A Limping Militant Democracy

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Images of hundreds of men gathering outside the former headquarters of the Italian post-fascist party (Movimento Sociale Italiano – MSI), giving the Roman salute in Acca Larentia (Roma) on the 8th of January 2024, have sparked numerous controversies in Italy. A genuine ceremony was taking place that night to celebrate the 46th anniversary of the killing of two militants in 1978. The men belonged to different groups but mostly to Forza Nuova, the current Italian neo-fascist party. The Roman salute was paired with the Fascist ritual of the "roll call", whereby a leader calls out the name of a fallen soldier and his comrades shout "*presente!"*.

Political institutions and civil society reacted by strongly condemning the salute. PM Giorgia Meloni has distanced her party (Fratelli d'Italia) from "fascism" allegations. After explaining that Fratelli d'Italia "has nothing to do with it", the President of the Senate, Ignazio La Russa (himself a member of the MSI in his youth), also added: "So far there have been conflicting sentences on whether the Roman salute on the occasion of celebrations for deceased people is a crime or not."

While one would expect the President of the Senate, facing an incident that stirred political controversy, to reason in more institutional terms rather than strictly legally, La Russa was partially correct in stating that the current Italian legal framework is (still) not sufficiently clear and coherent on the matter.

In contrast to Germany, which has a broader protection system, "militant" anti-extremism in Italy is articulated in two major areas: the criminalization of fascism apologia and the banning of political movements that refer to fascism. Moreover, in Italy, unlike Germany, banning formal parties (and not just political groups) is still a controversial issue although the Constitution, at least in theory, would admit its feasibility. There is no precedent. Although the legal regulation of the aforementioned instruments differs in some respects from the German system, one thing is certain: to some extent and under certain conditions, Italy can also be described as a militant democracy.

Italian militant democratic main provisions

First, it should be noted that the militant approach of the Italian system, due to its totalitarian past, is explicitly aimed at far-right extremism. There are two major legal frameworks that encompass punitive norms towards fascist behaviors. Both derive their constitutional legitimacy from the XII Transitory and Final Provision of the Constitution, which explicitly prohibits *any form* of revival of the dissolved Fascist National Party.

This clause permitted the enactment of Law nr. 645/1952, commonly known as "Scelba Law". This Law ensures sanctions for conducts that could contribute to

the re-establishment of the disbanded Fascist National Party. It criminalizes the reorganization of the fascist Party (Article 1), any apologia for fascism – *i.e.* for its principles, methods or actions (Article 4) – and any fascist demonstration (Article 5). Moreover, according to Article 1, political movements "inspired by fascism" can be banned either through a Government Decree (an emergency tool never used) or by the Minister of the Interior following a criminal sentence against individual members of a political movement establishing their intention to reconstitute the fascist party (a tool used three times so far).

The main issue raised by the provision is the definition of a "fascist party" and which entities are covered by the prohibition: for the majority opinion, it refers not to "a" fascist party but to "the" Fascist Party[1)], *i.e*., that well-defined historical entity that manifested itself in the country's political reality from 1919 to 1943. Only for a few scholars (C. Esposito, I partiti nella Costituzione italiana, Padova, 1954, 215 ff.), "fascist" might point to any party that seeks to establish dictatorships or diminish the currently existing democratic principles.

The second important legal framework for combating political extremism is Law No. 205 of June 25, 1993, also known as the "Mancino Law", which broadened the scope of application of the XII Transitory and Final Provision of the Constitution by including racist and discriminatory ideologies among those deemed unconstitutional.

The recent decisive intervention of the Supreme Court on the fascist salute

Since the 1950s, there has been a rich but equally inconsistent jurisprudence, both from the Constitutional Court and ordinary courts (including the Supreme Court), on the meaning to be attributed to the fascist salute and the necessary conditions for such an act to fall within the scope of the aforementioned laws.

Since the Constitution does not impose "ideological" limits on the freedom to express one's thoughts, even when the expression concerns fascism, the Courts concluded that praising fascism should not be criminalized *per se*[2)]. In order to sanction the Roman salute, a genuine (although not immediate) risk of a reorganization of the fascist party has been proven.

However, the practical application of these principles has not been consistent.

