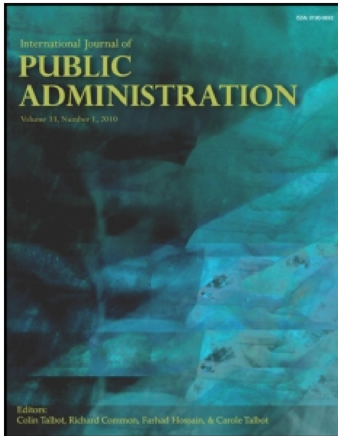
This article was downloaded by: *[Salerno, Giulio]*
On: *21 June 2011*
Access details: *Access Details: [subscription number 933920028]*
Publisher *Routledge*
Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



International Journal of Public Administration
Publication details, including instructions for authors and subscription information:
http://www.informaworld.com/smpp/title~content=t713597261

Implementation and Revision of the Italian Constitution Since the 1990s

Giulio M. Salerno[a]
[a] Department of Public Law and Theory of Government, University of Macerata, Macerata, Italy

Online publication date: 23 February 2011

To cite this Article Salerno, Giulio M.(2011) 'Implementation and Revision of the Italian Constitution Since the 1990s', International Journal of Public Administration, 34: 1, 114 — 122
To link to this Article: DOI: 10.1080/01900692.2011.536094
URL: http://dx.doi.org/10.1080/01900692.2011.536094

PLEASE SCROLL DOWN FOR ARTICLE

Full terms and conditions of use: http://www.informaworld.com/terms-and-conditions-of-access.pdf

This article may be used for research, teaching and private study purposes. Any substantial or systematic reproduction, re-distribution, re-selling, loan or sub-licensing, systematic supply or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The accuracy of any instructions, formulae and drug doses should be independently verified with primary sources. The publisher shall not be liable for any loss, actions, claims, proceedings, demand or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.

International Journal of Public Administration, 34: 114–122, 2011
Copyright © Taylor & Francis Group, LLC
ISSN: 0190-0692 print / 1532-4265 online
DOI: 10.1080/01900692.2011.536094

Routledge
Taylor & Francis Group

Implementation and Revision of the Italian Constitution Since the 1990s

Giulio M. Salerno
Department of Public Law and Theory of Government, University of Macerata, Macerata, Italy

This article describes the evolution of the Italian Constitution since 1990. A distinction is made between a "rigid" Constitution and an applied or "living" Constitution. Laws that have constitutional status and their limits are also examined. Moreover, the changing destiny of the various "seasons of reform" of the Constitution and the long road towards the "implemental" integration of the Constitution is also discussed. Finally, the role of the Constitutional Court in relation to the Constitution and as the "guarantor of the constitutional conformity" of the entire legal system is explained.

Keywords: Italian constitution, constitutional reforms, Constitutional Courts, administrative law

Downloaded By: [Salerno, Giulio] At: 09:18 21 June 2011

WHAT IS THE ITALIAN CONSTITUTION TODAY?

Our Constitution is something very different from a simple piece of legislation. This solemn written document presents itself as set in stone, and stands out, in terms of its superior legal value and force, from the laws normally approved by Parliament. As we will see in more detail later on, the Italian Constitution is no longer represented by the original text, approved by the Constituent Assembly on December 22, 1947. Not only has this document been updated in several places by the laws of constitutional status approved from 1948 onwards, it has also been modified by the laws of constitutional revision approved up until the present day, and particularly by the reforms implemented in the 1990s.

In addition, the Constitutional Court has operated on and through the Constitution in carrying out its basic functions as guarantor. As such, in order to glean a full understanding of what the Italian Constitution is today, it is not sufficient to read the content of the official texts. Rather, it is necessary to go deeper into the subject, which is the purpose of this article. We will delineate here the essential, indefectible features of the Constitution; we will explain the procedures through which it can be modified; we will describe the long process of implementation of the Constitution from the time when it first entered into force; we will provide an overview of the main seasons of reform that have affected the Constitution; and, last of all, we will delineate the central role played by the Constitutional Court in the execution and implementation of the Constitution.

A "RIGID" CONSTITUTION

The first essential, indefectible feature of the Italian Constitution is its rigidity. In actual fact, all of the modifications that have thus far been made to the constitutional text — which we will discuss in more detail later—are not sufficient to demonstrate that the Italian Constitution has become a "flexible" test. In this sense, the Constitution is very much at odds with the Italian Statute granted by Charles Albert in 1848, which, as is well-known, was easily repealed and bypassed during the Fascist period. Italy's legal system affirms — almost unanimously — that ours is, and shall always remain, a rigid Constitution.

