AN INTRODUCTION TO THE ITALIAN CONSTITUTIONAL COURT

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PREFACE

Last spring I prepared a short paper which I called "An Introduction to the Italian Constitutional Court." In it I examined the Court--very tentatively--from a number of viewpoints. At the time I looked forward to a summer of research on the Court in Italy; and I hoped that the thesis I would write on the Court this year would have none of the tentativeness of that first effort.

As you can see from the title, this paper is still an introduction, and as you will discover soon it is still tentative. Writing a senior thesis about the Italian Constitutional Court is not as absurdly ambitious as writing one all about the United States Supreme Court; but it is still too broad a subject to allow much depth. I have always realized this, but it has seemed to me impossible to study one aspect of the Constitutional Court in detail without knowing a certain amount about it in general.

There is very little written about the Italian Constitutional Court in English. One could certainly read it all in an afternoon. Some of what there is was written after the adoption of the postwar Italian Constitution but before the Court actually began its work in 1956; most of the rest was written

shortly after 1956; little has appeared since 1960.

This would not be so bad if there were a vast and valuable literature in Italian. In a sense there is: if you glance through the card catalog in the National Library in Rome you will find hundreds of texts on constitutional law. Constitutional law in Italy, however, is not the study of cases but an abstract exegesis of the Constitution.

Nor have Italian political scientists written much about the Court. For one thing, all the social sciences are far less popular in Italy than in the United States, so that much less is written in them relative to other disciplines. Also, in the social sciences, Italy--and indeed all Europe--is well behind America. Finally, the myth of the judge as automaton, as disinterested finder of the law, is probably stronger today in Italy than in America. To study a court as a political body still seems to many Italians almost profane; and this attitude surely inhibits studies of the Constitutional Court by both scholars and journalists.

All this is meant to explain the general and introductory nature of this paper. I have attempted to look at the Court from a number of angles. Chapter I merely explains how the Court came to be; Chapter II portrays the Court, first, as a legal institution and, second, as an actual functioning body; and chapter III

examines the backgrounds and characteristics of the justices. In Chapter IV I have recounted the struggles which have taken place among the political parties when Parliament has attempted to elect its five justices to the Court. The purpose of this account is to elucidate what seems to me one of the most interesting questions, as well as one of the least approachable, concerning the Court, i.e., its political nature and role. Chapter V examines all the Court's decisions which bear on questions of Church and State. I chose to investigate the Court's work in this area because it is important, because it has probably been the most controversial, and because it is the area in which the clash of interest groups can be observed most clearly. Chapter VI describes the distinctive "style" the Court has developed and speculates on the role the Court can and will play in governing Italy in the future.

I would very much like to thank the McConnell Foundation for awarding me a scholarship to do research for this paper in Italy last summer. And I owe many thanks to a number of Italians who aided a sometimes confused American student in the August heat: I should especially mention Professor Salvatore Messina, president of the Centro di Studi Giuridici e Sociali in Rome; Professor Giuseppe Di Federico of the Political Science Faculty of the University of Bologna; and Professor Antonio La Pergola of the Faculty of Law of the University of Bologna. This fall,

Dr. Giuseppe Cardillo and the staff of the Instituto Italiano di Cultura of New York helped me enormously in locating biographical information about the justices.

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A Note on Abbreviations

Throughout this paper I have used the Italian abbreviations for the various political parties. Below are the abbreviations used and the parties they stand for:

Christian Democrats (DC), Partito Democrazia Cristiana.

Communist Party (PCI), Partito Communista Italiano.

Socialist Party (PSI), Partito Socialista Italiano.

Liberal Party (PLI), Partito Liberale Italiano.

Social Democrats (PSDI), Partito Socialista Democratico Italiano. Joined with the PSI in the mid-sixties to form PSU (Unitarian Socialist Party: Partito Socialista Unitario). The former PSI and PSDI elements split in 1969; the PSI reverted to its old name, and the former-PSDI faction retained the name PSU.

Italian Social Movement (MSI), Movimento Sociale Italiano, the neo-fascists.

Socialist Party of Proletarian Unity (PSIUP), Partito Socialista Italiano di Unità Proletaria.

Republican Party (PRI), Partito Repubblicano Italiano.

Monarchists. Since the Monarchist Party has changed its official name and initials several times, I have not used abbreviations for it.

I. ORIGIN AND ESTABLISHMENT

The first Constitution of modern Italy was the Albertine Statuto, granted in 1848 by Carlo Alberto, to his kingdom of Piedmont and Sardinia. When Italy was unified under his son, Vittorio Emmanuele II, the Statuto became the basic law of the nation and remained in force until 1948.

Modeled on the liberal Belgian Constitution of 1831--which in turn had been inspired by French democratic theory--the Statuto vested all legislative power in the elected representatives of the people. No court could refuse to enforce a law or strike it down as unconstitutional. Such an attempt would have been considered a serious violation of the principle of separation of powers. Moreover, the Statuto was a "flexible" constitution, i.e., it could be overriden by a simple act of Parliament or a royal decree.[1]

It is certainly not surprising that judicial review found no place in the Statuto, for it was not a popular idea on the continent of Europe in the nineteenth century and the first half of the twentieth. Nevertheless, it did have a few advocates. Jalabert, Jèze, and Saleilles in France, and Buehler and Nawiatsky in German argued for a kind of judicial review similar to the American. Hariou, Duguit, Thaller, Goldschmidt, and von Hippel advocated judicial review with natural law as the standard against which to measure positive law. On the whole, the idea of judicial review was

considerably more popular in Germany than in France or Italy.[2]

The Frankfurt Assembly of 1848 gave Germany a supreme court with the power of judicial review, but with the founding of the German Empire, it was abandoned. And although the constitution of the Weimar Republic contained no provision for the exercise of judicial review, some German courts claimed it during the twenties and thirties.[3]

The first important European experiment with judicial review was instituted by the Austrian Constitution of 1920. Hans Kelsen, who played an important role in writing the Constitution, widely publicized Austria's experience.[4]

Before 1920, Austrian courts, like those in most European countries, including Italy, were able to pass on only the "extrinsic constitutionality" of legislative measures, i.e., they could refuse to apply them only if the procedure of enactment had been illegal. The 1920 Constitution, however, created a Constitutional Court (Verfassungsgerichtshof) with the power to annul statutes or administrative orders which violated substantive provisions of the Constitution. The Court was a special organ outside the ordinary judiciary. The justices were elected by Parliament: the lower house (Bundesrat) elected half and the upper house (Nationalrat) elected half.

Cases reached the Austrian Constitutional Court in two ways. If the case involved a private party, a constitutional

question could be raised either by one of the parties or by the court during the course of proceedings before the Supreme Court (Oberster Gerichtshof) or the highest administrative court (Verwaltungs-gerichtshof). The case was then sent to the Constitutional Court, which would rule on the constitutional question only and remand the case to the court in which the question had been raised. In addition, the federal government could make direct application to the Court for the annulment of a state law, and a state government could ask for annulment of a federal law. The Court was also empowered to give advisory opinions on questions of jurisdiction between the federal government and a state.

Kelsen had proposed two other means by which constitutional questions could be raised: 1. by a general prosecutor who could raise constitutional questions at any time and without reference to any case, and 2. by outvoted minorities in Parliament who wished to test the constitutionality of statutes passed by the majority. Neither of these provisions was included in the 1920 Constitution.

The Austrian Constitutional Court functioned effectively for only a few years. In 1929 the election of the justices by Parliament was replaced by appointment by the administration, and the Court was emasculated.

After World War II a number of forces combined to make judicial review very popular in Europe. In the former Axis nations, especially Germany, one force was clearly the enthusiasm

of the American military government. This was much less important in Italy. Second, many democrats in Italy and Germany saw judicial review as a way of preventing future Mossolinis and Hitlers from destroying liberty within the shell of a democratic constitution. Finally, many Europeans, especially the Christian Democrats, who emerged as the dominant political force in Italy, Germany, and France, blamed the school of legal positivism, which had been in vogue earlier in the century, for facilitating the rise of fascism. Interest in natural law, and with it judicial review, grew. The Christian Democrats succeeded in instituting effective constitutional courts in Italy and Germany. In France, they were thwarted by the Socialists, who were obsessed with Franklin Roosevelt's struggles with the Supreme Court over New Deal legislation.[5]

In Italy in 1946 a Constituent Assembly was elected to draft a new Constitution. The Christian Democrats obtained about 35 per cent of the seats; the Socialists won 20 per cent; the Communists 19 per cent; the Liberals 6 per cent; and a neo-fascist group called "The Common Man" (Uomo Qualunque) won 5 per cent. Because of its huge size--556 representatives--the Assembly decided to delegate a committee of 75, on which each party would be represented proportionally, to prepare a draft of the Constitution. This committee divided itself into three subcommittees: one to draft the part of the Constitution dealing with the rights and

duties of citizens; one to draft the sections on the structure of the government; and one to draft the provisions on social and economic rights and duties. The second subcommittee--on the structure of the government--was subdivided into one subcommittee on the executive and one on the judiciary. Chaired by Giovanni Conti, a member of the PRI, the subcommittee on the judiciary was composed of 17 members, including the famous legal scholar, Piero Calamandrei; future prime minister and President of the Republic Giovanni Leone; and two future Constitutional Court justices, Gaspare Ambrosini and Giuseppe Cappi.[6]

The Committee of 75 completed the first draft of the Constitution before the end of 1946. Articles 126 to 129 provided for a Constitutional Court which resembled the Court created by the Austrian Constitution of 1920. The justices were to serve for nine years. One-half were to be chosen from among the judges of the ordinary judiciary; one quarter were to be lawyers or law professors; and one quarter were to be selected from among citizens eligible for public office. The number of justices and the bodies who were to appoint them were left unspecified.[7]

The 1946 draft was a compromise in which all the parties had participated. In 1947, as the Cold War deepened, the parties of the center became increasingly suspicious of the Communists. In May, yielding to intense pressure from Washington and the Vatican, DeGasperi expelled the Communists from his coalition.

The 1947 draft of the Constitution reflected the nation's changed political climate. Many of the economic rights were deleted, the political rights of the citizen were strengthened, the executive's power was increased, and the independence of the Constitutional Court was made more secure. The Christian Democrats' only defeat was the deletion of a provision of the Constitution which had guaranteed the indissolubility of marriage.[8]

With regard to the Constitutional Court, four changes were made. The justices' term was increased from nine years to twelve. The size of the Court was fixed at 15. The appointing bodies were specified: Parliament was to elect five justices; the highest ordinary and administrative courts were to elect five; and the President of Republic was to elect five. And citizens who were eligible for public office but who were not lawyers, magistrates, or law professors were made ineligible to sit on the Court.[9]

The provisions of the 1947 draft of the Constitution were not amended by the Assembly. The new Constitution passed the assembly by the amazing vote of 453 to 62.

The Court could not begin its work without extensive enabling legislation by Parliament. And the First Legislature, elected in 1948, moved very slowly and irresolutely in providing this. Anti-communist feeling was at its peak in Italy and the Christian Democrats were not particularly anxious to create a body which might annul many of the police laws which had been enacted

under Mussolini and which were now being used effectively against Communist disruptions. Not until the end of its term in 1953 did Parliament enact the last of the enabling legislation.[10]

The magistrates promptly elected five of the justices, but Parliament deadlocked and was unable to elect its five justices until December 1955. Once elected, the justices spent the rest of the winter establishing internal rules of procedure. As president of the Court, they elected Enrico DeNicola, Italy's provisional President from 1946 to 1948. The Court began to accept cases in the spring; on June 5, 1956, it handed down its first decision.

1. See Roy P. Franchino, "Some Observations on the Italian Constitutional System: Historical Development, General Characteristics, and Individual Rights," 9 Journal of Public Law 24, 24-26 (1960).

2. See Gottfried Dietze, "Judicial Review in Europe," 55 Michigan Law Review 539 (1957); and Dietze, "America and Europe--Decline and Emergence of Judicial Review," 44 Virginia Law Review 1233 (1958).

3. Carl J. Friedrich, The Impact of American Constitutionalism Abroad (Boston: Boston University Press, 1967), pp. 81-82. Also see Friedrich, "The Issue of Judicial Review in Germany," 43 Political Science Quarterly 188 (1928).

4. Kelsen's "La garantie jurisdictionelle de la constitution," 35 Revue du Droit Public et de la Science Politique en France et a l'Etranger 197 (1928) was very influential in Italy and throughout Europe. After coming to the United States he wrote "Judicial Review of Legislation--A Comparative Study of the Austrian and the American Constitution," 4 The Journal of Politics 183 (1942).

   On the 1920 Austrian Constitution also see J. A. C. Grant, "Judicial Review of Legislation under the Austrian Constitution of 1920," 28 The American Political Science Review 670 (1934).

5. Friedrich, The Impact of American Constitutionalism Abroad, p. 262.

6. Vittorio Falzone, Filippo Palermo, Francesco Cosentino, La Costituzione della Repubblica Italiana illustrata con i lavori preparatori (Roma: Carlo Colombo, 1948), pp. 9-12.

7. Mario Einaudi, "The Constitution of the Italian Republic," 17 The American Political Science Review 661, 662-664 (1948).

8. Ibid.

9. Ibid.

10. David G. Farrelly, "The Italian Constitutional Court," 1 Italian Quarterly 50 (1957); Gaspare Ambrosini, "La Corte costituzionale (L'apporto decisivo della sua giurisprudenza per la chiarificazione e lo svolgimento dell'ordinamento costituzionale," Autonomie e garanzie costituzionali (Firenze: Vallechi Editore, 1969) p. 16.

11. THE COURT AS AN INSTITUTION

Articles 134 to 137 of the Italian Constitution set out the general framework for the Constitutional Court. The details of organization and administration were provided by three laws passed by Parliament: Legge costituzionale 9 febbraio 1948, n.1; Legge costituzionale 11 marzo 1953, n. 1; and Legge 11 marzo 1953, n. 87.[1] In addition the Court itself promulgated rules of procedure before beginning to accept cases in 1956.[2]

The Constitutional Court is composed of 15 justices. Five are appointed by the President of the Republic. Five are elected by the two houses of Parliament sitting in joint session.[3] For election by Parliament a vote of three-fifths of the members of the two houses is required on the first two ballots and approval by three-fifths of those voting is needed on all subsequent ballots.[4] Five justices are elected by "the highest ordinary and administrative courts." Specifically, the Court of Cassation, Italy's highest ordinary court, elects three justices. The Court of Accounts, an independent financial and administrative agency which acts as a check on the executive, elects one justice. And the Council of State, an independent agency which oversees the drafting of bills and decrees, elects one justice.[5]

Men selected for the Court by the President or by Parliament must be judges or retired judges of the Court of Cassation,

Court of Accounts, or Council of State, university professors of law, or lawyers with 20 years or more of practice.[6] Those selected by "the highest ordinary and administrative courts" must be members or retired members of the court which elects them.[7]

Appointment to the Court is for a twelve-year term, and the justices are not immediately eligible for reappointment.[8]

Various safeguards have been enacted to protect the independence of the justices.[4] The salaries of the justices must always be as high as or higher than those of the highest-ranking members of the ordinary judiciary.[9] The Court itself decides all controversies concerning the election or appointment of its justices.[10] No justice can be removed except by a vote of two-thirds of the members of the Court, and the only grounds for removal are physical incapacity or grave deficiencies in work.[11] Constitutional Court justices cannot be arrested without the Court's authorization except for certain very serious crimes.[12]

In addition, the justices are forbidden while on the Court to hold any other job or position which carries a salary. They may not serve on committees within the Magistracy, occupy a university chair, stand for election, or take part in any political activity.[13]

The president of the Court is elected by the justices themselves. His term is four years, and he is eligible for reelection as soon as his term expires.[14] In practice, however, only one president has served a complete four-year term, and none has been reelected. When the Court was organized in 1956, 79 year-old Enrico DeNicola, a former President of the Republic, was the obvious choice for first president of the Court. After DeNicola resigned angrily and somewhat mysteriously in 1958, the justices adopted the rule that the oldest justice should be elected president in order to prevent the election from becoming a divisive event. Thus Gaetano Azzariti, then 77, was chosen to replace DeNicola; and when Azzariti retired in 1961, 79 year-old Giuseppe Cappi succeeded him. Cappi stepped down in 1963, and the justices elected as president Gaspare Ambrosini, the oldest of the original 15 justices still on the Court. Ambrosini served the full four-year term, leaving the presidency and the Court in 1967. By the beginning of 1958, all the original 15 justices had left the Court, and the justices decided to substitute seniority on the Court for age as the criterion for selection of the president. At that time, however, the two men with the most seniority, Antonio Manca and Biagio Petrocelli, had only three months left of their terms on the Court. They therefore asked not to be nominated, and Aldo Sandulli, who ranked third in seniority, was

elected.[15] Sandulli, then 53, served as president for only about a year before his term on the Court expired in 1969. Giuseppe Branca, 62, was senior man on the Court in 1969; he was elected to replace Sandulli and served as president until his twelve-year term ran out in July 1971. After waiting nearly five months for Parliament to fill Branca's seat, the justices decided in late November not to wait any longer and proceeded to elect as president Giuseppe Chiarelli. Chiarelli was third in seniority, but the two men with greater seniority, Giuseppe Fragoli and Costantino Mortati, were scheduled to leave the Court during the summer of 1972.[16] Chiarelli's term expires in 1973.

By deciding to elect its presidents on the basis of age or of seniority, the Court has avoided potentially divisive squabbles, but it has also paid a price. Selection on the basis of age resulted in very old presidents; the average age at election of the three men chosen on this basis was about 77. The custom of selecting the president on the basis of seniority has resulted in the selection of men near the end of their twelve-year terms on the Court; the average term as president for the three men chosen on this basis is less than two years.

