of war. They did not affect the substantially peaceful relations between the Court and the other supreme organs of the state. They did not repeat themselves after the first years of the Court's activity.

Even here the difficulties of compliance should not be exaggerated; too much significance actually has been attached to the Italian failure to follow the Court's leadership. For one thing, noncompliant behavior on the part of regular courts has probably been less frequent than suspected. For another, we must consider and weigh the behavior of the Constitutional Court itself. In many of the cases where it used "hortatory" language, the Court could easily have transformed its exhortations into binding rulings, thereby putting a much greater pressure on other state agencies whose action the Court regarded as desirable. Instead of upholding statutory provisions on the basis of a particular interpretation that did not bind the ordinary courts, it could simply have nullified them in full or in part.⁸⁰ Ordinary judges would have been compelled—short of open rebellion—to comply with the Court's rulings. Instead of upholding legislation with the gloss that it was not fully satisfactory and that it deserved revision, it could have simply struck it down. Parliament would then have been compelled to act.⁸¹

The Constitutional Court has carefully avoided this course of action. Even after noting that its admonitions were not producing results, the Court very seldom switched from exhortations to orders. It has done so only in two famous (or infamous) instances of open noncompliance by the Court of Cassation (the highest Italian regular court);⁸² in a third case, the Court of Cassation simply ignored a Constitutional Court decision altogether.⁸³ Parliament does not seem

80 This is exactly what some constitutional lawyers urge the Court to do in a systematic way, see MORTATI, *supra* note 68, at 1300-301.

81 See Denti, *Il gratuito patrocinio davanti alla Corte Costituzionale*, 1969 RIVISTA DI DIRITTO PROCESSUALE 149, which shows how the Constitutional Court, by invalidating the existing law on free legal counseling for indigents, would have compelled Parliament to enact immediately a statute providing for a truly adequate legal service. The same could be shown with regard to the law pertaining to other subject matters (such as family relations, police activities, and so on).

82 Decision n. 8 of 1956 by the Constitutional Court upheld a provision of the Public Security Law giving the prefects the power to issue emergency regulations, on the assumption that the provisions did not give them the right to restrict constitutionally protected rights. The Court of Cassation, which had in the past already ruled that the provision, properly interpreted, gave the prefects the power to restrict constitutionally protected rights, stuck to its interpretation in a subsequent decision (*Corte di Cassazione*, decision n. 2068 of 1958). Three years later the Constitutional Court declared unconstitutional the part of the provision which gave the prefects (according to the Court of Cassation's interpretation) the disputed right. *Giur. Cost.* No. 26 (1961).

Giur. Cost. No. 11 (1965) by the Constitutional Court upheld a provision of the Criminal Procedure Code on the assumption that it did not foreclose the presence and assistance of counsel at various stages of the "istruzione sommaria." The Court of Cassation, which had in the past already ruled that the provision foreclosed the counsel's presence and assistance, stuck to its previous interpretation (*Corte di Cassazione*, decision April 28, 1965). Thereupon, the Constitutional Court voided right away the provision in question in *Giur. Cost.* No. 52 (1965).

It is important to point out that, after the decision in *Giur. Cost.* No. 26 (1961) and *Giur. Cost.* No. 52 (1965), the Court of Cassation promptly complied with the rulings of the Constitutional Court.

83 In 1966 the Court of Cassation decided to admit in criminal proceedings evidence gathered prior to the Constitutional Court's decision in *Giur. Cost.* No. 52 (1965) and obtained the methods that did not respect the defendant's rights as affirmed by that decision. The Court of Cassation contended that, while the decision of the Constitutional Court undoubtedly displayed its effect for the future (and foreclosed therefore any further gathering of evidence with procedures not allowed by it), it could not invalidate evidence already obtained. This conclusion was reached on the basis of a particular interpretation of a statutory provision (art. 30, *Legge* n. 87 of 1953) concerning the effects in general of the Constitutional Court's voiding of a statute.

In that very year the Constitutional Court denied that its decisions could not have, with respect to the problem in question, retroactive effects. But instead of declaring unconstitutional art. 30 of *Legge* n. 87 as interpreted by the Court of Cassation, the Constitutional Court

to have actually been as defiant. The inevitable conclusion is that to a certain degree the Court itself probably expected its exhortations to go unheeded. In this connection, we should remind ourselves that dissenting opinions are not allowed in Italy. But majorities on the Court may at times admit into its opinions "hortatory" language expressing the point of view of the dissenting minorities.

This brings us back to our initial contention. Instances of brazen disregard of the Court's rulings have not occurred thus far. Compliance, in the strict sense of the word, has not been a problem for the Court, at least not a major one. What prevents the Court from exerting stronger impact upon other state agencies and upon society at large is not *open* resistance outside the Court, but rather the calculated strategy of the Court itself not to extend too far the range of its innovations. Such restraint is perhaps based (apart from other reasons) on an obscure feeling that had the interventions gone much further, the Court's decisions would have met with resistance.

As noted earlier, however, the Court did not want to become a determining factor in Italian political life. It has been content with a more modest role. This explains why, among other things, the Court chose on so many occasions (and still does) to use "hortatory" instead of "binding" language in its decisions, a wise choice in my opinion. In any case, it seems fairly clear that the Constitutional Court's role in Italian politics has been extremely limited. Yet it should perhaps be said in conclusion that empirical studies of compliance have been lacking in Italy. Perhaps the conclusions of this writer, a professor of law, would be qualified by the studies of scholars oriented toward and trained in social science.

upheld it, only stating that it should have been interpreted differently. 127 Giur. Cost. (1966). The Court of Cassation, of course, not being bound by the interpretation suggested by the Constitutional Court, went on deciding its own way and admitting in criminal proceedings the contested evidence.

On the whole episode see Merryman & Vigoriti, *supra* note 68, at 675-81.

In 1970 the Constitutional Court had a second opportunity to strike down as unconstitutional art. 30: but it shrank again from taking such a step, merely reaffirming its view as to the correct interpretation of the provision. 49 Giur. Cost. (1970). For a criticism at the Constitutional Court's acquiescence, see L. Elia, *La Corte ha chiuso un occhio (e forse tutti e due)*, 1970 *POLITICA DEL DIRITTO* 946.