What, then, do we mean when we refer to the rigidity of the Constitution? This concept implies the necessity that any modifications to the constitutional text be implemented, as we will see later on, in line with an appropriate legislative procedure — one that is at once not only different and more complex and difficult than the normal legislative procedure, but also directly disciplined and, therefore, guaranteed by

Correspondence should be addressed to Giulio M. Salerno, Department of Public Law and Theory of Government, University of Macerata, Piazza Strambi 1, 62100 Macerata, Italy. E-mail: salerno@unimc.it

Downloaded By: [Salerno, Giulio] At: 09:18 21 June 2011

the Constitution itself (cf. Articles 138–139). It requires that revisions to the Constitution and the "other constitutional laws" be passed by each chamber with two successive resolutions at an interval of no less than three months, and approved with the absolute majority of the members of each chamber at the second vote.

In addition, the laws in question can be subject to a referendum, if requested — within three months of their publication (for notification purposes) — by one-fifth of the members of one of the chambers, or 500,000 voters or five regional councils; in such cases, the constitutional law subject to the referendum is promulgated by the Head of state if it is approved by a majority of valid votes. In any case, no such referendum may be held when the law of constitutional status has been approved at the second vote by each chamber with a majority of two-thirds of its members (Article 138 of the Constitution).

In general terms, then, the current Italian Constitution certainly stands out from the previously valid Albertine Statute, which although it was a written constitution, was also flexible, in that it could be modified by ordinary law (or, at least, this was the case until the introduction of laws that were constitutional in character; cf. Law 2693/1928). By the same token, our legal system also stands apart from those (such as the ones that were in force in the European states prior to the American and French Revolutions) in which the Constitution — given its status as common law and, therefore, its necessary flexibility — can be modified both by customs and by the law (a current example of this would be the Constitution of the United Kingdom, which is the joint result of customs and of the laws approved by the UK Parliament).

THE WRITTEN CONSTITUTION AND THE APPLIED CONSTITUTION

Ours is a written Constitution and it is only on the basis of, and in compliance with, the written text that constitutional norms can be justified. Certainly, it is also the case that Italian law differentiates the written or formal Constitution — meaning that set of norms contained within the constitutional text — from the constitution as applied, which is another thing entirely and is referred to as the "material constitution." This definition, made famous in Italy by Costantino Mortati in his 1940 monograph, refers to the set of ideal interests and political values and ends to which the dominant forces prompt the state's action, to such an extent as to impose them as fundamental to, and characteristic of, the structure of the social body. This would give rise to the so-called "regime principles," which would be made normative(meaning that they would take on the value of cogent legal norms, regardless of the content of the written Constitution, and that they could be implemented even *contra constitutionem*) and which would at the same time be non-modifiable. It is clear, however, that accepting such an interpretation means denying the value of our rigid written Constitution, running the risk of bypassing or even undermining it. This explains why said definition — the "material constitution" — has hardly ever been used by the Constitutional Court, which is the body charged with the responsibility of safeguarding the Constitution and ensuring compliance with it. In contrast, albeit in very few cases, the Court has made use of "custom" as a source of norms of constitutional status, but only for the purposes of implementing or adding to the constitutional text, and never in a derogative or, worse still, a modifying or abrogative sense in relation to the content of the written Constitution.

The meaning of the applied constitution is very different, since with this term the law denotes that wide-ranging — and, in truth, rather imprecise — set of norms that, over and above their insertion within the written Constitution, govern through their content that which would be considered, in line with the accepted interpretation, as a typical "constitutional matter." The applied constitution would deal, for example, with the normative governance of those elements traditionally considered to be constitutive of the state (populace, territory, and sovereignty), or also those institutions from time to time considered essential for the presence of that type of state (for example, the electoral process, or the procedures for the formation of laws and constitutional revision). The flexibility and indeterminate nature of the notion of "constitutional matter" is, however, clearly evident, to the extent that the corresponding expression, used in the last section of Article 72 of the Constitution, in relation to the procedure for the formation of laws, was interpreted by the Constitutional Court not by using standards based on objectivity, content, or functionality, but rather by making it coincide with the laws of constitutional status — i.e., those laws approved in accordance with the procedure set out in Article 138 of the Constitution (cfr. Ruling 168/1963), so that — almost paradoxically — the meaning of "constitutional matter" depends on the legislative procedure that is used by Parliament.

THE "LIVING" CONSTITUTION

The meaning of the expression "constitution in force" or "living constitution" is different from the meaning of the other expression thus far covered, because this is an expression that the law uses frequently to denote that set of norms contained in the written Constitution in terms of their current application and interpretation by, above all, constitutional case law. This implies that not all of the written Constitution is effectively in operation (see, for example, the case of Article 39, on collective labor agreements), and that the constitutional norms are defined by their effective implementation, which is put in place by legal practitioners. This form of implementation is governed by the Constitutional

Court in the exercising of its functions as the body responsible for constitutional law. In this regard, the Constitutional Court performs an important duty of guiding the interpretation of the constitutional norms, and does so also through reference to its "precedents" (cf. Bin).