The Constitutional Court is charged with four tasks: (1) to judge the constitutionality of laws and acts of the national and regional governments; (2) to resolve conflicts of jurisdiction

between the national government and one or more regions; (3) to settle juridictional disputes between regions; and (4) to act as the court of impeachment when charges are made against the President, the Prime Minister, or a cabinet minister.[17]

The method by which a case reaches the Constitutional Court depends upon the parties involved. If the case involves one or more private parties, there are two possible ways. First, one of the parties may question the constitutionality of a statute or an administrative action during the course of ordinary litigation. Unless the trial judge (a) can render a judgment in the case which is independent of the constitutional issue or (b) decides that the issue of constitutionality is manifestly unfounded (the concept of manifesta infondatezza), he must immediately transfer the case to the Constitutional Court. He must also prepare a statement for the Constitutional Court explaining the constitutional issue raised, how it came up during the litigation, and why he decided to transfer the case.[18]

If the trial judge decides that the constitutional issue raised is manifestly unfounded, he must explain his decision. His decision, however, cannot be appealed.[19] Some Italian Courts -- especially high ones -- appear to have used manifesta infondatezza rather ruthlessly in order to cut off constitutional challenges. In 1961 the Constitutional Court held that the constitutional

challenges to an important law which had been raised during litigation in a pretore (a court of limited jurisdiction in which a young judge usually presides) were correct and declared the law unconstitutional. Similar challenges had previously been declared manifestly unfounded by the Court of Cassation and at least five tribunals and courts of appeals. In a study of manifesta infondatezza, Piero Calamandrei pointed out a case in which a court produced a long, closely reasoned decision to show that a particular constitutional challenge was manifestly unfounded. If the challenge was obviously groundless, Calamandrei asked, why the long decision?[20]

A number of justices and other important commentators have expressed serious concern about the ability of the ordinary courts to cut off potentially important constitutional challenges through the use of manifesta infondatezza. Vezio Crisafulli felt the Court had pursued the right solution to the problem in interpreting as liberally as possible the rules for raising constitutional issues before the Court.[21] Nicola Jaeger approved of the Court's decisions in this area, but he did not think they sufficed. He suggested that perhaps it would be wise to reexamine the idea proposed in the Constituent Assembly but never accepted of appointing an impartial public official who either on his

own or on the petition of a private party could raise a constitutional question before the Court.[22]

The trial judge can raise the issue of constitutionality himself during the trial and send the case to the Constitutional Court. In that event, he must prepare a statement for the Constitutional Court explaining the constitutional issue he believes to be raised. When the Constitutional Court has settled the constitutional issue, the case is remanded to the original court.

When the dispute is between two governmental units, the procedure is completely different. The State can challenge the constitutionality of a regional law within 15 days after the President of the Council of Ministers has been notified of its passage.[23] A region can challenge the constitutionality of a national law within 15 days of its publication in the Gazzetta Ufficiale della Republica Italiana, the official daily bulletin of the national government.[24] One region can challenge another region's law within 60 days after its publication.[25] If the State claims that a region has passed a law which invades an area reserved to the State by the Constitution, or if a region claims that a law passed by the State or by another jurisdiction invades its sphere, the aggrieved governmental unit can challenge the law within 60 days of its passage.[26] When the validity of

a regional law is questioned in Parliament, the region can ask for a court judgment sustaining its law.[27] All these disputes go directly to the Constitutional Court. In each instance, the governmental unit initiating the action must submit a statement to the Court setting forth the facts which gave rise to the controversy and the sphere of authority or section of the Constitution allegedly invaded. In the case of jurisdictional disputes, the Court has the authority to suspend the operation of challenged laws until the justices have resolved the dispute.[28]

No sooner than 20 days after the Constitutional Court has received a case, either by transfer from an ordinary court or by direct application of the national government or a regional government, the president of the Court appoints one justice as reporter for the case.[29] The reporter reviews the record and collects new evidence. He can call for parliamentary records,

take testimony, and receive expert evidence.[30] At this stage in the proceeding, the parties to the original dispute can submit pertinent materials to the Court.[31] The national government (represented by the State's Attorneys Office, the Avvocatura dello Stato) may decide to intervene and to submit pertinent materials.[32]

Within twenty days of his appointment, the reporter submits his findings to the president of the Court.[33] His report must contain: (1) a statement of the facts of the case; (2) the contents of the order of transfer if one was involved; (3) the arguments adduced by each party; (4) any other relevant and important information he discovered; and (5) his recommendations on how the case should be decided.[34] After the justices have read this report and discussed the issues with the reporter, they vote either to meet in council or to hold a public hearing. The president decides at this point, either on his initiative or upon petition by one of the parties, whether any pending cases of a similar nature can be resolved at the same time.[35]

If the Court decides to meet in council, it does so to dismiss the case either because the issue has already been decided in a previous case, because neither side has advanced convincing arguments for or against the challenged law or decree, or because the change of unconstitutionality is manifestly unfounded. If the Court dismisses a case at this stage, it hands down only a brief

statement explaining its reasons for doing so. (This brief statement is called an ordinanza).[36]

If a public hearing is held, at least eleven justices must attend.[37] The reporter speaks first followed by counsel for the two parties.[38] After the hearing the Court meets to decide the case. The decision is by an absolute majority vote. The reporter votes first, and the other justices vote according to their ages starting with the youngest. The president votes last.[39] In the event of a tie, the president's side wins.[40] The vote is never revealed, and all the justices sign the opinion. The president selects one justice to write the opinion.[41] The name of the justice selected is not revealed to the public, but it is suspected that the reporter is usually chosen. If the case has turned on a procedural issue, the Court will hand down an ordinanza; otherwise it will hand down a sentenza, a longer statement which argues the disputed points in greater detail. Even the sentenze of the Italian Court are, however, generally only three or four pages long. The outcome of the case is published in the Gazzetta Ufficiale. When a law is held unconstitutional, it becomes officially void on the day after publication. Decisions of the Constitutional Court, however, have no retroactive effect. The ordinanze and sentenze of the Court

are published in the Raccolta Ufficiale delle Sentenze e Ordinanze della Corte Costituzionale under the supervision of one of the justices.

All costs incurred by the private parties in testing the constitutionality of a law or decree are paid by the Court.[42]

In addition to deciding questions of constitutionality and settling jurisdictional disputes, the Constitutional Court tries cases of impeachment against the President, the Prime Minister, and cabinet ministers. Parliament is empowered to impeach these officials by an absolute majority vote of its members in joint session.[43] For cases of impeachment, the regular fifteen justices are joined by sixteen aggregate justices. These aggregate justices are elected by Parliament at the beginning of each legislative term; the legal qualifications for an aggregate justice are the same as those for the Senate.[44]

When a case of impeachment reaches the Court, the president of the Court appoints one justice to conduct a preliminary investigation. If the President of the Republic is impeached, the president of the Court must conduct the investigation.[45]

When the investigation is concluded, the president sets the date of the trial.[46] On the day of the trial and before the proceedings begin, a judge may ask to be allowed to abstain from hearing the case for a specific reason. The prosecution

or the defense may oppose the plea. Likewise, the prosecution or the defense may challenge any judge for cause. The Court decides immediately all petitions for abstention or disqualification.[47] Unless he is disqualified or allowed to abstain, each regular and aggregate justice is expected to be present at the trial every day. Twenty-one justices constitute a quorum, and the aggregate justices must be in the majority.[48] Conviction on each charge requires a simple majority vote. If the vote is tied, the accused is acquitted.[49]

* * *

It is difficult to learn much about the dynamics of decision-making on the Court. The president of the Court is almost certainly more influential than the other justices, but how much more? By law, he chooses the reporter for each case, presides at the public hearing and when the Court sits in council, decides whether certain cases can be heard together, and votes last. On the other hand, by custom, he is chosen not for intellectual or personal qualities, but for seniority.

The reporter is probably quite influential. Through his summary of the facts and arguments of the case he may be able to

make the other justices see the case in his terms. He studies the case more thoroughly than his colleagues, and this may give him an advantage in debate, especially on complicated cases. The importance of the president is closely related to the importance of the reporter. If the reporter is usually able to persuade the Court, the president's authority to choose the reporter is quite important.

On the German Constitutional Court, where the reporter performs about the same function as on the Italian Court, each justice tends to serve as reporter for cases in a certain area.[50] Some specialization of this sort has occurred on the Italian Constitutional Court, too. For example Giovanni Cassandro served as reporter for most of the cases concerning the regions during his term on the Court.[51]

There is no evidence to suggest that some justices on the Italian Constitutional Court are deliberately chosen as reporter more often than others or that some are shunned. The justices serve as reporter about the same number of times each year. (See Table 2.1)

The short, impersonal, and unsigned opinions of the Italian Court offer little insight into that body's internal workings. And few justices have been willing to speak about such matters off the bench. The most explicit remarks by a justice about

decision-making on the Court were made in December 1970 by Giuseppe Branca at the press conference traditionally held by the president at the end of the year -- and Branca's remarks are explicit only in comparison with those of previous presidents and only when one remembers how indirect Italian public men can be when they wish. His comments are unusual and amusing enough to describe and quote at some length.[52]

At one point in his talk, Branca, who spoke without a prepared text, noted with approval how much bolder and more liberal the Court had become during the past two years, and he asked rhetorically what had caused this change. Part of the explanation, he said, was the change of a few justices on the Court. Since decisions are by majority vote, a few substitutions can make quite a difference. And "it is not necessary for a liberal or ultraliberal justice to replace a conservative; it is enough for the conservative to be replaced by a man whose conservatism is less political and less stern, a man who is more humane and more sensitive to new social outlooks." Branca emphasized, however, that changes in personnel were only a partial explanation.

Some have suggested, Branca continued, that the two new presidents, i.e., Sandulli and Branca himself, were the cause of the change, but that notion is founded on the illusion that decisions on the Court are made by only the president and the reporter.

Instead, all fifteen justices participate vigorously in deciding the cases. "None of you journalists," he said puckishly, "has gotten the idea of eavesdropping when the Constitutional Court meets, but if you did, you would hear loud shouts, because the problems we discuss produce high emotions and each man defends his position vocally." He continued,

But I do not deny that the president's temperament can to some extent influence the direction of the Court. None of the previous presidents will object if I say that the recent changes were possible because the outlook of the two most recent presidents was, because of their ages, a little bit more modern than that of their predecessors -- because of their age, I say. But, I repeat, their outlook, which often coincides with that of their colleagues, is not the determining factor. The president's real power -- this is the last week before Christmas; it is a week of confession; and here we confess to you, our confessors -- the president's real power is in determining the role of cases transferred to the Court. It can be important to discuss one case rather than another and it can be important to assign one justice as reporter rather than another. That is the power of the president; to use a sporting term, the president 'sets the pace.' On a track or a cycle course there is always one person who goes ahead and leads the pack. Now, setting the pace

doesn't make that person win, but by speeding up or slowing down, he can cause the victory or the defeat of another."

Branca went on to say that the principal reason for the Court's change of direction in recent years was not new justices or new presidents but a profound change in public opinion on many issues.

1. Legge costituzionale 9 febbraio 1948, n. 1 can be found in Gazzetta Ufficiale della Repubblica Italiana, 20 febbraio 1948, n. 43, p. 574. Legge costituzionale 11 marzo 1953, n. 1 can be found in Gazzetta Ufficiale, 14 marzo 1953, n. 62, pp. 982-983. Legge 11 marzo 1953, n. 87 is in Gazzetta Ufficiale, 14 marzo 1953, n. 62, pp. 984-989. I will cite these respectively as l.c. 9-2-48, l.c. 11-3-53; and l. 11-3-53.

   A "constitutional law" (legge costituzionale), as provided for in Article 138 of the Constitutional, is considered a part of the Constitution. The procedure for passing a constitutional law which implements a general provision of the Constitution is the same as procedure for amending the Constitution. In either case, the bill must be approved by each Chamber in two successive debates within an interval of not less than three months. For the final vote it must be approved by an absolute majority of the members of each Chamber.

   An ordinary law (legge) must simply be passed by a majority in both Chambers.

2. The Court's internal rules, called "Norme integrativi per i giudizii davanti alla Corte costituzionale," can be found in Gazzetta Ufficiale,24 marzo 1956, n. 71, pp. 1045-1050. I will cite these rules as N.i.

   David G. Farrelly and Stanley H. Chan, "Italy's Constitutional Court: Procedural Aspects," 6 American Journal of Comparative Law 314 (1957) is a good summary of all the important laws pertaining to the Court, i.e., articles 134 to 137 of the Constitution and l.c. 9-2-48, l.c. 11-3-53, l. 11-3-53, and N.i.

3. Constitution, art. 135.

4. L. 11-3-53, art. 3.

5. L. 11-3-53, art. 2.

6. Constitution, art. 135.

7. L. 11-3-53, art. 2.

8. Constitution, art. 135

9. L.c. 11-3-53, art. 6.

10. L.c. 11-3-53, art. 3.

11. L.c. 11-3-53, art. 7.

12. L.c. 11-3-53, art. 11.

13. L. 11-3-53, art. 7 and 8.

14. L. 11-3-53, art. 6.

15. "Sandulli presidente della Corte costituzionale," Corriere della Sera, January 17, 1968, p. 5.

16. "Chiarelli presidente della Corte costituzionale," Corriere della Sera, November 11, 1971, p.1.

17. Constitution, art. 134.

18. L. 11-3-53, art. 23.

19. L. 11-3-53, art. 24.

20. Mauro Cappelletti, John Henry Merryman, and Joseph M. Perillo, The Italian Legal System (Stanford, California: Stanford University Press, 1967), p. 78 n.

21. Vezio Crisafulli, "Le funzioni della corte costituzionale nella dinamica del sistema: esperienze e prospetlive," La giustizia costituzionale (Firenze: Vallecchi Editore, 1966), p. 91.

22. Nicola Jaeger, "Rilievi suggeriti da otto anni di esperienza della Corte costituzionale," Conversazioni tenute negli anni 1962-1964, Centro Italiano di Studi Amministrativi, quaderno, n.11.

23. L. 11-3-53, art. 31.

24. L. 11-3-53, art. 32.

25. L. 11-3-53, art. 33.

26. L. 11-3-53, art. 39.

27. L. 11-3-53, art. 35

28. L. 11-3-53, art. 40; N.i., art. 28.

29. N.i., art. 7.

30. N.i., art. 13.

31. N.i., art. 10.

32. N.i., art. 4.

33. N.i., art. 8.

34. Farrelly and Chan, op. cit., p. 321.

35. N.i., art. 15.

36. N.i., art. 9.

37. L. 11-3-53, art. 16.

38. N.i., art. 17.

39. N.i., art. 18.

40. L. 11-3-53, art. 16.

41. N.i., art. 18.

42. Farrelly and Chan, op. cit., p. 324.

43. L.c. 11-3-53, art. 12.

44. Constitution, art. 135.

45. L. 11-3-53, art. 44.

46. L. 11-3-53, art. 46.

47. L. 11-3-53, art. 47.

48. L. 11-3-53, art. 48.

49. L. 11-3-53, art. 49.

50. Donald Kommers, "The Federal Constitutional Court in West Germany," in Joel Grossman and Joseph Tanenhaus (eds.), Frontiers of Judicial Research (New York: Wiley, 1969).

51. Stefano Rodota, "La svolta 'politica' della Corte costituzionale," Politica del Diritto, vol. 1, no. 1, July 1970, p. 38.

52. Branca's speech is published as "Un anno di attivita della Corte costituzionale" in Politica del diritto, vol. 2, no. 1, February 1971, pp. 31-47. The remarks discussed here are on pp. 34-35.

TABLE 2.1

Number of times justices served as reporter in four years.

A. 1957

1.	De Nicola[1]	0
2.	Jaeger	11
3.	Castelli Avolio	9
4.	Battaglini	9
5.	Cassandro	8
6.	Manca	8
7.	Cosatti	8
8.	Petrocelli	8
9.	Gabrieli	8
10.	Perassi	6
11.	Bracci	6
12.	Papaldo	6
13.	Ambrosini	5
14.	Cappi	5
15.	Azzariti[2]	4
16.	Sandulli[3]	1

B. 1966

1.	Ambrosini[4]	0
2.	Chiarelli	14
3.	Branca	13
4.	Benedetti	12
5.	Bonifacio	12
6.	Manca	12
7.	Sandulli	12
8.	Mortati	11
9.	Verzi	11
10.	Cassandro	10
11.	Jaeger	9
12.	Fragali	8
13.	Petrocelli	5
14.	Papaldo	5
15.	Castelli Avolio[5]	3

C. 1967

1.	Ambrosini	0[4]
2.	Papaldo	17
3.	Mortati	16
4.	Chiarelli	15
5.	Fragali	13
6.	Manca	12
7.	Branca	12
8.	Sandulli	10
9.	Benedetti	10
10.	Oggioni	10
11.	Bonifacio	10
12.	Petrocelli	9
13.	Verzì	8
14.	Cassandro	8
15.	Jaeger	6

D. 1968

1.	Sandulli[4]	0
2.	Branca	16
3.	Bonifacio	15
4.	Chiarelli	12
5.	Benedetti	11
6.	Fragali	11
7.	Verzì	11
8.	De Marco	10
9.	Mortati	10
10.	Oggioni	9
11.	Rocchetti	9
12.	Trimarchi	8
13.	Capalozza	8
14.	Manca	
15.	Petrocelli[5]	3
16.	Crisafulli[3]	2

1. President; stepped down during term.
2. Served part of term as justice and part as president.
3. Joined Court during term.
4. President of Court.
5. Stepped down during term.

III. THE PERSONNEL OF THE COURT

This chapter is an attempt to draw a collective portrait of the men who have sat on the Italian Constitutional Court. It first examines five characteristics of all the justices: their regional ties, their age at appointment, the social class of their parents, their professions, and their participation in partisan politics. All these characteristics, probably, have a bearing on the judges' performance on the Court. Other characteristics which one might examine in a study of the justices of another country's Constitutional Court are irrelevant in Italy. The ethnic background of the justices, for instance, while significant in the United States, is unimportant in Italy, which is ethnically homogeneous to a high degree. (German-speaking Alto-Adige and French-speaking Val D'Aosta are very small and not very important. They have not had any justices on the Court and are unlikely to have any in the future.) In Germany, it might be important to know whether a justice was a Protestant or a Catholic, but in Italy if a justice is religious it can almost be assumed he is a Catholic. It is certainly not inconceivable for a Protestant or Jewish justice to be appointed, but, should it occur, it would not be an important event. In modern Italy, the important religious cleavage is not between Catholics and Protestants or between Christians and Jews but between clerical and laical elements. And it is not easy to determine exactly where a man stands on this issue. Party affiliation is one way. (See Table

3.7.) Unfortunately, biographical sketches in newspapers and entries in biographical dictionaries do not list men as "devout," "agnostic," or "atheistic."

