INNOVATION AND TRANSITION IN LAW

Experiences and Theoretical Settings

Edited by
Massimo Meccarelli
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Innovation and Transition in Law:
Experiences and Theoretical Settings

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Dealing with Experiences

The words of Justice and the long Italian transition (1943-1958)

Antonella Meniconi

> Discourse is not simply that which translates struggles or systems of domination, but is the thing for which and by which there is struggle, discourse is the power which is to be seized. (M. Foucault, *The Order of Discourse*).[1]

1. Introduction

My paper explores how the language of magistrates is one of the keys to interpreting the Italian transition to democracy. The period between 1943 (the fall of Fascism) and 1958 (when the new Superior Council of the Judiciary, the *Consiglio Superiore della Magistratura*, was created) was decisive for the construction of the new Italian democratic system. In the debate at the Constituent Assembly (1946-47) the "democratic" integrity of the judiciary was much discussed. In particular, the credibility of the upper ranks was questioned especially by left-wing anti-fascist parties, also in relation to the dilatory attitude of the Corte di Cassazione (Court of Cassation) in proclaiming the results of the referendum, on the choice between monarchy and republic. Those judges, and especially those at the top of the judicial pyramid, had been trained and had operated during Fascism thus it was asked: what would be their degree of "loyalty" to the new democratic system?

First of all, the purge of the magistrates closest to the regime (as more generally happened in the administration for senior officials) was not at all incisive; indeed, on the basis of accurate research, historiography has now ascertained it was limited to a few cases and not always exemplary. During the entire period, about four hundred magistrates out of a thousand cases examined were subjected to purge proceedings, which amounted to bringing about ten percent of the entire judiciary to trial before the commissions. However,

1 Foucault (1981) 52-53.

of these only a few dozen were effectively expelled from the judiciary, while some preferred to avoid the shame of going to trial by requesting and obtaining a retirement from the judiciary, but then returned, in some cases, to the judiciary in subsequent years.[2]

Moreover, it was a curious game of parts; those who participated, *ratione officii*, in the purging commissions of the various administrations (special rules provided for this) were magistrates which created a sort of double role difficult to interpret, even though it was to give the judiciary an undoubted centrality.[3]

The issue of democratic integrity was strongly re-proposed because of the role that the judiciary itself played concretely in the application of the Togliatti Amnesty of 1946 (launched only a few weeks after the referendum), where the Court of Cassation (in particular Section II) was accused of excessive leniency towards those who were accused of collaborationism.

More generally, as far as the application of the sanctions against Fascism was concerned, starting from a stricter approach by the Corti d'Assise Straordinarie (Extraordinary Assizes Courts) and the special section of the Court of Cassation of Milano near the end of the war, the orientation of the judiciary soon tilted in favour of a moderate application of the new sanctions, despite the circulars issued by the various Ministers of Justice (Umberto Tupini and Palmiro Togliatti) ordering the application of the legislation against Fascism "with speed and rigour". A sort of "resistance" by the judiciary to the punishment of crimes committed by Fascists marked the transition phase between the old and new regime. A difficulty, which can even be described as "human", of the high magistrates to distance themselves from the mentality, network of relations and extra-legal considerations with which they were imbued during the Fascist era, emerged with force. In this sense the continuity between Fascism and the new Republic did not only pass through a continuity of rules and regulations, but also of mentality, of culture. Moreover, also the power relations within the judiciary and the relationship with politics were marked by continuity, even if in a different constitutional system. Ultimately, the relationship between justice (State) and citizens, i.e. an authoritarian one, changed almost not at all.

Thirteen years after 1948 (the year of the new Constitution), in 1961, a

2 Meniconi (2017), also for the bibliography.

3 As Massimo Pilotti (see below) president of the purge Commission of the Ministry of Foreign Affairs.

young magistrate and future founder of Magistratura democratica (Md), the left-wing judiciary's part (1964), Marco Ramat, would speak of a problem, also generational, of the high magistrates, trained during Fascism (if not before) with constitutional innovations. The young judge emphasized the different visions at stake as:

> leaps into the unknown, according to the former, democratic evolution according to the latter; let's adapt the Constitution to the previous laws, says (and tries to do) the former; let's adapt the previous laws to the Constitution says (and tries to do) the latter.[4]