In 2017, a Court in Varese, basing its decision on the Mancino Law, convicted a teacher who exchanged a Roman salute with one of his students upon leaving school, because of the "inherent gravity" of the gesture performed by an educational figure. Conversely, in Milan four individuals were acquitted for the same gesture, arguing that, despite the clear reference to fascist symbolism, it did not pose a serious and concrete danger of reorganizing the fascist party.

In some cases, the Roman salute was penalized using the Scelba Law (Article 5, fascist demonstrations), while in others, it has been addressed through the Mancino

Law (Article 2, discriminatory or racist demonstrations), arguing that racism was an implicit element of fascist ideology.

The relationship between these two offences remained unclear: was the Mancini Law subsidiary to the Scelba Law or were they independent of each other, meaning each had a different scope of application? This legal issue was resolved on January 18th 2024 by the en banc session of the Corte di Cassazione with reference to a case bearing the same dynamics of the gathering in Acca Larentia.

The Court of Appeals in Milan convicted some individuals under the Mancino Law. The *en banc*session overturned the verdict, specifying in the provisional information two concepts: first, concerning the Roman salute, the applicable offense is the promotion of fascism (Article 5 of the Scelba Law), and not (only) the promotion of discriminatory and racist ideas (Article 2 of the Mancino Law); second, the two offences are independent of each other without one overriding the other.

This decision does not represent an exoneration of the neo-fascists, as some provocatively claimed, but rather that they can be prosecuted for two offences, rather than one. Conversely, the judges clarify the substantive and structural core of the Italian democratic value system: what is being stated is that praising fascism and spreading discrimination are attitudes that are distinctly unconstitutional.

The foregoing considerations help to establish some lines of differentiation and similarities with the German case. A first point of convergence may occur in the 2024 decision of the BVerfG on blocking the funding of the neo-Nazi party *Die Heimat,* based on the party's continuous and overt discriminatory attitude towards those who are not considered members of the people (*Volksangehörige*), in blatant violation of the principles of human dignity and democracy. It is true that these are partly different scenarios (dissemination of extremist ideas on the one hand, and unconstitutional political association on the other). They do, however, share the belief that the violation of the democratic principle is manifested precisely through the denial of citizenship and fair participation in the decision-making process of immigrants who become Germans.

The comparison with the German case is particularly interesting with regard to the offence of disseminating extremist ideas itself: the legal framework in Italy is quite similar to the one in Sections 86 and 86a of the German Criminal Code towards the use of signs and symbols considered unconstitutional. However, two differences persist: First, in Germany, the prohibitions do not only apply to Nazi-fascist symbolism but are extended to all unconstitutional organizations such as terrorist, communist, Islamist, Russian militarist groups, etc. Second, unlike in Italy, even the mere trade of material containing symbols of unconstitutional organizations is banned.

Conclusion

Restrictions on political associations or individuals that "celebrate" the dissolved national fascist party (the very party that existed between 1921 and 1943) are in line

with the XII Transitory and Final Provision. Nevertheless, in practice, these tools have not found a wide and clear use. For instance, is it legitimate to ban formal parties? The answer is not clear.

Fascism has become a word that carries various meanings. Inflationary use of the term can lead to a semantic shift that may actually result in ambiguity or, at least, impair our focus and ability to recognize real forms of fascism when they arise. In this respect, Italy is not fully equipped to defend itself against extremist ideologies other than literal “fascism”: given its limited framework, the use of the term “fascism” can sometimes be inappropriate and other times ineffective. On top of that, Italy is also afflicted by a “judicial policymaking” issue: when faced with cases bearing a certain ambiguity level, the degree of militancy of the system is left to the decision of judges, based on their personal interpretation of the conditions and limits of the two laws against unconstitutional ideologies. The very existence of these provisions demonstrates that Italy is a militant democracy, but their ambiguity makes it a limping one.

A final, brief consideration of the perspectives. It is true that extreme right is arising in Europe. However, the Acca Larentia episode should not worry too much: Italy is a noisy and vibrant democracy and there is no danger that fascism might appear just around the corner. Nevertheless, the real danger requires attentive supervision from public institutions and societies as a whole: that some extremist ideas, if tolerated beyond measure, may regain strength and legitimacy on the political stage, normalizing the abnormal and finally slowly jeopardizing the democratic debate.

References

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- Italian Constitutional Court, decision n. 1/1957 and n. 74/1958 and, ex multis, Corte di Cassazione, decision n. 38686/23.