Since justices on the Italian Constitutional Court are chosen by three different bodies, this chapter examines the characteristics or the justices selected by each of those bodies and attempts to relate the nature of the appointing body and its method of selection to the type of men picked.

* * *

The Characteristics of All the Justices

The Court has been dominated by Southerners. Men are classified in this chapter as Northerners or Southerners by their places of birth, and the South is defined in the traditional way, i.e., as the regions of Basilicata, Calabria, Capania, Molise, Puglia, Sardinia, and Sicily. These seven regions, which contain 37 per cent of the population, have had 72 per cent of the justices; the North, with 63 per cent of the population and most of the nation's industrial and commercial centers, has had only 28 per cent

of the justices. (See Table 3.1.) The two regions which have produced the most justices are Campania (7), which contains Naples, and Sicily (6). In contrast, Lombardy, which contains Milan (Italy's second largest city and home of Olivetti, Pirelli, and Montecatini) has had only two justices. Lazio, which contains Rome, has had only one. Piedmont, which contains Turin (home of Fiat); Emilia-Romagna, which contains Bologna; and Veneto, which contains Venice, have not had any. (See Table 3.2.)

Southerners have dominated the Court because they dominate the legal profession in Italy generally. Both economics and culture make the law a far more popular discipline among Southern students than among students from the North. For example, the University of Naples, the largest university in the South, each year produces about 12 per cent of the nation's college graduates but about 19 per cent of its law graduates. Palermo, the second largest Southern university, produces only about 5 per cent of Italy's college graduates overall but about 15 per cent of its law graduates. On the other hand, the University of Milan, which produces 11 per cent of the college graduates overall, produces only 6 per cent of the law graduates. Padua, which produces nearly 6 per cent of the college graduates, produces less than 2 per cent of the law graduates.[1] (See Table 3.3.) Although far less populous than the North, the South produces about one-half of the nation's graduates in law each year.[2] Furthermore, Southern law graduates perform

better in the concorsi (national competitions) necessary for entrance and advancement in the magistracy or as a law professor. (See Table 3.3.)[3]

The Constitutional Court justices have generally been rather old. Their average age at appointment, 63.2 years, is higher than that of the justices of any other constitutional court. The average in West Germany is 51, in the United States 53, in Japan 61, and in Ireland 61.[4] There is, however, a slight trend toward younger appointments to the Italian Court. Whereas the average age for the first 15 justices was 65.4 years, that of the last 17 was 61. In addition, most countries whose justices are appointed at a significantly younger age allow those justices to serve during good behavior (e.g., United States, Australia) or for a very long term (e.g., Canada prescribes a maximum term of 20 years). In most of the countries whose justices serve for short, fixed terms, the average age at appointment is not significantly lower than for the Italian justices. (See Table 3.4). At any given time, therefore, the Italian justices are not much older than other justices. In 1969, for example, the average age of the justices of the Supreme Court of the United States was 66; the average age of the Italian justices was 62.[5] On the whole, it seems unlikely that the age of the Italian justices causes them to differ much from constitutional court justices elsewhere.

Most of the justices of the Italian Constitutional Court appear to have come from middle class backgrounds. I was able to discover the occupation of the fathers of 22 of the 33 justices. Not

unexpectedly, the middle class professions are well represented: eight of the 22 were the sons of lawyers or magistrates, two of physicians, one of a university professor, and four of secondary school teachers or officials. The father of one justice, Jaeger, was a wealthy businessman; Castelli Avolio's father was a wealthy sculptor; and Gabrieli's father was a well-to-do farmer. For the rest, one justice was the son of a railroad station master, one of a clerk, and one of an Army fencing master. None were the sons of factory employees or laborers.

Of the 33 men appointed to the Constitutional Court, the vast majority--29--spent their careers as magistrates or professors of law. There have been more professors (15) than magistrates (14). Four justices were lawyers who were active in politics before appointment.

What explains the large number of magistrates and professors chosen? Constitutional legislation enacted by Parliament indirectly requires that one-third of the justices be magistrates. Article 135 of the Constitution provides that one-third of the seats on the Constitutional Court are to be filled by "the highest ordinary and administrative courts." Subsequent to this provision, Parliament prescribed that the Court of Cassation elect three justices from among its members or retired members and that the Court of Accounts and Council of State each elect one justice from among its members or retired members. Thus the justices elected

by the magistrates will always be magistrates too. Seven of the ten magistrates to sit on the Court were selected in this way; the other three were appointed by the President.

The large number of professors selected is not the result of a Constitutional or legal requirement. The President and the Parliament can select any lawyer with twenty years of experience as well as any magistrate or professor of law. To now, fourteen of their 21 choices have been professors. One explanation of this phenomenon which is occasionally offered is that in Italy's state of Parliamentary immobilismo, noncontroversial and relatively nonpartisan men have been sought. This explanation has little to recommend it. Many of the professors chosen had played major political roles. Lelio Basso, whose nomination to the Court was voted down in Parliament three times because of the adamant opposition of the DC, is a professor at the University of Rome. And men like Bracci, Cassandro, and Trimarchi were hardly nonpartisan figures.

The large number of law professors chosen is probably the product of the Italian Roman law culture. The legal scholar has always been the "hero" of the Roman law systems. The scholar presides over the doctrine, which is the most creative and dynamic aspect of the civil law. In comparison, the judge's function is viewed as mechanical. As a result, professorships of law are clearly the most prestigious legal positions in Italy (with the

exception now of seats on the Constitutional Court). As Merryman, Cappelletti, and Perillo observe in their study of the legal profession in Italy, "Among the most famous and successful practicing lawyers, professors predominate."[6]

In addition, Italian law professors--and Italian professors generally--play a more important role in politics than their American or British colleagues. Antonio Segin, former President of the Republic and Prime Minister; Giovanni Leone, now President and twice Prime Minister; and former Prime Minister Aldo Moro were all law professors. Amintore Fanfani, three times Prime Minister, was a professor of economics. For roughly 12 of the 24 years since the adoption of the new Italian Constitution in 1948, the Prime Minister has been a professor. Not only does custom sanction major political roles for professors, but university regulations allow top professors to turn over most of their teaching chores to their assistants. This allows law professors plenty of time to engage in lucrative private practice or to participate in politics.

Not surprisingly, a number of men who helped to frame the Italian Constitution have sat on the Constitutional Court. Six justices--Ambrosini (DC), Cappi (DC), Mortati (DC), Castelli Avolio (DC), Rossi (PSLI), and Perassi (PRI)--were elected to the 556-man Constituent Assembly in 1946. Because of the huge size of the Assembly, the deputies decided to delegate the task of

drafting the Constitution to a committee of 75 of its members chosen to represent the parties in proportion to their strength in the Assembly. For the most part the parties chose their abler men for this committee, known as the "Committee of 75."[7] Ambrosini, Cappi, Mortati, Rossi, and Perassi were among the 75 delegates chosen. The "75", in turn, divided itself into three sub-committees, charged respectively with drafting the sections of the Constitution concerning (1) the rights and duties of citizens, (2) the constitutional organization of the State, and (3) economic rights and duties. The second sub-committee was subdivided into a section on the executive and a section on the judiciary. All of the five justices-to-be served on subcommittee two (the subcommittee on the constitutional organization of the State). Perassi was chosen secretary of the subcommittee. Within that subcommittee, Perassi, Mortati, and Rossi sat in the section on the executive; Ambrosini and Cappi sat in the section on the judiciary.

When the subcommittees had finished their work, the "75" named a committee of 18 to assemble the various sections of the Constitution and prepare it for submission to the full Assembly. Among the 18 men originally selected for this important job were three future justices: Perassi, Ambrosini, and Rossi. Mortati was selected later to fill a vacancy.

Eight justices--or about one-fourth--served in either the Chamber of Deputies or the Senate. Seven of these eight--Rossi (PSDI), Capalozza (PCI), Rocchetti (DC), Trimarchi (PLI), Ambrosini (DC), Cappi (DC), and Castelli Avolio (DC)--sat in Parliament after 1948. DeNicola, the first president of the Court and Italy's provisional head of state from 1946 to 1948, served in Parliament as a Liberal from 1909 to 1924. Only one other justice had political experience during the pre-fascist era: Cappi stood for Parliament unsuccessfully on the People's Popular Party (precursor of the DC) ticket in 1919.

Three justices served as cabinet ministers: Rossi was Minister of Education in the second Segni government (February 1959 to March 1960); Bracci was Minister of Foreign Trade in the first deGasperi cabinet; and Azzariti served as Minister of Justice in 1943 in the Badoglio government, the first government after the fall of Mussolini. In addition, Rocchetti held the post of Undersecretary for the Department of Justice from 1953 to 1955 in the Pella, Fanfani, and Scelba governments.

Several justices have held important positions in their parties. Cappi was national secretary of the DC, as well as president of the DC parliamentary group. Cassandro, who helped to reorganize the Liberal Party after World War II, was general secretary of that party in 1945 and 1946. At the time of his election to the Court in 1968, Trimarchi was vice president of the Liberal Parliamentary Group.

The Characteristics of the Justices by Appointing Body

Justices are appointed to the Constitutional Court by three dissimilar groups: (1) the Court of Cassation, the Court of Accounts, and the Council of State, (2) the President of the Republic, and (3) the two houses of Parliament sitting in joint session. Each appointing group has selected men with different characteristics.

The Court of Cassation, the Court of Accounts, and the Council of State must each make its selections from among its own members or retired members. In other words, they must choose men who have risen to the top of the ordinary judiciary.

The Italian judiciary is organized very differently from America's or Britain's. In Italy, a judgeship is not the culmination of a career as a practicing attorney; no judges stand for election; judgeships are never distributed for political reasons; and no one can enter the judiciary except at the lowest level. Law graduates between the ages of 21 and 30 must take highly competitive exams to enter the magistracy. Judges are supervised and promoted by other judges, and advancement depends on seniority and ability with seniority generally the more important factor. Lower court judges are evaluated by higher court judges almost entirely on the basis of their written opinions.[8]

Since advancement in the magistracy is based very heavily on seniority and since only the judges in the highest levels of the

judiciary are eligible for appointment to the Constitutional Court, the men chosen by the Court of Cassation, the Court of Accounts, and the Council of State have been older than those chosen by either Parliament or the President. In addition, the Court of Cassation, the Court of Accounts and the Council of State have often selected their president or the president of one of their sections, and attainment of these positions also depends on seniority.[9]

The magistrates have selected a higher ratio of Southerners to Northerners (9 to 1) than Parliament (7 to 3) or the President (9 to 4). This statistic is probably not very important, since Parliament and the President have also favored Southerners very heavily; but, given the preponderance of Southerners in the magistracy generally, it is not unexpected.

The justices selected by the magistrates have generally spent their entire careers climbing the hierarchy of the magistracy. A number have written articles and monographs on legal subjects, and one magistrate, Gabrieli, has also written a large number of books. After reaching the higher levels of the magistracy, a few, e.g., Gabrieli and Lampis, taught law courses in a university. Several have served on public committees. DeMarco, for example, served as Chairman of the Advisory Committee for Tax Evasion of the Ministry of Finance, and Chairman of the Interministerial Committee for the application of Article 78 of the Peace Treaty.

The men chosen by the magistrates have really not participated in partisan politics at all. None sat in Parliament or held a position of leadership in a political party. None was elected to the Constituent Assembly. Azzariti was Badoglio's Minister of Justice, and Castelli Avolio was elected to the Constituent Assembly, although he does not appear to have played a very important role there.[10] But Azzariti and Castelli Avolio were named to the Court by the President, not by their fellow magistrates. It is very difficult, therefore, to draw any conclusions about the political attitudes which the men appointed by the magistrates bring to the Constitutional Court. The socialists and communists claim the entire magistracy is a stronghold of reaction, but I have no evidence to indicate whether the justices appointed by the magistrates have been more conservative than their colleagues. Their age and comparatively narrow and technical background and the high percentage of Southerners among them certainly raise that possibility.

Two Presidents have had the opportunity to name justices to the Court: Giovanni Gronchi (1955 to 1962) appointed nine, and Giuseppe Saragat (1964 to 1971) chose three. No vacancies occurred during the short Presidency of Antonio Segni (1962 to 1964). Both Gronchi and Saragat chose mostly professors of law, probably because professors are highly respected in Italy, because law professors are naturally regarded as the leaders of their profession, and because the selection of a law professor does not seem a narrow,

partisan choice and therefore unbecoming the role of the Head of State. Nevertheless, both Gronchi and Saragat have leaned toward men of their own party. Gronchi, a DC, chose three justices with DC affiliations: Azzariti, Castelli Avolio and Mortati. Saragat, a PSDI, chose Paolo Rossi, a professor with strong PSDI affiliations.

The men selected by the President have been far more active in politics than those chosen by the magistrates, although somewhat less active than the appointees of Parliament.

The President's appointees to the Court have been nearly as old as those of the magistrates (68 for the magistrates' and 67 for the President's). But if two of the magistrates appointed by the President, Oggioni and Azzariti (both of whom were 75 at appointment) and DeNicola (79 at appointment and a special case in every respect) are excluded the average falls to 62.

Because Parliament must elect its justices by a vote of three-fifths, and because of the fragmentation of power in Parliament since the elections of 1953, the five judgeships which Parliament fills have been allocated to the various parties roughly in proportion to their strength in the Chamber and the Senate. In 1955 Parliament chose two Christian Democrats, one Socialist, one Liberal, and a political independent who was rumored to have had some ties with the PCI (professor Nicola Jaeger). This formula for allocating the seats was honored by all the parties throughout the fifties and sixties. Whenever a judge who had been elected by

Parliament left the Court, the party which had nominated him nominated his successor, who was automatically assured the support of the other parties. And although the Communists had not selected Jaeger in 1955, when his seat fell vacant in 1967, they were allowed to choose his successor. Recently, however, this system has broken down with the refusal of the Christian Democrats to vote for the Socialists' nominee.

Since the justices elected by Parliament are nominated by the parties, it is not surprising that they have been the most politically active members of the Court. Parliament has selected mostly professors of law who have also participated in partisan politics, but it has also chosen three lawyers who had spent nearly their entire careers in politics.

1. The number of law graduates comes from Giuseppe Di Federico, Il reclutamento dei magistrati, (Bari: Editori Laterza,1968), p. 114. The number of students in all disciplines comes from (ed.) S.H. Steinberg and John Paxton, The Stateman's Year-book, 1969-1970, (London: St. Martin's Press, 1969.)

2. Di Federico, op. cit., p. 108.

3. Ibid., p. 114.

4. Walter F. Murphy and Joseph Tanenhaus, The Study of Public Law, (New York: Random House, 1972), p. 103.

5. The ages of the American justices were as follows: Black (83), Warren (78), Douglas (71), Harlan (70), Brennan (63), Marshall (61), Fortas (59), Stewart (54), and White (52). Today the average age of the American justices is 65; the average for the Italians is 68.

6. Mauro Cappelletti, John Henry Merryman, and Joseph M. Perillo, The Italian Legal System (Stanford, Calif.: Stanford University Press, 1967), p. 87.

7. John Clarke Adams and Paolo Barile, "The Implementation of the Italian Constitution," 47 The American Political Science Review 61, 62 (1953).

8. See Cappelletti, Merryman, and Perillo, op. cit., Chapter 3, "The Law Professionals," pp. 86-110.

9. A good example of the tendency of these courts to choose their senior members was the election held in 1968 by the Council of State to fill the seat previously held by Papaldo, who had been president of a section of the Council of State before his election. Angelo De Marco, president of a section, on the second round of voting defeated Carlo Bozzi, the president of the Council of State. "Documentazione e cronaca constituzionale," Giurisprudenza constituzionale, 1968, vol. I, p. 158.

10. The two volume Commentario sistematico alla Constituzione italiana, (Firenze: G. Barbera, Editore, 1948) edited by Piero Calamandiei and Alessandro Levi lists the points made in the Assembly by all the deputies. It has no listing for Castelli Avolio. In addition, he did not serve on any important committees.

TABLE 3.1

Geographical distribution of justices--North and South

	Population	% of Population	No. of Justices	% of Justices
North*	31,894,832	63.3	9	28.1
South**	18,568,930	36.7	23	71.9

*Abruzzi, Basilicata, Calabria, Campania, Molise, Puglia, Sardinia, and Sicily.

**Emilia-Romagna, Friuli-Venezia Giulia, Lazio, Ligivia, Lombardy, Marche, Piedmont, Trentino Alto-Adige, Umbria, Vald'Aosta, Veneto.

TABLE 3.2

Geographical distribution of justices by regions

Region	% of Population	No. of Justices	% of Justices
Abruzzi	2.4	2	6.2
Basilicata	1.3	1	3.1
Calabria	4.0	2	6.2
Campania	9.4	7	21.9
Lazio	7.8	1	3.1
Liguria	3.4	2	6.2
Lombardy	14.6	2	6.2
Marche	2.7	1	3.1
Puglia	6.8	3	9.4
Sardinia	2.8	6	9.4
Sicily	9.3	6	18.8
Tuscany	6.5	2	3.1
OTHERS*	35.7	0	0.0

*Emilia-Romagna, Friuli-Venezia Giula, Molise, Piedmont, Trentino Alto-Adige, Val d'Aosta, Veneto.

TABLE 3.3

Distribution of law students and winners of concorsi in Italian law schools 1960-1964.

Law School	Region	No.of students in all disciplines	% of students in all disciplines	% of all law students	% of winners of concorsi
Five largest Northern universities					
Rome	Lazio	52,935	15.2	15.9	18.6
Milan	Lombardy	37,364	10.8	6.3	4.3
Padua	Veneto	20,029	5.8	1.9	2.6
Bologna	Emilia	18,554	5.3	2.7	1.9
Turin	Piedmont	17,381	5.0	2.7	4.0
TOTAL FOR ALL NORTHERN UNIVERSITIES			61.5	48.1	44.9
Five largest Southern universities					
Naples	Campania	41,765	12.0	18.6	27.1
Bari	Puglia	26,051	7.5	6.1	8.7
Palermo	Sicily	15,967	4.6	14.7	5.9
Catania	Sicily	14,841	4.3	4.8	5.3
Messina	Sicily	13,143	3.8	2.3	4.7
TOTAL FOR ALL SOUTHERN UNIVERSITIES			38.5	51.9	55.1

(Adapted from Table XXIII, Giuseppe Di Federico, Il reclutamento dei magistrati p. 114.)