Furthermore, Alain Bancaud, referring to the French judicial system – somewhat similar to the Italian one at that time – highlights that the high magistracy "does not stand for immutability. But for social position and family origin it is predisposed to stability and the reproduction of the past". The point – according to him – is not so much resistance to innovation, but prudence, circumspection: "in the judicial, and therefore legal habitus, change as permanence is in fact written". As a high French magistrate pointed out in a speech at the inauguration of the 1962 judicial year, the language used by judges could only suffer from this "circumspection", from this resistance to neologisms, to fashionable formulas, to the point of being tinged with traditionalism and capable of receiving innovation very slowly (at the pace of a lowland infantryman, a "*fantassin de plaines*").[5]

However, also in relation to the recent authoritarian past, at the time of the election of the Constituent Assembly and during its proceedings, the issue of justice was on the agenda in both the political and legal fields.

As we know, the principle of autonomy and independence of the judiciary was explicitly acknowledged in the Constitution of 1948. It was thus possible to achieve a strong guarantee of the "external" independence of the judiciary from the other branches of power, on the basis of a model of a non-bureaucratic judge freed from the executive and endowed with its own self-governing body. The principle of the "judge subject only to the law" (art. 101 Const.), which Piero Calamandrei, more than anyone else, wanted included in the constitutional text, opened the door to the "internal" autonomy of the judiciary, that is, the autonomy of each individual judge in the exercise of jurisdiction and in the application of the law.

However, much remained to be done to bring about this disruptive consti-

4 Ramat (1961) 849-850.

5 Bancaud (1993) 111 ff.

tutional innovation, inasmuch as two major obstacles persisted: the hierarchical constraint in relation to the exercise of jurisdictional power and the implicit conditioning of magistrate' careers by superiors, in part residual from the 1941 judicial law, implemented by the Minister of Justice, Dino Grandi.[6]

In fact, after the end of the war, shortly before the institutional referendum in 1946, all or almost all of the most repressive provisions of the Fascist judicial system of 1941 had already been eliminated, with the so-called Guarentigie Law, at the initiative of the Minister of Justice, the secretary of the Communist Party Palmiro Togliatti. In particular, the hierarchical relations of dependence of the "pubblico ministero" (Public Prosecutor) on the minister were abolished at that time and were replaced by supervision, but the hierarchy of the organisation of 1941 was not altered at all. Togliatti and his collaborators decided, in that delicate phase of transition, not to question the prerogatives of the high judiciary. No overall reform was therefore carried out, but only the "surgical" removal of certain parts of the 1941 law, which thus "purified" remained for a long time the fundamental text for the Italian judiciary.

The "internal" independence of the judiciary thus remained a chimera for many years. The existing structure – with the high judiciary sitting in the seats of the Court of Cassation, at the head of the entire judiciary and, above all, responsible for checking constitutional legality – remained unchanged for a long time. Thus, the articles of the constitutional text, which called for the establishment of the Corte costituzionale (Constitutional Court) and Superior Council of the Judiciary, were not implemented. The two bodies intended to change the legal and institutional framework were not created until 1956 and 1958, respectively.[7]

In this context the judiciary (especially the high ranks) undoubtedly played an important role, although not free from ambiguity and resistance to change. Above all, the language used by them is a telltale sign of continuity, and sometimes ruptures, in the judicial system.

In fact, the persistence over time of a language that resisted the constitutional innovations of 1948 is evident at least until the end of the 1960s. Only in that period of social and institutional changes, a new model of magistrate would begin to emerge not without many struggles, a model more aware of the constitutional interpretation of the law and less conditioned by legal formalism.

Within this general framework, the first aspect that I will deal with is the language used by the "procuratori generali" (public prosecutors) in public oc-

6 R.d. no. 12 of January 30 1941.

7 For a bibliography see Meniconi (2018b).

casions, such as the speeches pronounced during the solemn inaugurations of the judicial years in the courtrooms of the Corti d'appello (Courts of Appeal) and Cassation. The second aspect I focus on is instead less evident and more difficult to explore, and it concerns the writing of the judgments, which, even if intended for publication, were written instead by judges in the privacy of their studies. Here they worked on the basis of precedents, legislation and doctrine, but also on the basis of the cultural, political and social values of the time that they and their colleagues at the board perceived as such; values that were not only reflected in the substance of the decision but are also translated, consciously or unconsciously, into the use of certain styles and formulations over others. Finally, I will draw some brief conclusions on the difficult path of democratic innovation during the long Italian transition.