In this way, in accordance with the guidance provided by the Constitutional Court, all of the written constitutional provisions have the possibility of being tangibly implemented through the legal system thus overcoming that interpretation, initially posited by the Supreme Court of Appeal, which negated the possibility of effective legal status for the constitutional provisions deemed to be merely program provisions — meaning that they were indicative of mere objectives or simple purposes that would have to be tangibly pursued in the subsequent development of the legislative action and, therefore, lacking in any cogent value — in contrast to those provisions that immediately produced direct effects, in that they were considered suitable for immediate application and that they, therefore, embodied "full normativeness" (Paladin). As such, the fully operational status of all of the constitutional norms has been confirmed not only in relation to all the public functions (Dogliani), but also in relation to all the components of the social body. In short, even the most generic affirmation contained in the constitutional text represents a limit for the laws in force, integrating them or in any case representing a binding standard for their interpretation (Crisafulli), even if there are cases (cf. Art. 39 of the Constitution on collective agreements) in which, even at constitutional level, it is possible to talk about disuse.

Downloaded By: [Salerno, Giulio] At: 09:18 21 June 2011

LAWS OF CONSTITUTIONAL STATUS

In any case, as indicated above, the constitutional provisions are not immutable; on the contrary, the Constitution itself, in the section on the "constitutional guarantees," envisages certain methods and conditions that must be respected for the approval of both laws revising the Constitution and of those expressly indicated as "the other constitutional laws" (cf. Art. 138 and 139). In general terms, we are dealing again with laws in the strict or formal sense, or with acts that, as with the ordinary legal provisions we will discuss later, are approved in terms of their content by the two chambers and are subsequently promulgated by the Head of state. But what distinguishes these laws of constitutional status from ordinary laws is, in formal terms the presence of a different, more laborious procedure that, as has been stated before, "is grafted on to the trunk of the ordinary legislative procedure" (Crisafulli); and in light of that more laborious procedure, in terms of their substance or content, the aforementioned categories of laws of constitutional status are able to implement legislation that acts at the constitutional level. The distinction between the revision laws — intended to modify the provisions set out by the Constitution — and the other constitutional laws, which are geared towards implementing provisions of a higher level than that of the ordinary laws, has not been respected in practice, because in reality the two categories are for the most part unified under the umbrella of the category of the laws of constitutional status. These particular laws, then, are those that are capable of modifying, partially repealing, abrogating or integrating the text of the provisions set out by the Constitution.

LIMITS ON THE LAWS OF CONSTITUTIONAL STATUS

Although, as has been said, the laws of constitutional status have a legal power higher than those of the primary sources they nevertheless do not have unlimited power. In other words, even though they embody the highest level of sovereign power within the legal system (and in this regard, according to Crisafulli, they could be classified as having "constituent power," even though it is important to bear in mind the opinion expressed by current law, which considers even constitutional revision to be an expression of the "constituted powers" since they are constitutionally founded and defined; cf. most recently, Pace), the laws of constitutional revision and the other constitutional laws come up against the limits that are set out by, or that can be deduced from, the Constitution.

First and foremost, there are the limits of form envisaged by the Constitution, which means that the laws of constitutional status are legally valid as long as they respect the procedure set out by the Constitution, at least to the extent that they themselves do not envisage the modification or partial repealing of the Constitution, since they must in any case respect — as current law has it — the supreme principles expressed by the constitutional regulations themselves on the revision procedure, even though these principles are not easily identified (cf. on this point, amongst many others, Dogliani & Panunzio). This problem became particularly evident when, in the 1990s, two temporarily applicable procedures that departed from the Constitution were approved, as set out respectively in Constitutional Law No. 1 of 1993 and, even more exceptionally, in Constitutional Law No. 1 of 1997. These two procedures that modified the Constitution were partially different from the procedure set out in Article 138 of the Constitution and were geared towards facilitating the modification of large parts of the Constitution itself. These special procedures were not, however, sufficient, to deliver the reforms that had been hoped for. As such, the ordinary, general procedure for revising the Constitution was applied again — the same procedure that had been effectively used, as we will see shortly, on numerous occasions during the latest of the seasons of "constitutional reform" (i.e., the period that saw the approval of laws to revise the Constitution in 1999, 2000, 2001, 2002, and 2003).