TABLE 3.4

Age and maximum terms of constitutional court judges

Country	Average age at appointment	Maximum years could serve
ITALY	63	12
Australia	53	*
Canada	55	20
India	57	8
Ireland	61	11
Japan	61	9
United States	53	*
West Germany	51	12

*No mandatory retirement age.

(Adapted from Table 4.1, Walter F. Murphy and Joseph Tanenhaus, The Study of Public Law, p. 103).

TABLE 3.5

Characteristics of justices by profession

ofession	No. of justices	Average age at appoint-ment	Northerners	Southerners	Members of Parlia-ment	Member of Con stitue Assembly
agistrates	14	68	1	12	1	1
ofessors	15	58	5	10	3	4
oliticians	4	69	1	3	4	1

TABLE 3.6

Characteristics of justices by appointing body

Appointing body	Average age at appointment	Professional background: Prof.	Mag.	Pol.	Region: South	North	Members of Parliament	Members of Constituen Assembl
President	67	8	3	1	9	4	3	4
Parliament	56	7	0	3	7	3	5	2
Magistrates	68	0	7	0	9	1	0	0

TABLE 3.7

Known party affiliations of justices

Christian Democrats (DC)

1. Gabrieli
2. Ambrosini
3. Azzariti
4. Cappi
5. Castelli Avolio
6. Mortati
7. Bonifacio
8. Rocchetti

Communists (PCI)

1. Jaeger
2. Crisafulli
3. Capalozza

Socialists (PSI)

1. Bracci
2. Branca

Liberals (PLI)

1. Cassandro
2. Trimarchi

Social Democrats (PSDI)

1. Rossi

Republicans (PRI)

1. Perassi

Monarchists

1. Petrocelli

TABLE 3.8

Selection of justices by appointing body and term of service.

A. Justices elected by Parliament

1. DC: Cappi (1956-1963)--Bonifacio (1964-).
2. DC: Ambrosini (1956-1967)--Rocchetti (1968-).
3. PLI: Cassandro (1956-1968)--Trimarchi (1968-).
4. PSI: Bracci (1956-1959)--Branca (1959-1971)--(Basso).[1]
5. PCI: Jaeger[2] (1956-1967)--Capalozza (1967-).

B. Justices selected by the President

1. De Nicola (1956-1957)--Sandulli (1957-1969)--Rossi (1969-).
2. Capograssi[3]--Petrocelli (1956-1968)--Crisafulli(1968-).
3. Castelli Avolio (1956-1966)--Oggioni (1967-).
4. Perassi (1956-1960)--Chiarelli (1961-).
5. Azzariti (1956-1960)--Mortati (1960-).

C. Justices elected by the Magistrates

By the Court of Cassation

1. Gabrieli (1956-1962)--Verzì (1962-).
2. Battaglini (1956-1960)--Fragali (1960-).
3. Lampis[3]--Manca (1956-1968)--Reale (1969-).

By the Council of State

1. Papaldo (1956-1967)--De Marco (1968-).

By the Court of Accounts

1. Cosatti (1956-1963)--Benedetti (1964-).

1. Basso was nominated by PSI last summer but did not receive the necessary votes in Parliament.
2. Jaeger had no formal ties with PCI. He was chosen by President Gronchi to fill the PCI seat.
3. Died before Court began work in 1956.

IV THE ELECTION OF JUSTICES BY PARLIAMENT

In March 1953, near the end of its term, the First Republican Legislature passed the law which specified the method by which Parliament elects its five justices to the Constitutional Court. For election on the first or second ballot, the law required a vote of three-fifths or more of the members of the two houses sitting in joint session. On all subsequent ballots, three-fifths of those voting were needed. Elected in 1948 during a period of strong anti-Communism, the First Legislature was the high-water mark of Christian Democratic power. The DC held more than half the seats in Parliament, and the other parties of the center -- the PLI, the PRI, and the PSDI -- controlled an additional ten per cent. Thus, coalition with either the right (the MSI and the Monarchists) or the left (the PSI and PCI) would not have been necessary to obtain the needed three-fifths vote. In addition, the Christian Democrats expected the new electoral law pushed through Parliament earlier that month to increase their representation. Doubtless these calculations were in the minds of the DC deputies who framed and passed the three-fifths requirement.

In the Parliamentary elections of May 1953, however, both left and right gained at the center's expense. The center retained only about half the seats in Parliament. Angered by the land reform of De Gasperi's four-party government (DC, PLI, PRI, PSDI), many conservatives had fled the DC for the parties of

the right wing (the MSI and the Monarchists), which tripled their strength and now controlled about ten per cent of the seats. More ominous, the left had swollen to over 35 per cent, with the Communists increasing their strength at the expense of the Socialists. The Social Democrats, unhappy with De Gasperi's electoral law and associating their own losses at the polls with their participation in the four-party alliance, decided not to join the alliance again. And, as always, disappointment at the polls, exacerbated the internal conflicts in the DC.

The 1953 elections ushered in a particularly frustrating era in postwar Italian history. Effective government by the center was no longer possible, and a center-left coalition was not yet possible. Nor was a center-right government (tried with disastrous results under Fernando Tambroni in 1960) possible. It is against this unstable background that Parliament's struggle to elect its five justices must be seen. Four governments held office between Parliament's first attempt to elect its justices in November 1953 and their successful election in December 1955. The first two governments, headed by Giuseppe Pella and Amintore Fanfani respectively were monocolore, i.e., comprised of only one party, the DC, which hoped to draw support in Parliament both from the right and the democratic left. The Pella government lasted four months and the Fanfani government two weeks. The

next two governments, under Mario Scelba and Antonio Segni, were coalitions of the DC, PSDI, and PLI. Together, these three parties commanded 295 of the 590 seats in the Chamber of Deputies (or exactly one-half). Nevertheless they outlasted the monocolore cabinets: the Scelba government lasted a year and a half, and the Segni government nearly two years.

Since the 1953 election had reduced the old four-party alliance to about 50 per cent of the seats in Parliament, it was clear that Parliament could not elect its five justices without some sort of arrangement between the center and one of the extremes. A center-right agreement was very unlikely. To amass three-fifths of the votes it would have had to stretch from the MSI to the PSDI. In other words, it would have had to include parties which stood for fascism (MSI); monarchy (Monarchist Party); secular, laissez-faire liberalism (PLI); Catholicism (DC); secular, non-Marxist welfarism (PRI); and non-Leninist Marxism (PSDI). There was more flexibility in putting together a center-left agreement, since only the participation of the DC and either the PSI or PCI was necessary and, therefore, no concessions need be made to win the support of the small parties of the center. There were, however, major difficulties. First, for a strong element in the DC, voting for a Communist was anathema; and ties between the PCI and PSI were still too strong to make an agreement between the center and the socialists alone possible.

Second, the DC had to worry not only about lining up the votes needed to elect the justices, but also about placating the parties whose help it needed on ordinary votes in Parliament requiring only a simple majority. This was certainly true of all the parties of the center and even to some extent of those of the right. Except in the unlikely event of a center-right alliance stretching from the PSDI to the MSI, the votes of the right would be irrelevant in the election of the justices. But its support could be very helpful on ordinary measures in Parliament. For example, several governments during the mid-fifties survived votes of confidence only because the right agreed to abstain.

Third, no matter what coalition was formed, any formula for allocating seats would have to be arguably representative of all major parties or points of view. A patently partisan formula would be a potent campaign weapon for the opposition.

Finally, there was no consensus on how the justices should be nominated. Should non-political men acceptable to all be chosen? Or should the seats be divided among the various parties and filled by men with party affilitions? And if they were divided among the parties, which parties should get seats? All the major parties? Or only those whose votes were necessary to assemble a vote of three-fifths? To some extent these were real questions of principle and to some extent fronts for partisan interests.

Parliament's first attempt to elect its five justices came in late October 1953. By that time representatives of the major parties had negotiated an agreement on four of the five seats. It was agreed that the DC would get two seats. To fill them, the DC had nominated Gaspare Ambrosini, an eminent professor of constitutional law at the University of Rome, an important member of the Constituent Assembly, and a DC deputy in the First Legislature; and Giuseppe Cappi, a leader in the party. The PSI had been allocated one seat and had nominated Mario Bracci, former law professor and rector of the University of Siena. A former member of the Party of Action, Bracci had signed the Croce manifesto and had served as Minister of Foreign Trade in De Gasperi's first cabinet in 1946.[1] The Communists, who were also allocated one seat, had chosen Vezio Crisafulli, professor of constitutional law at the University of Trieste and a rank-and-file party member.

The stumbling block was the fifth seat, which was to go to one of the smaller parties. There were two candidates, both law professors at the University of Naples. The Liberals proposed Giovanni Cassandro, professor of the history of Italian law and common law and former general secretary of the party. The Monarchists were promoting Biagio Petrocelli, a professor of criminal law who had never played an important role in politics.[2]

On the eve of the first ballot, the left supported the laical candidate Cassandro and the DC supported Petrocelli. In an attempt to reach an agreement, the leaders of the three major parties, Aldo Moro (DC), Pietro Nenni (PSI), and Palmiro Togliatti (PCI), met on October 30, the day before Parliament was to vote. Speaking for the DC, Moro said his party believed the seats should be filled on the basis of proportional representation of the parties in Parliament and that the four largest parties, the DC, PCI, PSI and the Monarchists, should be represented. Moro urged the left to vote for Petrocelli, who, Moro claimed, was not a militant Monarchist. Togliatti and Nenni, however, said they could never vote for any Monarchist. The only agreement the leaders could reach was that perhaps the President, Giuseppe Gronchi, could suggest an acceptable third candidate. Gronchi succeeded in persuading the left to accept a member of the Monarchist Party to be selected by him, but the left refused to vote for Petrocelli because they felt the solution to the deadlock should be a compromise. For their part, however, the Monarchists would not compromise and remained firm in support of Petrocelli.[3]

Without any agreement among the parties, the joint session of Parliament on October 31 was doomed to failure. On both ballots the Christian Democrats voted for only their own two candidates, while the left voted for Bracci, Crisafulli, and

Cassandro. The Monarchists and MSI cast their votes for only Petrocelli, and the PLI, PRI, and PSDI voted for the candidates of both the DC and the left, as well as for Cassandro. As a result, all the candidates fell well short of the 499 votes needed.[4]

In the absense of an agreement among the parties, it was pointless to bring the question before Parliament again. The winter and spring passed without any agreement. Finally, Luigi Einaudi, president of the Senate, and Enrico De Nicola, president of the Chamber of Deputies decided to schedule another joint session of Parliament in late July for the purpose of electing the justices. They hoped this would put pressure on the parties to break the deadlock.[5] In a sense, the parties were further from an agreement in July than they had been in the fall. Prompted by its right wing, the DC now said it could not vote for a Communist and proposed a new formula for allocating the seats. The Christian Democrats were to retain two seats. (If the other parties demanded it, they were willing to give up one of these and have it filled by an "independent" justice.) The socialists were to retain their one seat; one seat was to go to the right and one to the small parties of the center.[6]

Clearly one of the elements which contributed to the deadlock was the coolness of the two biggest parties to the idea of the Court itself. The Christian Democrats regarded the Court as

a potential obstacle and rival source of power which could make governing even more difficult than it already was. These fears were especially acute since the party could control only two of the 15 seats on the Court. The Communists had never been enthusiastic about the Court. Togliatti had opposed it at the Constituent Assembly and had labeled it with the pejorative term used in Italy by Communists and Catholics to refer to the rationalist, empirical, liberatarian, and reformist elements: "illuminist."[7]

The Socialists and the parties of the democratic left saw the Court as a potential initiator of reform and were anxious to have it begin its work. The Socialists even offered at one point to give up their seat to the Communists in order to break the deadlock, but the Communists refused.[8] They felt the left, like the DC, should have two seats.[9]

With prospects dim for reaching agreement on a formula for allocating the seats, President Gronchi brought up the idea of electing five "independent" men. The PCI was publicly interested in this scheme and other parties may have considered it privately, but none backed it. All the parties seem to have concluded that it would be very hard to find "independent" men who would be acceptable to all and that if they could be found they would often be simply men with unknown political leanings.[10]

Parliament attempted for the third time to elect the justices on July 29. This time only the left voted -- and only for its own candidates. All the other parties cast blank ballots, and no one was elected. Parliament adjourned for summer vacation a few days later.

The positions stated by the major parties in July 1954 remained largely unchanged and the justices remained unelected for over a year. Finally the president of the Senate, the political independent Merzagora, and the president of the Chamber of Deputies, Giovanni Leone, a DC, hoping to prod the parties toward an agreement, scheduled another joint session for November 15, 1955.

The DC's position had changed somewhat since July 1953. The party leaders now argued that three seats should be awarded to the parties comprising the majority in Parliament and two to the opposition.[11] Since, at the time, Segmi presided over a coalition government of Christian Democrats, Social Democrats, and Liberals, it was clear that two of the majority seats would go to the Christian Democrats and one to the Liberals. This formula marked the end of the DC's support for the Monarchists' candidate. In November 1953 and July 1954 monocolore DC governments which often looked to the right for help were in power. Now, the center alliance had been resurrected, and the DC backed the candidacy of the Liberal Cassandro. The new formula was

ambiguous concerning which parties were to get the two opposition seats. The intention of the party directorate appeared to be to let the opposition parties decide this among themselves and present their solution to the majority for approval.

The new plan must have seemed clever indeed to the leaders of the DC. It provided a plausible justification for allocating two seats to the Christian Democrats and one to the Liberals. It was designed to make it appear that any further delays were the fault of the squabbling opposition parties. Finally, the party directorate thought it might more easily persuade the conservative wing to vote for a Communist justice if it appeared the DC had agreed, in exchange for support for the center candidates, to vote for whomever the opposition nominated for its two seats.

Nevertheless, the new formula did not appear to take in anyone. Many Christian Democrats announced immediately that they could not in good conscience vote for a Communist, and former Prime Minister Scelba construed the new plan in a way which pleased the conservatives. After criticizing the party leadership for not consulting its Parliamentary group before promulgating the plan, he interpreted the plan, as the PLI had earlier,[12] to provide one seat for the opposition parties of the left and one

for those of the right.[13]

In response to the new DC formula, Togliatti said that the PCI would continue to demand a seat. Nenni said that the PSI would be happy to accept a formula of three seats for the majority to two seats for the left. His party, he said, would even, as a last resort, abandon its demand that Parliament elect its nominee if the President promised to name him to the Court later.[14] Both the PLI and the PSDI, as members of the government, naturally supported the three to two formula, and Saragat went so far as to say that not to adopt it would be "politically immoral."[15]

Much more effective than the Christian Democrats' new formula was the threat posed by Don Luigi Sturzo's plan to amend the laws concerning the Court to require only a majority rather than three-fifths to elect the justices.[16] Since the three-fifths requirement had been enacted by ordinary legislation (legge 11 marzo 1953, art. 3), a majority in both houses could amend it. Thus, although the center alone could not elect the justices under the current rules, it could change those rules and enable itself to

do so. An additional impetus to reach a solution was provided by the rumor that Gronchi was prepared to call for new elections -- which none of the parties wanted at that time -- if Parliament again failed to elect the justices.[17]

Anxious to break the deadlock and fearful that the Christian Democrats might actually pursue the Sturzo plan, Nenni and the PSI made the first move. Caucusing before the first vote on November 14, they decided to vote for Ambrosini in addition to the two candidates of the left. Nenni thought the left would lose little bargaining power by electing one of the candidates of the center, since the center would still have to come to some agreement with the left to secure the election of its other two justices. Further, he thought the election of Ambrosini would defuse the threat posed by Sturzo and put pressure on the DC to make the next move. The left could say, we elected one of your men, now you elect one of ours.[18]

When the results of the first ballot were announced, Ambrosini had received 522 votes, nearly sixty more than needed. The DC caucused quickly to plan its strategy. After some debate, the party decided to begin to give some votes to the PSI candidate, Bracci, and the new monarchist candidate, Condorelli. It was decided that all the Social Democrats and the DC senators would vote for Bracci and that all the Liberals and the DC deputies

would vote for Condorelli. In that way neither would be elected; the DC only hoped to tease the opposition into a favorable compromise.[19]

The Italian Parliament, like the British, eschews such modern devices as voting machines. Each member records his vote on a paper ballot, leaves his seat, walks to the front of the chamber, and drops his ballot in an urn on the president's desk. Thus votes are times of confusion and communication is very difficult. No one knows how the vote has come out until the paper ballots are counted and the vote is announced by the president. When the results of the second ballot were announced, Parliament was stunned to hear that the socialist candidate Bracci had been elected. He had recieved 477 votes, ten more than needed. Had only the DC senators and the members of the PSDI, along with the PSI and PCI, voted for Bracci, he would have received only 431 votes. Clearly about 50 DC deputies had gone against the orders of their leaders and cast their votes for Bracci. Perhaps in the excitement over the unexpected election of Ambrosini and the confusion of voting the leaders' plan was not clearly communicated to all the deputies. More likely, a group of left-wing Christian Democrats simply rebelled at voting for the monarchist Condorelli or felt they should reciprocate for the socialists' support of Ambrosini that morning.[20]

With the Christian Democrats still reeling from the election of Bracci, Parliament met again in joint session two days later on November 16. The parties had not reached any agreement, and no one was elected. The left voted for only Crisafulli on both the first and second ballots. The DC voted for Cappi, Cassandro, and Condorelli on the first ballot and for Cappi and Cassandro on the second.[21]

There was no progress in the negotiations among the parties during the next two days. On November 18, Parliament reconvened in joint session without any hope of a successful election. As they had on the second ballot on the 16th, the Christian Democrats voted for only Cappi and Cassandro; the Communists and Socialists voted for Crisafulli; and the right voted for Condorelli. Needless to say, no one was elected.[22]

The voting on the sixteenth and eighteenth, coming close on the heels of the startling events of the fourteenth, was mechanical and futile. At this point, Merzagora and especially Leone began a vigorous attempt to mediate the remaining points of disagreement between the center and the left. It was an opportune time for the presidents of the two houses to throw themselves into the struggle, because the election of Bracci, in a sense, had made the election of the remaining three justices possible. Nenni had been correct in thinking that the left had given up little

in electing one of the three center justices. The center would still have had to bargain to elect the other two. But once Bracci was elected, the principal question which had caused the deadlock -- whether the left was to have one or two seats -- became moot. Unless a coalition stretching from the neo-fascists to the social democrats could be assembled (and that had always been dubious) or unless the three-fifths rule were changed (a drastic and dangerous move), the cooperation of the left would be needed to elect Cappi and Cassandro. It was hard to see how that cooperation could be won except by giving the left a second seat.