2. To speak in a courtroom

During the inaugurations of the judicial year a real "theatre" is staged. A theatre with costumes (the togas of ermine), decorated armchairs, and a well-informed audience (authorities, other magistrates, experts, journalists), and where, using a theatrical word, a representation or rather a self-representation of justice takes place.

The reference to the theatre is not accidental: the scenic aspect, the placement in space of the main characters, the costumes, the division of parts between those who "act" and those who "assist" as spectators, is required by the very nature of the judicial institution. As Michel Foucault reminds us, the judicial institution "solemnises beginnings, surrounds them with a circle of attention and silence, and imposes ritualised forms on them, as if to make them more easily recognisable from a distance"[8]. In a courtroom one waits in religious silence as if one were in church for the word of the magistrate who carries out justice, but also who communicates the "secrets" of the exercise of jurisdiction to the public. Foucault describes it as a ritual:

> Ritual defines the qualification which must be possessed by individuals who speak (and who must occupy such-and-such a position and formulate such-and-such type of statement, in the play of dialogue, of interrogation or recitation); it defines the gestures, behaviour, circumstances, and the whole set of signs which must accompany discourse; finally, it fixes the supposed or imposed efficacity of the words, their effect on those to whom they are addressed, and the limits of their constraining value. Religious, judicial,

8 Foucault (1981) 2.

therapeutic, and in large measure also political discourses can scarcely be dissociated from this deployment of a ritual which determines both the particular properties and the stipulated roles of the speaking subjects.[9]

In Italy, under the 1865 law, judicial speeches were originally intended to present "an account of the way in which justice was administered throughout the jurisdiction of the Court and the tribunal"[10] but soon became increasingly significant, especially for the solemn place where they took place (the monumental palaces of justice, the courtrooms decorated with flags).[11]

It is no coincidence that the ritualistic, symbolic, and even religious element has been highlighted not only by Foucault by also by many scholars (such as Antoine Garapon and Michele Luminati) with reference to the very nature of the judicial function (which needs its own ritual for its legitimacy) and to the figure of the magistrate (the so-called "Priest of Themis", the ancient Greek goddess of law, to quote the title of a book by the magistrate Guido Raffaelli appeared in 1948 to "instruct" the new judges).[12]

But it is mainly the judicial speeches, pronounced on the public occasions of the inaugurations, that constitute – in my opinion – a decisive moment in the process of building a professional identity. Depending on the period, they changed in nature and content (but not in their external form), sometimes limiting themselves to reports, other times hinting at interpretations, while in some cases rising to real statements in terms of politics of law, or politics tout court.[13] Since 1959 the Superior Council of the Judiciary has, however, by means of some memoranda, made the inaugural speech obligatory, establishing the subjects who are entitled to speak, the timing and themes of the report.[14]

To begin with, the speeches pronounced in the Liberal era (1861-1922) appear in a rather free and personal format and with a certain variety, both in the structure adopted and in substance. There was not yet a rigid and defined *cliché*, although of course there were rules.

Among the sample of speeches I have examined from the Liberal period,

9 Foucault (1981) 62.

10 Art. 150 of the judicial law of 1865 (r.d. no. 2626).

11 Da Passano (1991).

12 Raffaelli (1945).

13 For judicial speeches from the 1990s in the climate of competition between the magistrature and politics see Sarzotti (2006) 13 (which quotes Bourdieu, 1986).

14 Sarzotti (2004) 139.

unsurprisingly references to national unity and the myths of the Risorgimento are prominent, as well as the principle of legality to be kept "always inviolate". For example, in 1877 the ancient motto "*Sub lege libertas*" appeared as an epigraph of the first speech to the newly established Court of Cassation of Rome by its Public Prosecutor, Senator Giuseppe De Falco. He appeared to take care to justify the pronouncement of the speech itself saying it was "*vestigia costumanza*" (vestige of an ancient Roman custom) born in Rome as "any custom useful for civil coexistence" that the first day of the exercise of public administration opened with "an oration intended to specify its duties". And the high magistrate followed by recalling the importance of these speeches, and above all the importance of the new Court born as "the first truly national court (...) to complete and guarantee national and legislative unity".[15] The double combination "national unity and legislative unity" and the hendiadys "fulfilment" together with "guarantee" (*guarentigia*) gave a sense of the task that the jurists, and in particular the practical jurists as magistrates, felt responsible for themselves in 1877, during Italy's nation-building.