In addition, there are limits on the content, in that the Constitution itself, in its closing Article, prescribes that "the

republican form cannot be subject to constitutional revision" (Article 139). Greater significance is now attributed to this provision, which was initially intended to prevent the Republic — which replaced the monarchy following the institutional referendum of 2 June 1946 — from being overthrown by a law adopted by the same procedure of constitutional revision. To this end, among the multiple, differentiated interpretations that the law has put in place to define the precise content of the notion of "republican form" (cf. Reposo & Volpe), the most preferable would appear to be that which takes into consideration not only the features that traditionally distinguish republics from monarchies (in short, an elected Head of state with a fixed term; cf. for all, G.U. Rescigno), but also that which connotes our republican form in its essential elements — i.e., the principle of the unity and indivisibility of the Republic as proclaimed by Article 5 of the Constitution (as stated by Paladin, who goes on to link the republican form with the principle of popular sovereignty expressed by Article 1 of the Constitution and, consequently, with those principles that characterize our liberal, pluralist democracy, meaning the principles put in place to safeguard the freedoms classified as inviolable by Article 2 of the Constitution).

On closer inspection, the more the "republican form" (protected by Article 139 of the Constitution) is filled up with the normative content, the more likely it is that this limit, positively provided for by the Constitution, ends up leading back to those "implicit" or "logical" limits on constitutional revision, the existence of which — albeit with a strong diversity of accents — is not only accepted by current law but is, in actual fact, authoritatively confirmed by the Constitutional Court. Indeed, the Constitutional Court highlighted the existence of "supreme principles" that, like those envisaged by Article 139 of the Constitution, "cannot be subverted or modified in their essential content either by laws of constitutional revision or by other constitutional laws," and that "belong to the essence of the supreme values on which the Italian Constitution is founded" (Constitutional Court 1146/1988).

In particular, when the Constitutional Court demanded that the laws of constitutional status be checked, it made specific reference to the limits it had already identified for each type of provision — such as those contained in the composition sources as per Article 7 of the Constitution or those that execute the treaties of the Communities and of the European Union — which, although of primary status, are partially able to depart from the constitutional provisions; and it can also be briefly restated that the limits applied on these occasions were those relating to the "inalienable rights of the individual" and to the "fundamental" or "supreme principles" of the constitutional legal system, which are also, therefore, connected to the organization and functionality of the public powers.

For example, in constitutional legislation the following principles were classified as "supreme principles of the legal system of the state": the sovereignty of the populace; the unity of state legislation; the unity of constitutional legislation; faithful collaboration between the powers of the state and between the state and the regions; and the laity of the state (cf. Constitutional Court 175/1973, 30/1971, 6/1970, 35/1985, 203/1989). The question of whether — and if so, to what extent — constitutional unrevisability (i.e., the constitutional illegitimacy of a law of constitutional revision that violates the same principle) derives from the definition of a certain legal principle — connected to the organizational make-up of the public powers — as being "fundamental" or "supreme," is discussed in texts on legal theory (cf. for all, Zanon).

ARE "REFORMS" OF THE CONSTITUTION PERMITTED?

Above all, the question is whether through a comprehensive reform of the Constitution it is possible at the same time to modify a plurality of institutions or parts of the Constitution. The opposing hypothesis — which was undermined by the major reform of the second part of the Constitution approved in 2001 — is based on the fact that, as we will see, the law of constitutional revision may be subject to a popular referendum and that, in cases of "heterogeneous" constitutional reform the people would not be free to express their own vote, being constrained to vote yes or no on the entire constitutional law and not on the individual parts. In truth, the popular vote is required not in order to allow the citizens to participate in determining the law, but, rather, to verify the existence or otherwise of popular consent with respect to the overall will for reform already expressed by the representative bodies in the respective resolutions. From this perspective, it must, therefore, be concluded that our legal system permits the simultaneous modification of constitutional provisions relating to a plurality of institutions or portions of the fundamental Charter, without there being any constitutional necessity that requires the distribution of said modifications across several revision laws that are presumptively "homogeneous" in terms of their content, subject or purposes.

In order to address such a complicated question, it is important to underline one or two more immediately evident features: first and foremost, from the perspective of the political opportunity, removing from the constitutional revision yet more principles with respect to those indicated positively by the provisions of the Constitution certainly does not make the current Constitution more solid. Indeed, history has shown that the more rigid the revision of the constitutional charter, the greater the reduction of the necessary capacity of the Constitution to adapt to social evolution, thus favoring the recourse to *de facto* acts — i.e., to the breaking of the law. From the strictly legal/normative perspective, then, there are authoritative legal opinions — backed-up by a

Downloaded By: [Salerno, Giulio] At: 09:18 21 June 2011

wealth of arguments — that deny, for example, equivalence between the unrevisability of the Constitution and the inviolability of rights (see Pace). Last, the use of "values theory," with the intrinsic discretion that it allows when interpreting and evaluating the law, casts the law into considerable doubt (Rimoli), which does not appear to be overcome even if it is claimed, as has been authoritatively stated, that the supreme principles would not be equivalent to "hierarchically superior norms," but rather, would express "essential and categorical values both in the construction and interpretation of norms (including those set out by the constitutional sources) and in the evaluation of their constitutionality" (Modugno).