Togliatti told the mediators that the PCI demanded a seat on the Court and the right to pick the man to fill it, just like all the other parties.[23] The Christian Democrats continued to express deep reservations about voting for a Communist.[24] The Republicans suggested that the way to end the deadlock was to elect three "independent" justices.[25] But the MSI and the monarchists rejected the idea of electing nonpartisan men. The government must choose, they insisted, between the right and the left.[26]

Taking into account all these demands, Leone and Merzagora drew up an astute compromise: in exchange for the election of the two center judges, Cappi and Cassandro, the PCI would be allocated one seat and the presidents of the two houses would

be charged with selecting an appropriate man to fill it; in addition, the President of the Republic, in making his five appointments to the Court, would see that the small parties were properly represented.[27]

With some modifications, this plan was accepted by all. Leone went home to Naples, and on the afternoon of November 30, the day before Parliament was to reconvene in joint session, he returned to Rome with a list of 15 professors of law who might be appropriate representatives of the PCI on the Court.[28] The parties of the center and the left looked over the list, found out all they could about the men listed bargained, and finally settled on Nicola Jaeger, a professor of civil law at the University of Milan, whose background was ambiguous enough to please everyone. The left -- and the right -- said he was a member of the Communist party with a card to prove it. The Christian Democrats asserted that he was a loyal Catholic who attended Mass every Sunday. The Socialists claimed that Nenni had suggested Jaeger to President Gronchi, whereas the center insisted that Leone alone had picked him.[29] Interviewed in his home in Milan, Jaeger himself denied having ever been a member of a political party or having ever taken a position which could be described as political on any public issue.[30]

The next day, on November 30, Parliament elected Cappi, Cassandro, and Jaeger to the Constitutional Court. All the

parties voted for them except the MSI and the monarchists; they refused to vote at all in protest over the election of "a well-known Communist."[31]

Soon after the election of Cappi, Cassandro, and Jaeger, President Gronchi made his five selections. Among, his five initial choices was Tomaso Perassi, a Republican. And when Justice Giuseppe Capograssi died in April 1956, Gronchi named the monarchist Biagio Petrocelli to replace him.

* * *

In 1959, Bracci became the first of the justices elected by Parliament to leave the Court. The PSI, which had nominated Bracci, nominated as his successor Giuseppe Branca, a professor of the history of Roman Law at the University of Rome with no political experience. Branca was promptly and quietly elected by Parliament. Indeed, after the election of the first five justices and until last year, the men nominated by the DC, PSI, PLI, and PCI to fill their respective seats on the Court were automatically elected by Parliament. When Nicola Jaeger's term on the Court ended in 1967, the PCI, in contrast with 1955, was allowed to name his successor. The Communists chose Enzo Capalozza, a lifelong Communist politician who had represented the party in both the Chamber and the Senate. Capalozza was elected to the Court without difficulty along

with Ercole Rocchetti, who replaced Ambrosini in one of the DC seats, and Vincenzo Trimarchi, who replaced Cassandro in the PLI seat.[32]

* * *

For three years, from 1968 to 1971, Giuseppe Branca, presided over a bold, reformist Constitutional Court which was unafraid to take on sensitive Church-State issues and unheedful of precedent. In 1969 it voided a law which made adultery illegal for women but not for men; the Court had ruled the same law constitutional in 1961. In February 1971, the Court held that article 7 of the Constitution had not "constitutionalized" the Lateran Pacts between the Italian government and the Holy See. Soon after this controversial ruling, the Court completely reversed a decision handed down only six years before during the presidency of Ambrosini and held unconstitutional a law which prohibited the dissemination of information about birth control. Finally, only a week before Branca's term expired, the Court upheld the constitutionality of the controversial law which legalized divorce. The Christian Democrats must have certainly rejoiced when Branca left the Court and returned to his teaching duties at the University of Rome.

Since Branca, who had been elected to the Court by Parliament, had been nominated by the PSI, it fell to the PSI to choose his

successor. The Socialists nominated Lelio Basso, a professor of the sociology of developing countries at the University of Rome and president of the Socialist Party of Proletarian Unity (PSIUP). As a left-wing member of the PSI, Basso had sat in both the Constituent Assembly and in Parliament. But, with other dissident socialists, he had left the party in the early sixties in protest over the PSI's cooperation with the center. These dissidents, who formed the PSIUP, favored close relation between the Communists and the socialist parties. In many respects they were further to the left than the PCI. In addition, Basso served as director of several socialist reviews and had written a number of books, some of a highly partisan nature, e.g., Due Totalitarismi: Fascisino e Democrazia Cristiana (1951) [Two Totalitarian Systems: Fascism and Christian Democracy].[33] In 1968, when President Saragat wanted to appoint a representative of the left to the Court, he had asked Basso, but Basso declined in order to continue his work with the PSIUP.[34] Had he been elected, Basso would certainly have been the most forceful and articulate representative of the far left to sit on the Court. The Communist Capalozza had not been as prominent as Basso before his election to the Court; and Capalozza was simply a party man, whereas Basso was an experienced ideologist and propagandist.

The Christian Democrats stated their position concerning Basso's nomination in July in a letter addressed to the directorate

of the PSI by the then party secretary, Giulio Andreotti. Andreotti said that the DC felt that Basso was "too political" for the Court and asked the PSI to submit a list of three nominees for the vacant seat.[35] But the Socialists refused to submit a list of candidates or withdraw Basso's name.[36] Parliament voted on Basso's nomination three times, on July 15, October 27, and November 8. On all three occasions the PCI, PSI, PSIUP, PSU (formerly the PSDI), PRI, and PLI voted for Basso and the DC, Monarchists, and MSI abstained. The matter was dropped in November because neither the DC nor the PSI was disposed to compromise and because Parliament had to turn its attention to the more pressing task of electing the President of the Republic. After Leone was elected President, the parties decided to wait until after the general elections in May.

From the time they first announced their opposition to Basso in July until the matter was dropped in November the Christian Democrats did not change their position, as stated in Andreotti's letter, nor did they elaborate much on it. The only real elaboration came in an article in the DC daily, Il Popolo, in November. Andreotti's argument that some men were too deeply involved in partisan politics to sit on the Court had been harshly criticized by the other parties. For instance, the general secretary of the PLI, Aldo Bozzi, had said that Basso's character was completely appropriate for the Court and that very political men had sat on the Court before.[37]

The Communist weekly, Rinascita, had pointed out that the Christian Democrats themselves had nominated men who had been deeply involved in politics; Rinascita specifically mentioned Cappi, who had been political secretary of the DC and the president of its delegation in the Chamber of Deputies.[38]

The article in Il Popolo responded to these attacks. It said the party was not advocating that an organ like Parliament elect apolitical men; rather it was saying that some men involved in partisan politics were not suited to perform the function of a judge, which calls for tha ability to act as a mediator. And, the article continued, the DC has not nominated any candidates of its own, nor has it made any personal references to Basso, except to say that he was too political.[39]

The Socialists' position also remained fixed throughout the struggle. They insisted that Basso was an appropriate nominee, that it was their prerogative to nominate whomever they wished, and that it was outrageous for the DC suddenly to attempt to alter the system which had worked for 16 years and to demand a list of candidates. And as time passed and the DC's opposition remained firm, the Socialists warned that the DC's obstreperous behavior was damaging the chances of a Christian Democrat being elected President.[40] The PCI's position remained the same as the PSI's throughout.

The laical parties of the center -- PLI, PSU, and PRI -- supported Basso on all three ballots too. Their position, however,

stressed the importance of not hindering the Court's important work and of not destroying the agreement on the election of justices reached after so much trouble in 1956. The position of the PLI and PSU, changed, however, as the struggle wore on. In November, both parties said the stalemate was not useful to the PSI or to Basso and hinted that Basso's name should be withdrawn. [41]

Throughout the struggle, the threat of a revolt of the left-wing Christian Democrats loomed in the background, but it never materialized. Two of the leaders of this faction of the party, Fiorentino Sullo and Luigi Granelli, repeatedly asked Andreotti and the other party leaders to reconsider their position. Sullo and Granelli argued that Basso was qualified for the job, that the party's position was damaging relations with the other parties in the center-left coalition, and that it made little sense to insist on a list of names for the election of Constitutional Court justices and not for all appointments.[42] And it was reported that some Christian Democrats had disobeyed orders and voted for Basso on the second ballot.[43] The left publicly urged Christian Democrats to vote for Basso, but this was really a futile appeal.[44] On every ballot Basso was nearly 200 votes short. It would thus have been necessary for about half of the Christian Democrats to revolt, and that was impossible. Fifty renegade Christian Democrats were able to effect the election of Bracci in 1956 only because the party leadership had instructed

about 140 Christian Democrats and Social Democrats to vote for Bracci in order to tease the left into a favorable compromise.

It is not perfectly clear exactly why the DC refused to have Basso elected. Displeasure over the direction of the Court under Branca and disapproval of Basso's strident radicalism are certainly factors, but there may be others. The Socialists' campaign to discredit the ordinary judiciary and portray it as sclerotic and reactionary may have contributed to the DC's decision.[45] The Communists alleged that the divorce case had been decided eight to seven and that Basso's seat represented the swing vote on Church-State issues.[46] In an article in Rinascita, Luciano Ventura claimed that under Branca the Court had addressed the problem of the constitutionality of several laws enacted during fascism. In the 1970's, Ventura said, the Court was ready to consider the constitutionality of recent laws concerning such important issues as criminal justice, relations between the State and the regions, and the balancing of the individual's right to privacy and the public interest. Ventura saw the DC's position on Basso as the beginning of an attempt to prevent such an activist Court from developing.[47] Finally, a number of commentators thought the DC's stand on Basso was a testing of the wind in preparation for the upcoming Presidential election.[48] Andreotti had previously suggested that the technique of a list of candidates be used in the Presidential election. A marathon election in 1964 had resulted in the election of a Social Democrat, Saragat, and the party was anxious to avoid a repetition.

If the DC submitted a list of candidates and the other parties indicated the one they would accept, the DC could then vote for that candidate. In this way, a stalemate could be avoided and the DC could be assured of victory.

Perhaps the position the DC takes when, after the general elections, Parliament again takes up the problem of filling the vacant seat on the Court will elucidate its behavior in the summer and fall of 1971.

1. In 1925, Giovanni Gentile, a Sicilian philosopher and a friend of Croce, circulated a fascist manifesto among Italian and foreign intellectuals. Croce wrote and circulated a liberal countermanifesto.

2. "Il Parlamento nominerà domani i cinque giudici della Corte costituzionale," Corriere della Sera, October 30, 1953, p. 1.

3. "Sempre discordi i partiti sul nome del quinto giudice," Corriere della Sera, October 31, 1953, p. 1.

4. "Il mancato accordo fra i partiti ha reso impossibile la nomina dei giudici costituzionali," Corriere della Sera, November 1, 1953, p. 1.

5. "Camera e Senato convocati per domani in seduta congiunta," Corriere della Sera, July 28, 1954, p. 1.

6. "Nessuna intesa raggiunta per i giudici della Corte costituzionale," Corriere della Sera, July 29, 1954, p. 1.

7. "Camera e Senato convocati ...," loc. cit. For an excellent discussion of the use of the word "illuminism" and its variants, as well as the role of the "illuminati" (the enlightened ones) in Italian politics, see Jacques Nobecourt, L'Italia al vivo, chapter 8, "Gli 'illuminati' ovvero la terza forza," (Milano: Etas Kompass, 1971), pp. 69-86. (The book was originally published in French as L'Italie à vif; it is available in Firestone, and probably in most American libraries, only in the French edition.)

8. "Camera e Senato convocati ...," loc. cit.

9. "Nessuna intesa raggiunta ...," loc. cit.

10. Nevertheless, this proposal drew considerable support from the independent press. See, for example, "Una via sbagliata," Corriere della Sera, November 1, 1953, p. 1; "Votazione nulla del Parlamento per i cinque giudici costituzionali," Corriere della Sera, July 30, 1954, p. 1; and Panfilo Gentile, "Un problema risolto," Corriere della Sera, December 1, 1955, p. 1.

    Mentioned as possible "independent" candidates were Enrico De Nicola (See Appendix A); Piero Calamandrei, perhaps the most distinguished constitutional scholar then alive, rector of the University of Florence, signer of the Croce manifesto, and an important and independent member of the Constituent Assembly; and Arturo Jemolo, a famous scholar of the canon law whose Chiesa e stato (Church and State) is a classic and who was also a signer of the Croce manifesto and a political activist.

11. "Una prova di forza dei partiti di centro nell' elezione dei giudici costituzionali," Corriere della Sera, November 11, 1955, p. 1.

12. "Immutate le posizioni dei partiti per la nomina dei giudici costituzionali," Corriere della Sera, November 13, 1955, p. 1.

13. "Le Camere si riuniscono oggi per eleggere i giudici costituzionali," Corriere della Sera, November 15, 1955, p. 1.

14. "Riunioni di partito e polemiche per la nomina dei giudici costituzionali," Corriere della Sera, November 10, 1955, p. 1.

15. "Una prova di forza ...," loc. cit.

16. "Riunioni di partito ...," loc. cit.

17. "Una prova di forza ...," loc. cit.

18. "La 'sorpresa Bracci' sarebbe avvenuta per un equivoco fra i democristiani," Corriere della Sera, November 16, 1955, p. 1.

19. "Anche i rappresentanti del PSI hanno votato per il candidato del centro," Corriere della Sera, November 16, 1955, p. 1.

20. Ibid. If all the PCI (192 members), PSI (103), and PSDI (25), and the DC senators (111) had voted for Bracci, he would have received 431 votes. Instead, he received 477. If all the MSI (38), monarchists (55), PLI (17), and DC deputies (263) had voted for Condorelli, he would have received 373 votes. Instead, he received 307, or 66 less.

21. "L'Intransigenza dei partiti ha reso vane le votazioni di ieri," Corriere della Sera, November 17, 1955, p. 1 and "Due 'fumate nere' in un atmosfera di diffidenza e di timore reciproci," Corriere della Sera, November 17, 1955, p. 1.

22. "Negativa anche la votazione di ieri per l'elezione dei giudici costituzionali," Corriere della Sera, November 19, 1955, p. 1.

23. "Leone riprende le consultazioni per la nomma dei giudici costituzionali," Corriere della Sera, November 29, 1955, p. 1.

24. "Riserve all'interno della Democrazia cristiana sulla progettata formula di centro-sinistra," Corriere della Sera, November 20, 1955, p. 1; "Merzagora convoca per giovedi i rappresentanti di tutti i partiti," Corriere della Sera, November 22, 1955, p. 1; and "Segni presiede una riunione dei rappresentanti dei partiti di centro," Corriere della Sera, November 23, 1955, p. 1.

25. "Leone riprende le consultazioni ...," loc. cit.

26. "Animate discussioni negli ambienti politici per l'interrogazione di Sturzo al Presidente del Consiglio," Corriere della Sera, November 26, 1955, p. 1.

27. "Animate discussioni negli ambienti politici ...," loc. cit.

28. "Moderato ottimismo di Leone sui risultati delle sue trattative," Corriere della Sera, November 30, 1955, p. 1.

29. "Le destre impugnano l'accordo raggiuntó con la mediazione di Merzagora e Leone," Corriere della Sera, December 1, 1955, p. 1.

30. "Il prof. Nicola Jaeger insegna a Milano dal 1945," Corriere della Sera, December 1, 1955, p. 2.

31. "Cappi, Cassandro e Jaeger eletti giudici della Corte costituzionale," Corriere della Sera, December 1, 1955, p. 1.

32. "Stamane l'elezione di tre giudici costituzionali," Corriere della Sera, December 19, 1967, p. 2; "Tre nuove giudici della corte costituzionale," Corriere della Sera, December 20, 1967, p. 7.

33. Biographical information about Basso is from Igino Giordani and Stephen Taylor (eds.), Who's Who in Italy, (Milan: Intercontinental Book and Publishing Co., 1958), p. 86; Edward A. deMaeyer (ed.), Who's Who in Europe - Dictionnaire biographique des personnalitiés européennes contemporaines, (Bruxelles: Editions de Feniks, 1966), p. 162.

34. "La DC e Basso," L'Espresso, November 14, 1971, p. 6.

35. "Il Parlamento elegge un giudice costituzionale," Il Globo, July 15, 1971, p. 4.

36. "I socialisti insistono sul nome di Basso," Il Globo, October 27, 1971, p. 4.

37. "La mancata elezione di Basso provoca la reazione del PSI," Il Globo, October 28, 1971, p. 4.

38. "Un candidato e non una 'rosa,'" Rinascita, November 5, 1971, p. 7.

39. "Prevista un'altra fumata nera per il giudice costituzionale," Il Globo, November 6, 1971, p. 4; "Riunioni e commenti dei partiti sulle prossime scadenze costituzionali," L'Osservatore Romano, November 7, 1971, p. 7.

40. "Improponibile un DC al Quirinale se persiste il veto all on. Basso," Il Globo, November 7, 1971, p. 4; "Diminuti nella terza votazione i suffragi a favore dell' on. Basso," Il Globo, November 10, 1971, p.4.

41. "Diminuti nella terza votazione ...," loc. cit.; "Spagnolli: i senatori della DC fedeli alla linea del partito," Il Globo, November 12, 1971, p. 4.

42. "I socialisti insistono ...," loc. cit.; "Oggi per la terza volta 'fumata nera' per Basso," Il Globo, November 9, 1971, p. 4.

43. "Prevista un'altra 'fumata nera' ...," loc. cit.

44. "Diminuti nella terza votazione ...," loc. cit.

45. "La mancata elezione di Basso ...," loc. cit.

46. "Un candidato e non una 'rosa,'" loc. cit.