THE LONG ROAD TOWARDS THE "IMPLEMENTAL" INTEGRATION OF THE CONSTITUTION

With the coming into force of the Constitution, on January 1,1948, not all of the bodies and institutions that it envisaged began functioning immediately. Indeed, the period since 1948 has seen the approval of numerous laws — both ordinary and of constitutional status — that are geared towards implementing those parts of the Constitution that, in the absence of said laws, would have remained ineffective. It can be said, then, that the constitutional laws approved to that end actually integrated the text of the Constitution in order to implement it more completely. In general terms, it is, therefore, correct to state that the Constitution currently in force is the result of the document approved in 1947 as integrated by said laws of constitutional status and as specified and clarified by the ordinary laws of implementation.

During the first legislature (1948–1953), a number of laws were passed that govern the exercising of constitutional justice (constitutional laws 1/48 and 1/53, and ordinary law 87/53), but the Constitutional Court only came into being in 1956, the National Council of the Economy and Labor in 1957 (Law 33/57), and the Upper Council of the Magistrature in 1958 (Law 195/58). The implementation of the regional legal system in relation to the regions of "ordinary autonomy" was particularly slow. In relation to the regions of special autonomy, the statutes of Sicily, Sardinia, Trentino-Alto Adige, and Valle d'Aosta were adopted by the same Constituent Assembly through constitutional laws 2, 3, 4 and 5 of 1948; indeed, the Sicilian statute had been in force since 1946. The Friuli Venezia Giulia Region had to wait for the passing of constitutional law no. 1 of 1963, which also saw the establishment of the Molise Region.

In terms of the regions of ordinary autonomy, as far back as the first legislature, Law 62/53 had put in place norms for the constitution and functionality of the regional bodies, but for the effective establishment of these regions it proved necessary to wait until the end of the 1960s and into the subsequent decade. It was at that time that Law 108/68 was passed upon the election of the regional councils — which took place on April 18, 1970 — along with budget law 281/70 (which, however, also regulated the other matters concerning regional reform), laws 480/71 and 519/719 (passed on May 22, 1971), which approved the statutes passed in the meantime by the regional councils, and various decrees to transfer certain administrative functions from the state to the regions (January 14, 15, 1971).

For the sake of completeness, it should be borne in mind that, with delegation law 382/75 and the consequent legislative decree 616/77, the sphere of regional autonomy was substantially expanded (perhaps even beyond certain constitutional limits) and that, with constitutional law 1/71 (integrated with numerous other provisions — cf. Presidential Decree 670/72), the special statute of Trentino-Alto Adige was profoundly altered, attributing to the two provinces the status of *bona fide* regions. Another constitutional fulfillment that had been delayed for years but was made necessary by the question of divorce (which had become so pressing in that period), was the approval of law 372/70, which regulated the direct democratic institutions envisaged by the Constitution — i.e., the popular initiative of laws and referendums.

REVISIONS OF THE CONSTITUTION: THE CHANGING DESTINY OF THE VARIOUS "SEASONS OF REFORM"

It would, however, be difficult to understand what the current Constitution is without also analyzing the modification, of constitutional status, to the document approved in 1947. Indeed, in the 60+ years since it came into force, the Constitution has undergone numerous modifications, which have been implemented through laws of constitutional revision or approved through the special procedure envisaged by Article 138 of the Constitution.

A number of revisions were implemented in the 1960s, including: constitutional law 2/63, which altered the numerical composition of the chamber and the Senate and reduced the duration of the Senate's legislature to five years, bringing it in line with the legislature of the chamber; constitutional law 1/67, according to which the prohibition of extradition for political crimes does not apply to crimes of genocide; and constitutional law 2/67, which modified the provisions on the appointment and duration of tenure of the judges in the Constitutional Court.

After a long pause, a number of constitutional reforms were approved at the end of the 1980s and the start of the 1990s. These were mostly connected to the tumultuous political events that characterized that period: constitutional law 1/89, relating to the penal responsibilities of ministers for crimes committed in exercising their duties, removing the authority from the Constitutional Court and granting it to the ordinary criminal justice system; constitutional law 1/91

Downloaded By: [Salerno, Giulio] At: 09:18 21 June 2011

allowed — under certain conditions — the President of the Republic to dissolve in advance the chambers even during the last six months of his or her mandate; constitutional law 1/1992, concerning amnesty and pardons, eliminating the intervention of the Head of state and introduced a legislative procedure constrained by extremely onerous processes; and, last but not least, constitutional law 3/1993 reformulating the guarantees of incontestability of members of parliament and making it possible for members of parliament to be subject to criminal procedures without authorization of the relevant chamber. This season of reforms was essentially linked to the relations between the political sphere and that of the judiciary, and the results cannot be considered wholly positive or fully satisfactory, since numerous crucial issues remained unresolved or, worse, compromised by some of the constitutional choices made during this period.

From the end of the 1990s, following the failure of the derogative procedures highlighted above, use was made once again of Article 138 of the Constitution and a major process of constitutional reform was undertaken, this time focusing on the strictly institutional profiles of the legal system. Of particular relevance were the following reforms: constitutional law 1/1999, which modified various articles of the fifth section of the second part of the Constitution on regional autonomy, accentuating above all the role of the President of the Regional Council and attributing statutory autonomy to the ordinary regions; constitutional law 2/1999, which introduced a wide-ranging set of regulations on the principal of due process; constitutional laws 1/2000 and 1/2001, which granted the vote to Italians residing overseas, reserving to these voters a certain number of parliamentarians; constitutional law 3/2002, which profoundly altered the criteria for subdividing the legislative remit between the state and the regions, as well as other provisions of the fifth section of the second part of the Constitution, relating to the legal system of the regions and the other territorial bodies; constitutional law 1/2002— in relation to the members and descendants of the House of Savoy — reducing the prohibition on their right of access to public offices and to the active and passive electorate, and for the male descendants permitting entry and residence within Italian territory; constitutional law 1/2003, which boosted the commitment of the Republic to promote, through appropriate provisions, equal opportunities for men and women; and, last of all, constitutional law 1/2007, abolishing the exception that had allowed the death penalty to be applied in those cases envisaged by the military laws of war.

In total, up to the present day, 15 laws of constitutional revision have been approved. These revisions have acted upon thirty-two articles of the original text of the Constitution: given that the Constitution approved in 1947 was composed of 139 articles, this means that a little over a quarter of the articles have been modified to one extent or another.

In the main — with the exception of certain modifications relating to side issues, so to speak, such as the return of the descendants of the House of Savoy — the reform process has been geared towards making the constitutional text more current and relevant, integrating into it principles and institutions that are by now widespread across western democracies, some of the most salient aspects being: institutional decentralization; the vote for citizens residing overseas; gender equality; and the absolute prohibition of the death penalty.

However, it is certainly the case that the first three of the aforementioned constitutional revisions have both wholly positive and less positive aspects. In particular, the reform of the system of relationships between the state and the autonomous territorial bodies has created, as is well-known, a number of problems of application, and certain aspects already appear to be in need of further reform. The overseas vote, albeit correct in principle, poses serious problems of probity and transparency that must necessarily be resolved. For their part, the constitutional regulations on equal gender opportunities have been formulated as a merely promotional norm that requires the intervention of the legislator and, moreover, they fail to set out clear guidelines on the recurrent problem of the introduction of the so-called “pink quotas” in electoral competitions. Last of all, it is essential to highlight that the current constitutional text appears seriously deficient in relation to two widely felt requirements: military activities for purposes of international security, on the one hand, and the process of European integration, on the other.

Military activities are still regulated on a case-by-case basis, giving rise on occasion to doubts of the constitutionality of the procedures implemented, for example in relation to the role of the Parliament and of the Head of state. European integration — with the exception of the odd recent reference in constitutional law, which has initiated a consolidated process of decentralization for the benefit of the territorial autonomies — continues to be governed by the constitutional principle that allows for “limitations of sovereignty” in favor of international legal systems that ensure “peace and justice among nations” (Article 11 of the Constitution). This is a true “Italian exception” in relation to the other European constitutions — an exception that many would like to see left behind, even though certain doubts may be raised, for example on the possibility that such a constitutional revision would permit that form of popular intervention on certain questions that is currently precluded by Article 75 of the Constitution.

It should, however, be borne in mind that the failure of the latest constitutional reform of the second part of the Constitution — rejected by the popular vote in 2006 — presumably makes yet more challenging the task of those who wish to proceed with further constitutional revisions. This would certainly be the case if an attempt was made to approve said reforms simply through the support of the parliamentary majority, as occurred for revision law 3 of 2001

Downloaded By: [Salerno, Giulio] At: 09:18 21 June 2011

and the failed revision of 2006. The complicity of the opposition forces — an element that had been considered almost natural up until constitutional law 3 of 2001 — seems now to have returned to being considered a necessary element in the effort to get approval on reforms that are actually capable of achieving the widest consensus in the legal system. Compromise solutions on the constitutional level are not a sign of weakness — rather, they are the result of the appropriate search for points of balance between the various positions.

THE ROLE OF THE CONSTITUTIONAL COURT IN RELATION TO THE CONSTITUTION

It cannot be denied that the living Constitution is also formed thanks to the primary role played by the Constitutional Court, so it is appropriate to devote some time to describing the remit of this body, which is crucial in ensuring the overall coherence of the legal system with respect to the Constitution.