47. Luciano Ventura, "Non è solo per il divorzio che si imputano sulla Corte," Rinascita, November 12, 1971, p. 5

48. "Un candidato e non una 'rosa,'" loc. cit. "La DC e Basso," loc. cit.

V. A SAMPLE OF THE COURT'S DECISIONS: QUESTIONS OF CHURCH AND STATE

The relationship between the Catholic Church and the Italian State has surely been one of the most important issues -- perhaps the single most important issue -- in the history of Italy since the Risorgimento. Everywhere in Italy there are reminders of this. The Constitutional Court, for examples, sits in a baroque palace, the Palazzo della Consulta, which was originally constructed for a cardinal. The government took over the building after Church officials retreated to the Vatican when Italian troops burst through Porta Pia on September 20, 1870.

The Italian Constitutional Court has handed down fewer than 20 decisions touching on relations between Church and State, but not surprisingly, they have been among its most important and controversial. Some of these decisions have concerned actual relations between the Church and the State or the status of the Church and its officials and organizations under Italian law. Some have concerned the treatment of non-Catholics and non-Catholic churches in Italian law, and others have involved questions of public morality. Thus although many of the cases involved the provisions of the Constitution specifically about religion -- articles 7, 8, 19, and 20 -- some of the most important have been fought on different terrain. Article 3 (legal equality of all

citizens), article 18 (freedom of association), article 21 (freedom of expression), and article 29 (legal equality of spouses) have all played important roles.

The Constitutional Court's treatment of Church-State matters falls into two distinct periods: The first, in which the Court trod very cautiously, extends from the Court's beginning in 1956 to the mid-sixties. During this period the Court heard 13 major Church-State cases and upheld the constitutionality of the challenged laws in all but three. In every case in which abrogation of the challenged law would have resulted in a significant secularization of Italian life, the law was ruled unconstitutional.

Two of the cases in which the law was overturned involved senseless discrimination against non-Catholic sects. The first case involved the constitutionality of article 25 of the public security laws, which made it illegal to conduct a non-Catholic religious service in a place not designated for that purpose without notifying the police in advance. A protestant minister, Lasco Umberto, was convicted of having violated this law and was sentenced to 15 days in jail. Rev. Umberto's lawyers claimed that article 25 violated no less than four articles of the Constitution: 8, 17, 19, and 20. But their main allegation was that it was in blatant contravention of article 17, paragraph 2, which states unequivocally, "Previous notice shall not be required

for meetings, even if held in places open to the public." Article 8 guarantees equal freedom to all religious creeds; article 19 protects the individual's right to worship as he pleases in public or in private so long as the rites do not offend public decency (buon costume); and article 20 forbids imposing special burdens on an organization because of its religious nature.

The government, represented by the State's Attorney (Avvocatura dello Stato), intervened on behalf of the challenged law. It argued, first, that article 17 of the Constitution had abrogated only article 18 of the public security laws, which had required prior notification of the police for all public meetings, but that it had not touched and had not been meant to touch article 25, which required previous notification only under specific circumstances. With regard to article 8, the State's Attorney pointed to paragraph three, which provides that relations between non-Catholic religious creeds and the State are "regulated by law on the basis of agreements between their respective representatives." Article 25 of the public security laws, the State's Attorney argued, was one of the laws which regulated that relationship. Finally, with regard to article 19 of the Constitution, the State's Attorney contended that by requiring anyone wishing to hold a religious service in an unusual place to notify the police in advance, the challenged law prevented ceremonies which

offended public decency. This tactic of defending a challenged law by recourse to the public decency provision of article 19 or article 21 was to become a trademark of future cases in this area, but it was unsuccessful here.

In sentenza 18 marzo 1957, n. 45, the Court rejected the government's arguments and held article 25 of the public security laws unconstitutional. Article 17 of the Constitution, the Court ruled, is a complete prohibition of all laws which required previous notice for meetings of any kind, except, as provided in article 17, paragraph 3, those held in public places. And public decency, the Court said was protected by other laws. The Court did not mention the State's Attorney's argument concerning article 8, paragraph 3. It would address that issue about a year and a half later when it overturned two closely related laws.

Sentenza 18 novembre 1958, n. 59, concerned two provisions of a law enacted in 1930 which 1) required governmental authorization to open a new place of worship for any non-Catholic creed, and 2) required non-Catholic clergymen who conducted religious services in places open to the public to be registered and certified by the government.

The Court declared both provisions unconstitutional as violations of both articles 8 and 19 of the Constitution. By guaranteeing the individual the right to worship however and

wherever he wishes, the Court wrote, article 19 certainly protects his freedom to choose his own clergymen and places of worship without governmental interference. And the Court firmly rejected the argument made by the State's Attorney, both in this case and the last, that article 8, paragraph 3, constitutionalized all existing laws concerning relations between the State and non-Catholic creeds, unless those laws were contrary to bilateral agreements. The Court ruled that the State Attorney's argument was correct only for those laws which protected legitimate governmental interests, but that the laws challenged here trespassed in an area which article 19 put beyond the State's reach.

The Court overturned one other law in a Church-State case during this period, but that was a law which worked to the disadvantage of Catholic orders. Articles 3 and 4 of legge 19 gennaio 1942, n. 86, forbade anyone to open a private school without governmental authorization; furthermore, although it laid down criteria which all private schools had to meet, it gave the government the discretion to grant or withhold authorization to any school which met them.

The Court observed that, as stated in article 33, paragraph 3, ("The Republic will lay down general rules regarding instruction...") the government could establish mandatory requirements for all schools; but the regulation at issue here did not serve a constitutionally permissible goal. The goal it had been enacted

to serve was government regimentation of all schools: it had been intended as a tool for the fascist agency ENIMS (Ente nazionale per l'insegnamento medio e superiore: National Agency for Middle and Higher Education).

This case was unlike any other decided by the Court during the period in that abrogation of the challenged law was in the Church's interest. And the laws overturned in sentenza 18 marzo 1957, n. 46, and sentenza 24 novembre 1958, n. 59, if they did not hurt the Church, certainly did not protect the position of the Church or of Catholic tenets in Italian life. In the other ten cases heard during the period, in which preservation of the challenged law was in the Church's interest, the law was upheld.

In 1957, a case concerning article 404 of the penal code was transferred to the Court. It was claimed that article 404, which forbade vilification or abuse of the "State religion," violated articles 8 and 19 of the Constitution. In sentenza 30 novembre 1957, n. 125, the Court rejected these challenges. First, it wrote, article 404 did not violate article 8 because the Constitution provides for special relations between the State and the Catholic Church, and those relations, according to article 7, paragraph 7, of the Constitution, are governed by the Lateran pacts. In contrast, the State's relationship with other religions is governed by article 8, paragraph 3. Together,

articles 7 and 8 establish equal liberty for all creeds, but not identical relations with the State.

The Court also denied that article 404 violated the right to religious freedom of non-Catholic Italians, which is protected by article 19. Article 404, it wrote, did not concern the individual's right to religious liberty, but rather the collective moral and social values of the Italian people. The contrasting treatment of the crime of vilification or abuse of religion in the penal codes of 1889 and 1930 elucidated the distinction. The 1889 code sought primarily to protect the individual's religious freedom and therefore prescribed an equal punishment for offenses against all religions. The 1930 code, on the other hand, was concerned with religious sentiments as a collective value of the people. And since the vast majority of Italians are Catholics, it prescribed a special penalty for abuse of the Catholic Church. The Court wrote -- and it would cite these words or use very similar ones frequently during the next eight or nine years -- "This system has its foundation in the position the Church occupies and has occupied because of the ancient uninterrupted tradition of the Italian people, the near total dominance of Catholicism in Italy, and the Lateran pacts."

Thus in sentenza 30 novembre 1957, n. 125, the Court used the two major arguments it would employ to defend legislation in the Church-State area. The first, in general terms, was that articles 7

and 8 of the Constitution sanctioned special treatment for the Catholic Church. And the second was that, on the basis of one of the Constitution's public decency provisions, legislation which protected or honored popular moral or religious values was constitutional.

Nine years later, in sentenza 31 maggio 1965, n. 39, the law forbidding vilification or abuse of the "State religion" was again questioned. This time the law was alleged to violate three articles of the Constitution: 8, 19, and 20. The Court rejected the arguments based on articles 8 and 19 for the same reasons it had given in 1957. Regarding article 19, it argued that article 404 did not specially reward citizens who are Catholics or specially penalize those who are not; rather it safeguarded "the religious sentiment as a collective good." And the Court dismissed the argument based on article 20 by simply repeating that the challenged law did not "safeguard the sphere of activity of the Catholic Church, but rather the religious sentiment of the majority of Italians."

Sentenza 30 decembre 1958, n. 79, grew out of a case which was the nonverbal equivalent of the vilification cases. A man named Giuseppe Fumarola had spit at a crucifix in the town of Martina Franca and had been convicted under article 724 of the penal code, which forbade offenses against "the Divinity, the symbols and the persons venerated in the State religion."

The pretore who transferred the case argued that the statute's reference to the "State religion" was unconstitutional. The Court ruled, however, that the statute was sound because it was based on the people's religious sentiments, and it quoted its language in sentenza 30 novembre 1957, n. 125 concerning the special place Catholicism occupies in the minds of the Italian people. The Court added,

> Article 724 of the penal code, as well as other articles of the same code (articles 402 to 405) refers to the 'State religion.' By this, however, it does not mean that Catholicism has a special formal status. Rather, it refers to the fact that Catholicism is the religion of nearly all Italians. Offenses against the Catholic Church naturally provoke more widespread and intense public reactions. Therefore the Catholic Church deserves special legal protection.
>
> There can be no doubt that the new Constitution has not altered the special place that Catholicism holds in the life of the Italian people. And therefore article 274 and all the other articles of the penal code which provide special protection for the symbols and officials of the Catholic religion are valid.

The issues involved in the cases on blasphemy also figured in three cases decided by the Court in the early sixties concerning the oath a witness must take. Article 449 of the code of criminal procedure instructed the official charged with administering the oath to warn the witness of the moral and religious significance of the oath and of the punishment for perjury. Then the official is instructed to say, "Fully aware of the responsibility which you assume with this oath before God and men, swear to tell the truth and nothing but the truth." And the witness is instructed to respond, "I so swear."

The constitutionality of this oath was first tested in sentenza 13 luglio 1960, n. 58. The order of the lower court which transferred the case claimed that the religious nature of the oath violated article 21, paragraph 1, of the Constitution, which states, "Everyone shall have the right freely to express his own thoughts, orally or in writing or by any other means of dissemination." The Constitutional Court did not agree. The oath did not violate the nonbeliever's right to freedom of thought:

> The oath does not impose religion on the atheist. The words 'fully aware of the responsibility which with this oath you assume before God' signify the obligation which the believer --

> and only the believer -- assumes. The obligation to tell the truth, in the case of the atheist, is enforced by the act of swearing before men -- a purely moral responsibility -- and by the threat of punishment, but not by love for or fear of God, Who for the nonbeliever is irrelevant.

The oath, the Court said, was supported by three obligations: one religious, one moral, and one legal. Like all oaths, it included those elements which could be counted on to impel the common man to tell the truth. In Italy, where, the Court observed, nearly everyone is a believer, it was natural to include religious elements.

Less than a year later the Court received another case in which the constitutionality of the oath was challenged, this time in relation to the Italian Constitution's freedom of religion provisions, articles 8 and 19. Nevertheless, the outcome was the same. In ordinanza 29 marzo 1961, n. 15, the Court summarily dismissed the allegation based on article 8, saying that article 8 concerns the rights of organized churches, not of individuals. And the Court felt the argument it had adduced in sentenza 13 luglio 1960, n. 58, concerning freedom of thought was equally applicable to freedom of religion: article 19 was not violated because the words "fully aware of the responsibility which with

this oath you assume before God" mean nothing to the nonbeliever.

The third test of the constitutionality of the oath had a different twist. This time two men had refused to take the oath saying that their religion, which they said was Pentecostal, forbade them on the authority of Matthew V, 34-37, to do so.[1] The defense claimed the oath violated articles 8, 19, and 21 of the Constitution.

In sentenza 8 giugno 1963, n. 85, the Court upheld the constitutionality of the oath for the third time. As it had in ordinanza 29 marzo 1961, n. 15, the Court dismissed the claim that the oath violated article 8, because article 8 protects the rights of churches, not of individuals. The Court defended the oath against the charge that it violated article 21 with essentially the same argument it had used in sentenza 13 luglio 1960, n. 58, viz., that the oath embodied general religious values rather than the particular beliefs or ceremonies of any denomination. However, the problem here was different and somewhat more difficult. In the 1960 case the Court had two arguments, either of which would have been logically sufficient to refute the claim that the oath violated the individual's freedom of thought or of religion: 1) that for a nonbeliever the religious elements in the oath were meaningless and thus could not abridge his rights, and 2) that, anyway, the particular form of the oath responded to the beliefs of the populace and

was therefore permissible. In this case, the first argument was unquestionably inapplicable: taking the oath did offend the individuals' deeply held beliefs. The Court was therefore thrown back on the second argument exclusively. It could add to that only that the right to religious liberty is not absolute and that the State is sometimes justified in imposing necessary duties on all citizens even when those duties are religiously offensive to some.

Perhaps the most explosive case in the area of Church-State relations which the Court received during its first decade was that discussed in ordinanza 14 giugno 1962, n. 52. An apostate priest, Francesco Paolo Niosi, had been elected mayor of the village of Ucria. But article 5 of the Concordat forbade an ex-priest to assume such a position. The town council expressed the opinion that article 7 of the Constitution had not raised all the provisions of the Lateran pacts to constitutional status; that individual provisions of the Concordat which conflicted with the Constitution could therefore be overturned; and that article 5 of the Concordat violated the Constitution's general equality provision, contained in article 3, as well as the guarantee, expressed in article 51, that "Public offices and elective posts shall be open to all citizens of either sex on an equal basis, in accordance with the provisions of law."

The Court managed to dodge the explosive substantive issue entirely. It stated that constitutional questions can be raised only during the course of proceedings before a judicial body; and since the town council of Ucria could not be construed as a judicial body, it did not have the authority to send the case to the Constitutional Court in the first place.

In sentenza 28 novembre 1961, n. 64, the Court dealt with another very controversial issue -- though surely less explosive than the constitutional status of the Lateran Pacts. Articles 559 and 560 of the penal code provided a more severe punishment for women convicted of adultery than for men. In this case, violations of articles 3 and 29 of the Constitution were charged. Article 3 guarantees legal equality to citizens regardless of "sex, race, language, religion, political opinion, or social and personal conditions." Article 29, paragraph 2, states, "Marriage is founded on the moral and legal equality of the spouses, within the limits established by law to guarantee the unity of the family."

The Court upheld the legislation. Article 29, it wrote, was not violated because articles 559 and 560 protected the unity of the family. Adultery by the wife was considered a more serious offense by society and could result in a greater diminution of the family's reputation. It could also have a more detrimental effect on the pyschological well-being of the children and may

introduce illegitimate children into the family.

Article 3 was not violated either, the Court said, because the principle of equality leaves the legislature the discretion to adopt different norms for objectively different situations. Since the legislature, like society in general, considered adultery by the wife a graver offense, it was justified in prescribing a more severe penalty.

The last of the Church-State cases belonging to the first era, sentenza 19 febbraio 1965, n. 9, concerned the touchy matter of birth control. A writer, Luigi DeMarchi, had held a conference in Florence on the subject, "The Dangers to Health and Society of Uncontrolled Population Growth." He had been arrested for violating article 553 of the penal code, which forbade dissemination of information about birth control. His lawyers claimed that article 553 violated article 21 of the Constitution, which states, "Everyone shall have the right freely to express his own thoughts, orally or in writing or by any other means of dissemination." The Court held the law constitutional.

The Court first addressed the argument raised by DeMarchi's lawyers that the law should be declared unconstitutional because its original purpose had been to further the fascist regime's policy of demographic expansion:

> All the decisions of this Court support the principle that the constitutionality of a law--in a legal system which antedates the promulgation of the Constitution and which the Constitution has profoundly modified and rigidly conditioned but not abolished--depends not on the end for which the law was adopted or the occasion which produced it, but from its objective conformity or disconformity with the Constitution.

The Court then noted that abridgments of freedom of expression are permitted only when based on provisions of the Constitution. The Court believed that the limitation on free expression contained in article 553 was justified by article 21, paragraph 6:

> Printed publications, spectacles, and all other displays that offend public decency are forbidden. The law will make adequate provisions to prevent and to suppress such violations.

Engaging in the sort of procrustean construction which is common for the United States Supreme Court, the Italian Constitutional Court interpreted article 553 not to forbid the dissemination of all information about birth control, but only dissemination which offended public decency, i.e., dissemination in a place or manner "which seriously violates the natural reserve or bashfulness which surrounds all matters concerning

sex, which does not respect the intimacy of sexual relations, or which undermines juvenile morality or human decency." It did not forbid propaganda on behalf of a policy of population control and certainly imposed no limitation on scientific thought and discussion.

And the Court added that the argument that propaganda offensive to public decency was prohibited by other laws was unfounded. Ironically the Court itself had used this argument in sentenza 18 marzo 1957, n. 45.

The Court, of course, was not empowered to decide whether DeMarchi was guilty or not, but its interpretation of article 553 indicated unmistakably that it felt he was not. It said pointedly, for example:

> And certainly article 553 imposes no limitation on scientific thought and discussion... The concern expressed by the private parties that the challenged law forbids all public discussion of the question of birth control and that it silences the moralist, the economist, and other scholars is unfounded.

But when the case was remanded to the pretore of Florence, he disregarded the Court's interpretation of the law, applied the law in its literal sense, and found DeMarchi guilty.

"The Court," he wrote--and he was legally absolutely correct--"should tell me whether a law is constitutional or unconstitutional and not attempt to show me how to interpret it."[2]

The first period of the Court's activity in the Church-State area ended in 1965. During it, the Court never handed down a decision which offended the Church. The Vatican's official daily newspaper, L'osservatore romano reported many of the decisions discussed above, but not once did it comment on them. In fact, unlike in recent years, the Court received very little publicity at that time. The Court's pro-Chruch opinions seldom elicited comments from the papers of the left, either.