The Constitutional Court is envisaged and governed through the final section of the second part of the Constitution, which relates to "constitutional guarantees." This positioning immediately clarifies the remit of the Court in terms of the overall design of the constitution: the Court is responsible for a plethora of jurisdictional functions that are directly linked to the safeguarding of the constitutional principles and provisions and to the repression of certain types of acts that are damaging to the rules underpinning our legal system. Specifically, the remit of the Constitutional Court encompasses four distinct areas: passing judgment on the constitutional legitimacy of the laws of the state, the regions, and the autonomous Provinces of Trento and Bolzano, and of acts with state legal force; passing judgment on conflicts of attribution between the powers of the state, between the state and the regions or the autonomous Provinces of Trento and Bolzano, or between the regions; passing judgment on accusations relating to so-called "presidential" crimes of the head of state; and passing judgment on the admissibility of requests for abrogative referenda submitted in accordance with Article 75 of the Constitution. This does not mean, however, that respect for the constitutional norms is not also ensured by other constitutional organs: for example, the President of the Republic does so when promulgating laws or issuing acts with legal force (similar to Constitutional Court 406/1989). However — since the Court has the exclusive remit over those functions that, as defined by the Constitution, determine the sphere of justice or of constitutional jurisdiction — a founding principle of our constitutional legal system is that the aforementioned attributions cannot be broken apart or attributed to other public bodies, not even through norms of constitutional status.

In particular, on the basis of this principle of the unity of the constitutional jurisdiction, the High Court for the Sicilian Region had its powers reduced. The Sicilian statute — adopted prior to the Constitution coming into force, and subsequently converted into constitutional law — had previously attributed to the High Court powers including the right to pass judgment on the constitutional legitimacy of state laws and regional Sicilian laws. As such, only the Constitutional Court is permitted to decide on the constitutionality of the law, meaning that only it can pass judgment on the political bodies — which are directly representative of the people — when exercising the legislative function attributed to them (cf. Articles 70 and 117 of the Constitution) as regards whether or not they are respecting the Constitution — i.e., implementing acts that are aligned with the principle of constitutional legality. This monitoring function is strictly linked to the rigidity of the Constitution and to the hierarchical subordination of the law to the fundamental text of the Republic. The judgment on the constitutionality of laws is put in place as the constitutional "limit," as per the general provision of Article 1 of the Constitution, making it one of the most important forms through which sovereignty can be exercised. In this sense, it can be said that the principle of legality, intrinsic to the rule of law, is completed by the principle of constitutional legality, which connotes and justifies the very definition of the constitutional state. With the establishment of the constitutional jurisdiction, another step towards constitutionalism can be said to have been taken: the law adopted by the representative bodies is not a source without limits, but — since it is hierarchically subordinate to the Constitution, it becomes open to review by a third, impartial body that ascertains its compliance in terms of the Constitution (the so-called "parameter" of constitutionality).

THE CONSTITUTIONAL COURT AS THE "GUARANTOR OF THE CONSTITUTIONAL CONFORMITY" OF THE ENTIRE LEGAL SYSTEM

In performing its role as the guarantor of the Constitution, the Constitutional Court carries out the duty of ensuring the most comprehensive "constitutional conformity" of the entire legal system. In particular, this duty has its source in three aspects that have come to the fore to an ever greater extent through the examination of constitutional legitimacy, particularly from the 1990s onwards. First of all, among the flaws of legal constitutionality that the Constitutional Court has claimed that it has been able to apply, there has been the flaw defined as "excess of legislative power." This flaw has been developed by taking its cue from administrative jurisprudence and from the flaw of excessive power configured therein to evaluate the fairness of the exercising of discretion in the adoption of administrative provisions, or,

Downloaded By: [Salerno, Giulio] At: 09:18 21 June 2011

Downloaded By: [Salerno, Giulio] At: 09:18 21 June 2011

rather, the diversion or deviation of the act from the objective of public interest that said act is by law intended to fulfill. It is, indeed, true that the law constrains the Court to exclude from its examination of constitutional legitimacy "any evaluation of a political nature and any examination of the use of the discretionary power of the Parliament" (cf. Article 28 of Law 87/1953); the intention here is to prevent the Court from ever using its own political evaluation – i.e., an evaluation "based on merit" — rather than that already carried out by the legislator.

However, that said, the Court can certainly examine respect for constitutional principles that impose certain conditions— at times indicated with very generic, indeterminate clauses — for which the law ends up being "functionalized," so to speak, by the Constitution (for example, the reinforced legal reserves and the conditions imposed therein). Or, on the basis of the principle of equality, the Court may carry out an evaluation of the reasonableness of the law in terms of symptomatic figures that are mostly similar to those adopted by the administrative jurisdiction— i.e., when the law has flaws relating to its internal logic, to the contradictions between means and ends, to the groundlessness of motives that justify exceptions or differences of treatment, and so forth. In other words, if the law is no longer "free in its purposes" (as per Guarino's famous concept), but appears constrained to be implemented in a way that respects the constitutionally imposed ends — and specifically, within the standard of reasonableness — this also reflects on the examinations of the Constitutional Court, which tends to make itself more incisive on the "overall correctness" of the legislation, albeit using methods that are not always uniform.