* * *

What caused the Court to change direction in the Church-State area in the late sixties is problematic. The change in this area corresponded to the Court's general liberalization during the presidencies of Sandulli and Branca. The explanation may be in personalities of Sandulli and especially Branca, a few substitutions on the Court, the swing leftward in the sixties of Italy's governing coalition, the Vatican's decision after the death of Pope Pius XII to play a less active role in Italian politics (Pope John said, "To the Vatican, Italy will be like the Philippines: a country with a Catholic majority and nothing more."),

or simply the drift of public opinion in Italy and the world.

Sentenza 3 dicembre 1969, n. 147, signaled the beginning of the new era. At issue were the unequal adultery laws which the Court had upheld eight years earlier. Of the 15 judges who had heard the 1961 challenge only 5 remained. Without mentioning its previous finding, the Court reversed itself completely. Different punishments for husband and wife, the Court said, cannot be justified on the grounds of preserving family unity. Indeed, it is absurd to argue that unequal treatment is necessary to protect the family:

> Since protection of family unity ought necessarily to be coordinated with the principle of equality, it will be necessary to demonstrate that, once it is established that the adultery of the wife should be punished, to punish the husband for the same offense would be to put the unity of the family nucleus in danger. But it is sufficient to mention this hypothetical argument to show its complete irrationality.

The Constitutional Court is not empowered to mend defective legislation either formally or through construction; it can only strike unconstitutional legislation from the books. Thus

its only recourse in this case was to abrogate Italy's adultery law.

The Church reacted cautiously to this development. A short editorial appeared the next day in L'osservatore romano.[2] The editorial agreed with the Court that men and women should be treated equally with regard to adultery, but it was unhappy that, as a result of the Court's decision, adultery was no longer a crime in Italy. It urged Parliament to pass quickly new legislation prescribing equal punishment for men and women. The article ended with a rebuke for those who would confuse morality with public attitudes: alleged changes in public attitudes toward adultery, it said, are no justification for its legalization. Although this article expressed concern that no law prohibiting adultery was now on the books, it did not criticize the Court's action in a

In late 1970 Luigi DeMarchi, then president of a pro-birth control group called AIED (Associazione per l'educazione demographica: Association for Demographic Education), was again arrested for violating the law against dissemination of birth control information. DeMarchi was brought before the pretore of Rome, who transferred the case to the Constitutional Court. There it was joined to a case in which Virginio Bertinelli, former president of the PSDI and Minister of Labor in 1962 and 1963, was

being tried under the same law for publishing a pamphlet entitled "Procreazione cosciente" (Planned Procreation).[3]

It was obvious that this would be an important case, and when the public hearing was held the galleries were filled with Italian and foreign newsmen. Television cameras were also admitted for the first time.[4]

The representative of the State's Attorney's Office, professor Chiarotti, startled those in attendance by asking the Court to uphold the law only insofar as it prohibited propaganda against abortion.[5] Although there were other laws which forbade abortions or encouragement to perform or undergo an abortion, article 553 was worded in such way that it comprehended both artificial contraception and abortion.

When the Court spoke, however, in sentenza 19 febbraio 1965, n. 9, it declared article 553 unconstitutional. The Court began by recalling that in 1965 it had declared that "the challenged law was valid insofar as its objective was the protection of public decency." But in the intervening years, it noted, although the law had not been applied very often, the ordinary judiciary had disregarded that interpretation and had applied the law in its literal sense. It had therefore become necessary to reexamine the question.

On reexamination, the Court found that discussion of birth control could no longer be considered generically to offend public decency:

> (T)he problem of reducing the number of births has today assumed such an importance and has attracted such wide interest that one cannot maintain that the public treatment of various aspects of the problem, the diffusion of information about contraceptives, and propaganda in favor of birth control constitute offenses to public decency. This is true especially in view of current public attitudes and the great increase in the level of health education of the general public.

And the Court added that there were other laws which prohibited dissemmating birth control information in ways offensive to the public decency.

The Court's arguments in the birth control cases are less interesting than its objectives. In the first case, its intent was probably to allow discussion of contraception and population control on a scholarly plane, while precluding the large-scale distribution of information about birth control to the public. The ordinary judiciary thwarted this plan, and thus probably

deemed article 553. When the law was tested again, the government was not even willing to defend it: the State's Attorney argued for its retention only as a superfluous anti-abortion law, and it did that much in all likelihood only to break the Church's anger.

L'osservatore romano's response to the second birth control decision was sharply critical. Writing in an opinion column, Giuseppe dalla Torre noted that the Court had upheld the same law only six years earlier and scored the Court for its inconsistency.[6] Noting that the Court had pointed out that the distribution of birth control information would still be subject to the general laws concerning public decency, he remarked, "We know, however, how well these laws are really enforced today!" He commented, as did Vatican spokesman professor Federico Alessandrini to the Corriere della sera reporter,[7] that the Church's position on birth control had been spelled out clearly in the encyclical Humanae Vitae (Of Human Life) and that there was nothing to add.

The Court tackled another problem in early 1971 that was even more controversial than birth control: the status in Italian law of the 1929 Concordat between the State and the Vatican. This issue had great practical importance because of its implications for the nation's controversial new divorce law.

During the debate in Parliament on the divorce bill (known as the Fortuna-Baslini bill), many Christian Democrats claimed that it violated article 7 of the Constitution, which states,

> The State and the Catholic Church shall be, each in its own sphere, independent and sovereign.
>
> Their relations shall be regulated by the Lateran Pacts ....

They argued that article 7 raised all the provisions of the Concordat to constitutional status. And article 34 of the Concordat states, "The Italian state, wishing to restore to the institution of marriage, which is the foundation of the family, a dignity in keeping with the Catholic traditions of its people, grants civil effects to the sacrament of matrimony, which is ruled by cannon law." They contended that article 34, by speaking of marriage as a sacrament and admitting that it was "ruled by canon law" and not civil law, implicitly recognized that marriages were indissoluble. Therefore, since article 34 had constitutional status, Parliament could not overturn it through ordinary legislation.[8]

The legal status of the Lateran pacts had long been a controversial point among Italian constitutional scholars. The

Constitutional Court had managed to avoid this issue in ordinanza 14 giugno 1962, n. 52. But several decisions of the Court of Cassation and the Council of State in the early sixties had adopted the theory that the Concordat had been constitutionalized in its entirety and that any alleged conflicts between sections of the Concordat and the Constitution could be resolved only by modification of the Concordat with the consent of both the Church and the State or by modification of the Constitution. This was probably the most pro-Church position adopted on this issue. The many theories advanced by constitutional scholars are too lengthy and complicated to recount here. They ranged from the theory advanced by the Court of Cassation and Council of State--which not only gave the Lateran Pacts constitutional status but allowed modification only through renegotiation--to theories which regarded many of the provisions of the Pacts as unconstitutional.[9]

The Court first addressed this question with two ordinanze and three sentenze handed down on February 24.[10] The first ordinanza concerned the annulment of marriages which had not been consummated and the second concerned the effect in Italy of a divorce obtained in Great Britian by two Italian citizens; since the new divorce law had been passed after the transfer of these cases, the Court remanded them for reconsideration. The three sentenze involved situations which did not clearly pose

the question of the status of the Lateran Pacts. There were hints in what the Court said that it did not believe article 7 of the Constitution had constitutionalized the individual provisions of the Pacts, but this was not completely clear. Writing in L'osservatore romano, Monsignor Vincenzo Fagiolo drew that inference from the five decisions.[11] But the subjects of these cases were so unexciting and the Court's ruling on the important issue of the status of the Lateran Pacts was so veiled that most of the press did not even report them.

Not long after Parliament passed the divorce bill in December 1970, a case was transferred to the Constitutional Court which questioned its validity on the grounds previously stated by DC deputies during the Parliamentary debate. On July 8, the Court handed down its ruling. It declared the divorce bill constitutional but managed largely to avoid the explosive issue of the legal status of the Lateran Pacts.

The Court began by observing that the case did not pose the problem of whether the State was capable of legalizing divorce by any means: the only question was whether ordinary or constitutional legislation was required. The Court thus rejected the argument that only through mutual agreement could the Pacts be modified; but this was the only comment the Court made about the legal status of the Pacts.

The Court said that ordinary legislation sufficed because article 34 could not be construed as banning divorce. The first draft of article 34, which was prepared by the Vatican in 1926 and which had guaranteed the indissolubility of marriage, had been rejected by the State. The State had advanced a counterproposal which had denied civil effects to annulments granted by ecclesiastical courts. The compromise reached on June 15, 1927, had read: "The Italian State, wishing to restore to the institution of marriage, which is the foundation of the family, a dignity in keeping with the Catholic traditions of its people, grants civil effects to religious marriages." This agreement had said nothing about divorce; it had merely granted civil effects to marriages performed by the Church. During the next year two changes had been made, both at the Vatican's insistence. A clause had been added to make it clear that jurisdiction over Church marriages was not being removed from the ecclesiastical courts. And the phrase "sacrament of matrimony" had been substituted for "religious marriages"; but this substitution had not signified agreement by the State that its court would never perform divorces. In fact, the law passed by Parliament to implement this provision had used the phrase "marriages celebrated before a Catholic priest." Thus, the claim that the divorce law violated article 7, paragraph 2, was unfounded.

The Court added that the new law did not shrink the jurisdiction of the ecclesiastical courts and thus, as had been claimed, violate article 7, paragraph 1, which states, "The State and the Catholic Church shall be, each in its own sphere, independent and sovereign." The new law, the Court said, had no legal effect on their authority to grant annulments for marriages celebrated by the Church.

The Church offered a rebuttal of the Court's arguments in a long front-page article in L'osservatore romano by Mario Petroncelli, professor of constitutional law at the University of Naples.[12] Petroncelli made two major points. First, he argued that article 29 of the Constitution guaranteed the indissolubility of all marriages. He noted that Calamandrei, well known for his laical views, subscribed to this theory. And second, he disputed the Court's interpretation of article 34 of the Concordat. It was foolish, he said, for the Court to point to the wording of the implementing legislation in order to discover the meaning of article 34: Parliament alone had been responsible for that law, but article 34 had been agreed to by both the Vatican and the State. Finally, he argued,

> If the State recognized (in article 34) the sacrament of matrimony, ruled by canon law, it implicitly recognized its indissolubility. The

> indissolubility of the sacrament is not simply an effect... but an inherent property. As canon 1013 of the code of canon law prescribes, if a marriage is performed with the understanding that it can be dissolved, it is not a valid marriage but a state of concubinage.

He concluded that article 34 forbids the Italian government to authorize its courts to dissolve marriages celebrated by the Church.

In November, the magazine Civiltà Cattolica ran an article by Salvatore Lener which attacked the justices of the Court and the method by which they had decided the divorce case.[13] The article includesthe text of a letter, allegedly written by Branca, which described how the Court reaches its decisions. It revealed that the Court is deeply divided along lines of ideology and partisan politics; that the justices vote according to their politics on most cases; and that the various factions attempt to form coalitions in order to assemble a majority. The article concluded,

> We should ask if this is what the Italian people, who had just regained their liberty, desired when, through their representatives to the Constituent Assembly, they established

that the new Constitution would be protected against Parliamentary violations by a supreme and impartial organ of Constitutional justice, composed of eminent men from the worlds of legal science,[14] the magistracy, and politics. We should ask at the same time whether these eminent men, when they occupied university chairs or sat on an ordinary court, instead of applying and teaching "the same law for all," taught or applied above all the political ideas of the party or fraction of a party to which they belonged.[15]

1. Matthew V, 34-37:

> "But I say to you, Do not swear at all, either by heaven, for it is the throne of God, or by earth, for it is his footstool, or by Jerusalem, for it is the city of the great King. And do not swear by your head, for you cannot make one hair white or black. Let what you say be simply 'Yes' or 'No'; anything more than this comes from evil."

2. "Verso l'abolizione del divieto di propagandare gli anticoncezionali," Corriere della Sera, February 24, 1971, p. 4.

3. "Dichiarati non perseguibili l'adulterio ed il concubinato," L'osservatore romano, December 6, 1969, p. 8.

4. "Verso l'abolizione del divieto di propagandare gli anticoncezionali," loc. cit.

5. Ibid.

6. Giuseppe dalla Torre, "Depositate due sentenze dalla corte costituzionale," L'osservatore romano, March 18, 1971, p. 7.

7. Silvano Villani, "La posizione della Chiesa: 'Nulla da aggiungere dopo l'Humanae Vitae,'" Corriere della Sera, March 18, 1971, p. 7.

8. "Divorzio: perché non è incostituzionale," Corriere della Sera, July 9, 1971, p. 5; "Perché il divorzio è costituzionale," Il Globo, July 9, 1971, p. 4; and "Respinta la incostituzionalità della legge che introduce il divorzio," L'osservatore romano, July 10, 1971, p. 8.

9. A summary of the scholarly debate on this point is contained in Stefano Merlini, "Obiettivo sulle sentenze della Corte costituzionale," Quale giustizia, no. 8, pp. 234-243.

10. Sentenze 24 febbraio 1971, nn. 30, 31, 32; ordinanze 24 febbraio 1971, nn. 33, 34.

11. Vincenzo Fagiolo, "Le sentenze della Corte costituzionale," L'osservatore romano, March 6, 1971, p. 3.

12. Mario Petroncelli, "Matrimonio e Costituzione," L'osservatore romano, July 14, 1971, p. 1.

13. "Severa critica della Civiltà Cattolica sulla 'costituzionalità' del divorzio," L'osservatore romano, November 21, 1971, p. 8.

14. The phrase "legal science" is loaded with meaning. As Cappelletti, Merryman, and Perillo explain, it "carries with it the assumption that the study of law is a science, in the same way that the study of other natural phenomena--say those of biology and physics--is a science. The work of the legal scholar is like the work of other scientists, not concerned so much with the solution of practical problems as with the search for scientific truth, for ultimates and fundamentals; not concerned so much with individual cases as with generic problems, the perfection of learning and understanding; not, in a word, with engineering, but with pure science. Mauro Cappelletti, John Henry Merryman, and Joseph M. Perillo, The Italian Legal System (Stanford, Calif.: Stanford University Press, 1967), p. 170.

15. Salvatore Lener, "'De profundis' per l'art. 7?," Civiltà Cattolica, November 22, 1971; quoted in "Severa critica della Civiltà Cattolica ..." loc. cit.

VI STYLE AND ROLE

The Constitutional Court was something absolutely new inItalian government when it began its work in 1956. It was called a court, but it was unlike any other court in Italian history. Since the Constitution had endowed it with the authority to strike laws it believed unconstitutional from the books, it was a court with some measure of legislative power; and Italian government had always worked on the principle of a very strict separation of powers. Only about one-third of its members were career magistrates and its hierarchical relationship to the ordinary and administrative courts was ambiguous.

The fifteen men who sat on the court in 1956 when it accepted its first case were therefore unable to rely heavily on the traditions of Italian law for guidance. They were able to learn something from the experience of the constitutional courts of other countries, especially the United States and West Germany; but, of course, because of considerable legal and political differences, the lessons learned elsewhere were not always applicable in Italy. The first impulse of the new Constitutional Court was to behave as much like a traditional Italian court as possible: one commentator observed that the Court's first decisions were indistinguishable in style from those of the Court of Cassation.[1] Fortunately - and probably of necessity - the Court soon began to invent a style of its own.

As used in this paper, the term "style" does not have a rigorous definition. Cappelletti, Merryman, and Perillo in their study of the Italian legal system use "style" to suggest those aspects of a nation's law and legal institutions which strike the foreign observer as "significantly, arrestingly different." [2] The use of the term here derives from their use. With regard to the Constitutional Court, it means those informal practices which the Court has adopted in order to work effectively within the Italian legal system, Italian government, and Italian society.

This chapter will discuss five aspects of the distinctive style of the Constitutional Court: its use of "precedent", its use of the intent of the framers of a statute to settle its constitutionality, its use of statutory interpretation to avoid declaring laws unconstitutional, the form in which its decisions are cast, and the use of non-legal materials in reaching decisions.

Judicial decisions traditionally are not a source of law in Italy; they are supposed to affect only the parties in the case which is decided. The doctrine of stare decisis emphatically does not exist. Italian democracy, heavily influenced by the example of France and the writings of French theorists, has regarded legislative supremacy as a cardinal principle. Only the legislature, which speaks for the people, is supposed to make law. Judges are to be the law's unthinking technicians.[3]

This conception of the judge as automaton is far from the truth in Italy today. To give just one example, the

Court of Cassation's interpretations of statutes in practice exert almost the influence of precedents on lower courts.[4]

And, of course, when the Constitutional Court declares a law unconstitutional, that decision eliminates the law and is therefore binding on all. When the Court decides that a statute is not unconstitutional, however, that decision has no formal effect erga omnes. The ordinary courts have no legal obligation to pay attention to this ruling in deciding whether a constitutional challenge is manifestly unfounded. More important, the Court has no formal obligation to follow its own precedents.[5]

Nevertheless, ordinary courts have in practice paid attention to the Constitutional Court's rulings. It would be futile continually to raise a constitutional challenge which the Court will surely reject. A judge who did that would almost certainly incur the disapproval of his superiors, upon whom he is dependent for advancement.

As for the Constitutional Court itself, the same doctrine of complete legislative supremacy which denies precedent a formal role in Italian law, encourages consistency in judicial decisions. In the folklore of the civil law, the justices are charged with discovering a preexistent, objective law. It is certainly not to be expected that such a law will change - at least not much or rapidly. Inconsistency in judicial decisions must therefore mean either that the judges are bad "law-finders" or that they have arrogated the power of the lawmakers.

The resultant of these two forces - 1. The absence of either a formal doctrine or a tradition of stare decisis

and 2. The expectation of consistency of interpretation which follows from the myth of mechanical jurisprudence - has been that the Court does use precedent; but it does not use it as frequently or feel as bound to it as a constitutional court in a common law country does.

The Court always cites a previous decision when dismissing a constitutional challenge as unfounded on the grounds that the Court has already heard and rejected a similar allegation. The Court also occasionally cites previous decisions to show the established interpretation of an important provision of the Constitution.

Some of the cases which the Court cites most frequently involve matters of procedure. For instance, the Court announced in its first decision that laws enacted before the promulgation of the new Constitution could be declared unconstitutional.[6] Since nearly all the laws the Court has overturned were enacted before 1948, this has turned out to be an extremely important decision, which the Court has often cited. Its liberal interpretation of the rules for raising a constitutional question[7] and its decision about the bearing of legislative history on constitutionality are also cited frequently.[8]

Some of the cases which the Court regularly cites fix the interpretation of an important substantive portion of the Constitution. Sentenza 14 luglio 1958, n.53, which gave article 3 of the Constitution - Italy's equivalent of the American Equal Protection Clause - a latitudinarian interpretation, is probably the best example. Others are

Sentenza 28 novembre 1957, n.125, which explained that the Catholic Chirch sometimes merits special treatment because of its special place in Italian history and in the minds of the people, and sentenza 13 dicembre 1962, n.123, which affirmed the right to strike for economic ends, except when the strike interferes with essential activities.

The Court cites these decisions and some others in the same way and for the same reason that the American Supreme Court cites, say, the Civil Rights cases or the Carolene Products Case: the difference is the frequency of citation. The Italian Court may cite a precedent in every third case whereas the average for the American Court may be closer to every third sentence. It is true that the Italian Court is quite young; it has far fewer precedents to use; and it has more constitutional problems to deal with for which the existing precedents are of little or no aid. Nevertheless, the Court's sparing use of precedent is mostly choice, not necessity. In this regard, the Constitutional Court's behavior conforms to Italian legal tradition. The Court of Cassation, whose interpretations of statutes are, in practice, definitive, cites its own "precedents" with about the same frequency as the Constitutional Court.

On the other hand, the Constitutional Court has been far more willing than the Court of Cassation to disregard "precedent." The Constitutional Court's quick turnabouts on the adultery and birth control laws, which were

discussed in the last chapter, are glaring examples. They are testimony to the weak place "precedent" holds in Italian law; it is difficult to think of two comparable reversals by the American Supreme Court. It should be noted, however, that both these reversals did occasion harsh criticism, some of which centered on their disregard for clear and recent precedent.

Article 12, paragraph 2, of the Provisions of the Law in General instructs judges on how to interpret statutes:

> In interpreting the statute no other meaning can be attributed to it than that made clear by the actual significance of the words, according to the connection between them, and by the intention of the legislature.

The judge can thus apply the law only according to its literal meaning or the intent of the legislature. But this formula is not as simple as it seems. Nearly all Italian jurists agree that a legal norm must be interpreted in order to apply it to a concrete case. The "actual significance of the words" is, therefore, an illusion and the key to interpretation is the legislative intent. Even this is not what it appears; as Cappelletti, Merryman, and Perillo note,

> (I)t seems to have been settled for some time that the reference is not actually to legislative intent but to the "intention, spirit, objective content of the norm itself." For legislative intent substitute personification of the norm.

> Or, as another writer has put it; "it is usual . . . to compare the norm to fruit which, detached from the tree, assumes its own identity, distinct from the tree that produced it." The actual occasion for its enactment - the occasio legis - is irrelevant. What the interpreter seeks is the ratio legis.[9]

The Constitutional Court has accepted this theory of interpretation. In sentenza 19 febbraio 1965, n.9, for example, it wrote, "The constitutionality of a law . . . depends not on the end for which the law was adopted or the occasion which produced it, but from its objective conformity or disconformity with the Constitution."[10] This principle is of critical importance since all the important Italian codes were enacted during the fascist era. If all these laws bore the taint of their framers - or, more accurately, of the era in which they were framed, since many of the framers were not fascists - nearly every law challenged in the Court would start out with the presumption of unconstitutionality.

In practice, the Court has not always completely divorced the occasio legis from the ratio legis. In sentenza 12 luglio 1967, n.114, for example, the Court passed on the constitutionality of a 1926 public security law which gave the prefect the power to dissolve and confiscate the property of associations, groups, or institutions which advocated changes in the "national order of the State"

or the State's regulations. The State's Attorney argued that, although the law had admittedly been enacted to serve illegitimate governmental ends, the law could be saved. It was a "blank norm," "one that could contain many different meanings, even diametrically opposite meanings."

The Court felt thatthis contention "did not make sense" and held the law to be in violation of article 18, which guarantees freedom of association and prohibits only secret, paramilitary organizations. Such a law, the Court said, could find no place in the "new Constitutional order."

The Court used legislative intent in the same backhanded way in sentenza 19 gingno 1958, n.36, which was discussed in the last chapter. In overturning a 1942 law which granted the government complete discretion to extend or to deny permission to open a private school, the Court noted that the law had been enacted as part of Mussolini's attempt to regiment education. The agency charged with administering the law, it recalled, was ENIMS, whose general task was "to bring a fundamental didactic, educational, and political unity to the private schools."

And in the second birth control case, the Court recalled,

> It is well known that article 553 of the penal code was part of the fascist demographic policy aimed at increasing population. Population was considered a major factor in national power, and national power was important for the political goals

> of the time. This is obvious, since the challenged law was included in the title, "Crimes against the Integrity and Health of the Race." [10]

In the face of the above paragraph and the images it evokes - fascism, aggression, racism - it is difficult to maintain that the occasio legis plays no role in interpretation.

The Constitutional Court is a special organ charged with a special function: to decide all constitutional and jurisdictional disputes. It is independent of all other courts and all governmental organs; it is not, as the United States Supreme Court is, the summit of the national judicial hierarchy.

The summit of the Italian judicial hierarchy is the Court of Cassation. The fundamental purpose of the Cour of Cassation, as stated in article 65 of the Ordinamento jiudiziario, the law which governs court organization in Italy, is to assure "correct observance and uniform interpretation of the law . . ." While its decisions are legally binding on only the court which receives the case on remand, in practice they have great influence. The Court of Cassation follows its own "precedents" very carefully; and since any party has the constitutional right to take his case to the Court of Cassation, a judge who disregards the Court's ruling in a similar case risks reversal. The Court of Cassation is thus the final interpreter of statutes under Italian law.[11]

The Constitutional Court must, of course, know precisely what a statute means before it can decide whether it is constitutional or unconstitutional. Since it is an autonomous body it can adopt whatever interpretation of the statute it chooses. Even if the Court of Cassation has previously interpreted it, the Constitutional Court is not obligated to accept that interpretation. If, after rejecting Cassation's interpretation and adopting another, the Constitutional Court declares the law unconstitutional, its decision on the interpretation of the statute, as well as its decision on its constitutionality, is final and irreversible. But when the Constitutional Court construes a statute differently from the Court of Cassation in order not to have to rule it unconstitutional its interpretation is not final. The case is remanded to the court in or by which the constitutional question was raised, and that court is not legally bound to follow the Constitutional Court's interpretation. On the contrary, it is informally bound to follow the interpretation of the Court of Cassation. The Constitutional Court is thus deprived of a tool which the United States Supreme Court has found very useful, i.e., the construction of statutes so as to avoid constitutional violations. The Constitutional Court has not been willing to resign itself to this deprivation. On several occasions it has attempted to employ this technique, but the Court of Cassation has not tolerated these invasions of its jealously guarded province

of statutory interpretation.

The first conflict arose from a reform of the penal code enacted by Parliament in 1955. The Court of Cassation was soon called on to interpret the reform measure and did so. Shortly thereafter the constitutionality of part of the reform measure was questioned, and the Constitutional Court, in order to avoid declaring the law unconstitutional, interpreted it in a way radically different from the Court of Cassation's.[12] The Court of Cassation seized the earliest opportunity to hand down another opinion on the matter in which it reaffirmed its previous interpretation. Barely two months later the Constitutional Court responded by doing what it had previously attempted to avoid; it declared part of the reform measure unconstitutional.[13] Even that ruling did not end the fight. It was clear that the new procedures prescribed by the section of the law which had been declared unconstitutional could not be used in future criminal trials; but what about those already in progress? Since this was a question of interpretation, not of constitutionality, it went to the Court of Cassation, which held that the new measures were permissible in cases already in progress at the time the law was overturned. Less than a year later, the Constitutional Court was called on to rule on the constitutionality of another section of the 1955 reform measure. In the course of finding the law constitutional, it interpreted it to require that those procedural reforms which had been declared unconstitutional cease immediately

even in cases already in progress at the time of the ruling of unconstitutionality.[14] The dispute ended when shortly thereafter the Court of Cassation clearly and somewhat truculently rejected the Constitutional Court's interpretation.[15]

A similar dispute occurred when in 1965 the Constitutional Court attempted to interpret in a radically new way a law forbidding the distribution of information about birth control.[16] The ordinary judiciary disregarded this interpretation, and in 1971 the Constitutional Court declared the law unconstitutional.[17]

In both these attempts to save constitutionally questionable laws through interpretation the Constitutional Court was thwarted. Nor does it seem likely that the Court of Cassation will allow the Court to use this technique successfully in the future. Most commentators seem to accept this judgment. Giovanni Leone, now President of the Republic and a former professor of law noted in 1969, "The Constitutional Court, after having experimented unsuccessfully with the instrument of interpretation, which caused an unfarorable reaction by the Court of Cassation, is now oriented - and justly - to resolve constitutional questions imperatively and drastically."[18] Former president of the Court, Gaspare Ambrosini, came to the same conclusion in an article published in 1969.[19] And at his press conference at the end of the year in 1970, Giuseppe Branca, then president of the Court, lamented that the Court's interpretative decisions do not have the force of law and are not able to overrule the

ordinary judges.[20]

The written opinions of the Constitutional Court are short, impersonal, and abstract. Neither the vote on the case nor the name of the justice who wrote the opinion are revealed, and there are never dissenting opinions. The names of the president of the court and the reporter for the case are listed at the head of the text. The facts of the case which gave rise to the constitutional question are included, albeit very briefly, in the official publication of the opinions in Giurisprudenza Costituzionale. But when the opinions are reprinted elsewhere the facts are almost always omitted and the "legal" section of the opinion (which is labeled, "Held in law.") is often abridged. Omis, for omissione)omission), is inserted in the text to mark deleted sections.

The Court's decisions are short largely because it generally asserts rather than demonstrate its conclusions. In a sense, its decisions are written in a kind of shorthand which is readily intelligible to Italian judges, lawyers, and law professors, if not to laymen and foreigners. In a paragraph the Court can express its position on a doctrinal debate which has raged among scholars. Judges, lawyers, and scholars who want a fuller exposition of the arguments can then consult those doctrinal articles which express the position the Court has selected. In the recent case on the constitutionality of the divorce bill, for example, the Court stated with-

out offering any arguments that article 7 of the constitution had not raised the individual provisions of the Lateran Pacts to constitutional status. This point had been argued in great detail by constitutional scholars, and the Court did not bother to repeat their arguments; it simply indicated the set of arguments with which it agreed.

Non-legal materials traditionally have had no place in Italian courts. The doctrine of the strict separation of powers has given Italian law what some writers have called "cultural agnosticism, a deliberate turning away from other than the purely legal aspects of the culture."[21] Ideas of justice or utility and information drawn from the social sciences or history have not been regarded as proper considerations for judges.

The Constitutional Court is not, however, merely a court. It is a special organ with special powers. Many eminent constitutional scholars have, therefore, concluded that it is completely proper for the Constitutional Court, unlike other courts, to entertain non-legal considerations in making its decisions. To say this is, of course, to admit that the Court is an organ which should play a political role. This is a very sensitive point because of the jealously of Parliament, the suspicion of the political parties, and the pervasive myth of mechanical jurisprudence. For this reason, scholars who discuss the political role of the Court almost always speak in very general terms. Among those scholars who have argued that the Court should play a political - but not a partisan - role are Piero Calamandrei,[22]

Vezio Crisafulli,[23] Mauro Cappelletti,[24] Paolo Barile,[25] Salvatore D'Albergo,[26] Giuseppe Maranini,[27] and Temistocle Martines,[28] and former president of the Court, Giuseppe Branca, who has now returned to his chair as professor of constitutional law at the University of Rome, vigorously advocated a very active role for the Court.[29]

It should be noted, however, that not all scholars have held this view. For example, Castantino Mostati and Gaspare Ambrosini, both of whom sat on the Court, have argued that the Court's method of decision-making and its role should not differ markedly from those of an ordinary court.[30]

It is difficult to predict which philosophy will prevail on the Court in the next few years - and still harder to make long term predictions. On being elected president of the Court in late November, Giuseppe Chiarelli expressed the hope that the work of the Court "would aid social progress." He continued,

> That phrase represents, at very least, the need to have an even firmer grasp on the real nature of things in our country and not to close ourselves up in a ivory tower of abstract jurisprudence . . . This also means that the Court should not actively make policy; it is not that it ought not concern itself with political problems, but it ought to examine them without considering partisan interests and guided only by faith in the law and a clear understanding of social reality.[31]

This language lies somewhere between Branca's frank espousal of activism and the dry legalism of Ambrosini.[32] It bears some resemblance to the manner in which Sandulli spoke when he was elected president.[33] It also seems probable that Chiarelli, like Sandulli, favors a moderately activist Court.

The Christian Democrats stand on the nomination of Lelio Basso is probably the most serious challenge the Court has yet faced. The D C's point, at least in part, seems to be to express stern disapproval of the Court's rulings on the birth control and divorce laws. And should the PCI and PSI yield to the D C's demand that they submit a list of candidates for their seats on the Court rather than a single name, those seats will be filled in the future with blander men than in the past. In addition, the President of the Republic is now a Christian Democrat, Giovanni Leone. His Court appointments will almost certainly be more conservative than those of his predecessor, Giuseppe Saragat.

It would be wrong, however, to overestimate the Christian Democrats' pique. It is unlikely that they will do much to diminish the Court's power or independence. Further, the parties of the democratic left are staunch supporters of the Court, and it is hard to see how Italy will be governed in the future except by a center-left coalition.

The Court is likely to retreat somewhat in the next few years from the advanced position Branca staked out. But in a country in which Parliament is often deadlocked and with the taste of power in its mouth, the Court is unlikely to ever renounce an active role.

1. Stefano Rodotà, "La svolta 'politica' della Corte costituzionale," Politica del Diritto, vol. 1, no. 1, July 1970, p. 38.

2. Mauro Cappelletti, John Henry Merryman, Joseph M. Perillo, The Italian Legal System (Stanford, California: Stanford University Press, 1967), p. 164 n.

3. With reference to Italy alone: Cappelletti, Merryman, Perillo, op. cit., pp. 181-182, 240, 252-253. With reference to civil law countries generally: Gottfried Dietze, "Judicial Review in Europe," 55 Michigan Law Review 539, 545 (1957).

4. John Henry Merryman and Vincenzo Vigoriti, "When Courts Collide: Constitution and Cassation in Italy," 15 The American Journal of Comparative Law 665, 669 (1967).

5. Ibid.

6. Sentenza 5 giugno 1956, n. 1.

7. Sentenza 6 luglio 1960, n. 59; sentenza 3 aprile 1963, n. 40; sentenza 3 aprile 1963, n. 41; sentenza 3 aprile 1963, n. 42.

8. Sentenza 14 giugno 1956, n. 2.

9. Cappelletti, Merryman, and Perillo, op. cit., pp. 255-256. Internal quote is from Torrente, Manuale di diritto privato (Milano: A. Giuffrè Editore, 1965), p. 27.

10. Sentenza 16 marzo 1971, n. 49.

11. Merryman and Vigoriti, op. cit., p. 669.

12. Sentenza 4 febbraio 1965, n. 11.

13. Sentenza 26 giungno 1965, n. 52.

14. Sentenza 29 dicembre 1966, n. 127.

15. For a full account of this dispute between the Court of Cassation and the Constitutional Court see Merryman and Vigoriti, op. cit., pp. 670-681.

16. Sentenza 19 febbraio 1965, n. 9.

17. Sentenza 16 marzo 1971, n. 49.

18. Giovanni Leone, "Spunti di riflessione sulla graduale piu incisiva presenza della Corte costituzionale," Autonomie e garanzie costituzionali (Firenze: Vallechi Editore, 1969), p. 348.

19. Gaspare Ambrosini, "La Corte costituzionale (L'apporto decisivo della sua giurisprudenza per la chiarificazione e lo svolgiemento dell'ordinamento costituzionale," Autonomie e garanzie costituzionali, p. 22.

20. Giuseppe Branca, "Un anno di attività della Corte costituzionale," Politica del Diritto, vo. 2, no. 1, February 1970, p. 34.

21. Cappelletti, Merryman, and Perillo, op. cit., p. 179.

22. Piero Calamandrei, "Si mette in pericolo la costituzionalità della Corte costituzionale," in Calamandrei, Scritti e discorsi politici, vol. 2, (Firenze: Vallechi Editore, 1966), pp. 277-301.

23. Vezio Crisafulli, "Le funzioni della Corte costituzionale nella dinamica del sistema: esperienze e prospettive," in La giustizia costituzionale (Firenze: Vallechi Editore, 1966, pp. 83-108.

24. Mauro Cappelletti, "L'attività e i poteri del giudice costituzionale in rapporto con il loro fine generico," in Scritti in memoriz di Calamandrei (Padova, 1958), p. 151.

25. Paolo Barile, "La corte costituzionale organo sovrano: implicazioni practiche," Giurisprudenza costituzionale, 1957, p. 914.

26. Salvatore D'Albergo, "Corte costituzionale e indirizzo politico," in La giustizia costituzionale, pp. 124-131.

27. Giuseppe Maranini, "La posizione della corte e dell'autorità giudiziaria in confronto all'indirizzo politico di regime (o costituzionale) e all'indirizzo politico di maggioranza," La giustizia costituzionale, pp. 132-154.

28. Temistocle Martines, "Questioni vecchie e nuove in tema di attivita interpretiva della Corte costituzionale," Autonomie e garanzie costituzionali, pp. 395-423.

29. Branca, op. cit.

30. Martines, op. cit., p. 397.

31. Amedeo Lanucara, "Intervista col presidente della Corte costituzionale," Il Globo, November 28, 1971, p. 1

32. For Branca's remarks see Branca, op. cit. For Ambrosini's press conference at the end of 1967, see "The Constitutional Court," 17 Italy: Documents and Notes 11 (1968).

33. Francesco Palladino, "Cerchiamo una società pui giusta," Oggi Illustrata, March 23, 1969, p. 12. Sandulli's comments at the press conference at the end of 1968 are reprinted in "The Constitutional Court in 1968--Statements by the President, Aldo Sandulli," 18 Italy: Documents and Notes 205 (1969).