Second, the Constitutional Court has affirmed, from its first ruling, that its examination of constitutional legitimacy can also encompass the laws — and the acts of equal status — that already existed at the time when the Constitution came into force (cf. Constitutional Court 1/1957, where the judge was permitted to ascertain the completion of the abrogation of the laws themselves, due to the continued existence of an incompatible provision of constitutional status). The checking of said sources relates only to material flaws and, in exceptional circumstances, to formal flaws (since said acts certainly may not be examined in relation to procedural laws that did not exist at the time of their formation). In such instances, the ascertained unconstitutionality is deemed to have "arisen," meaning that it began at the time when the Constitution came into force. This has allowed the Constitutional Court to bring into line with the Constitution many provisions that had previously been in force – i.e., those approved under the statutory regime or the Fascist regime — thereby resolving the state of uncertainty that resulted from the position taken by the judges who, before the Constitutional Court came into force, had attributed abrogative effectiveness only to the constitutional provisions that produced direct effects and not to those so-called program provisions (cf. on this point, Crisafulli).

Third, it is important to underline the interpretative autonomy that is ever more frequently asserted by the Court in relation to the "terms" of its judgment, since these terms are outlined by the subjects — specifically, the judges — who raise the questions of constitutionality. This autonomy has allowed the Constitutional Court substantial freedom of movement, which sometimes appears to exceed the limit of the "non ultra petita rule" – i.e., the principle that requires the Court to make judgments only on that which is requested of it. In particular, the interpretative autonomy has facilitated the emergence of pronouncements by the Constitutional Court that annul only certain norms inferable from the legislative provision, so that said provision continues to form part of the letter of the law. This is the requirement of a rather important phenomenon — that of interpretative rulings, which allow the Constitutional Court considerable room to maneuver, enabling the formation of pronouncements that do not directly affect the letter of the law, affecting instead their prescriptive meaning. However, this results in uncertainty as to application, and perhaps, then, does not ensure, in concrete terms, the most effective form of implementation of the Constitution in terms of individual and collective behavior.

By the same token, it should be borne in mind that, from the 1990s onwards, the Court has asked the judges who raise questions of constitutionality to make a preliminary interpretative effort – i.e., to identify a compliance-focused interpretation of the legislative text that allows the law a normative signification that is coherent with the Constitution. Only if said effort is made and the judge demonstrates that it is not possible to take from the law any interpretation that complies with the Constitution does the court deem admissible the question submitted for it to rule upon. While with this "filter" of admissibility the Court constrains the judges who must reconstruct the laws in coherence with the Constitution, this approach also runs the risk of reducing the margins of intervention of the examination of constitutionality. In sum, the role of the Constitutional Court has made it possible for the Constitution to mirror with increasing effectiveness the real events in which citizens are all involved. It is, however, important to ensure that the forms of intervention used by the Court make the Constitution truly clear and evident – i.e., a source of principles that are ever more widely recognized and applied across the entire legal system.

REFERENCES

Bin, R. (2002). *Capire la Costituzione*. Roma-Bari: Laterza.

Crisafulli, V. (1984). *Lezioni di diritto costituzionale*. Padova: Cedam.

Dogliani, M. (1982). *Interpretazioni della Costituzione*. Milano: Franco Angeli.

Modugno, F. (2009). *Interpretazione giuridica*. Padova: Cedam.

Mortati, C. (1940). *La Costituzione in senso material*. Milano: Giuffrè.

Pace, A. (2006). *Costituzioni rigide e costituzioni flessibili*. Padova: Cedam.

Paladin, L. (2002). *Le fonti del diritto italiano*. Bologna: Il Mulino.

Panunzio, S. (1998). *I costituzionalisti e le riforme*. Milano: Giuffrè.

Reposo, A. (1972). *La forma repubblicana secondo l'art. 139 della Costituzione*. Padova: Cedam.

Rescigno, G. U. (1981). *Art. 87*, in *Commentario della Costituzione*. Zanichelli: Bologna-Roma.

Rimoli, F. (1999). *Pluralismo e valori costituzionali. I paradossi dell'integrazione democratic*. Torino: Giappichelli.

Volpe, G. (1981). Art. 139, in *Commentario della Costituzione*. Bologna-Roma: Zanichelli.

Zanon, N. (1988). *Premesse ad uno studio sui principi supremi di organizzazione come limiti alla revisione costituzionale*, in *Giurisprudenza costituzionale*.

Downloaded By: [Salerno, Giulio] At: 09:18 21 June 2011