Following the early 1900s, as has been noted, the problem of adapting the law to the new political, social and economic reality quickly became a focus of reflection,[16] such as happened in the eloquent speech in 1912 by Lodovico Mortara, Public Prosecutor of the Court of Cassation of Rome.[17] Here, the celebrated jurist took the opportunity to carry out an accurate analysis of the situation of the judicial body, expressing his fears of the risks that it would become a "particular oligarchy", if an overall "judicial reform" was not carried out. Without entering a discussion on the matter (later in 1919 Mortara was able as minister to propose this reform which was however rejected), we can observe here the words of the high magistrate-jurist which constituted an actual manifesto of judicial policy, even in opposition to the approved reforms of the Minister of Justice Vittorio Emanuele Orlando (note, for example, the expression used by Mortara of "democratic institution" always with regard to the judiciary).[18]

15 De Falco (1877) 6. All the cited judicial speeches of the Courts of cassation and, from 1923, the unified Court of cassation are accessible at the websites of the *Biblioteca centrale giuridica* and of the *Corte di cassazione* <https://www.giustizia.it/giustizia/it/mg_22_4_4.page>; <http://www.cortedicassazione.it/corte-di cassazione/it/archivio_storico.page;jsessionid=F79DDE3B2C2469DF323E946B2D4BFBFB.jvm1>.

16 Cazzetta (2013) 19.

17 On the figure of Mortara see: Meccarelli (2012) and Boni (2018).

18 Mortara (1912) 25.

But it was not only eminent personalities such as Mortara who dared to speak out in a context intended, at least formally, for the modest task of presenting judicial statistics. Indeed, during the First World War and immediately afterwards, other public prosecutors showed an awareness of the new times and, in relation to them, the new tasks of justice; they became increasingly conscious that the contingent changes imposed by the war on the legal system would become permanent.

The patriotic emphasis obviously resonated (such as the list of the fallen of the war from the various courts pronounced at the beginning of the speeches) or the reference to the "communion of ideals and intentions" between the different Courts.[19] But there were also observations and even timely references to the necessary transformations of the law, for example, the recognition of certain patrimonial rights for women (in fact the abolition of marital authorisation dates back to 1919), which aimed at a certain openness, even if often accompanied, in the style of the time, by prudent specifications. For example, the speech of 1918 which proclaims itself "certainly without feminist propaganda", and goes on to say:

> these lofty womanly virtues in all social gradations, from the royal Majesty to the modest, humble worker of the factories and fields, constitute the best titles of merit for the homeland and cannot fail to open the way to the greater demands and realisation of the gentle sex's civil aspirations.[20]

In short, the speeches full of doctrinal references, read as a whole and even in their variations, allow us to understand how the numerous economic and social upheavals caused by the war and their impact in the legal field were perceived inside the judiciary as well as how they were represented externally. Furthermore, struggling with the swirling transformations in the civil and criminal fields, the high ranks of magistracy came to propose a "systematisation" of the tumultuous war legislation, an unprecedented phenomenon that was already creating a new jurisprudence.[21]

Everything or almost everything changed, however, during the Fascist period, when the preambles of the speeches were transformed into an occasion of celebration of "Fascist justice", with precise ritual themes (references to the Homeland, to the Duce and to the House of Savoy). Now, the "new" in-

19 De Blasio (1918) 23-24.

20 De Blasio (1918) 18.

21 Meniconi (2018a).

augural addresses presented a very rigid structure, almost a pre-established and, given the occasion, predictable "plot". The introduction inevitably began by greeting the authorities and paying homage to the regime and to the Savoy family. Then followed the "greetings and memories of magistrates", always invariably, "outstanding", especially if deceased or retired, and then to the "illustrious lawyers" and other figures who had left the district in the past year. Then came the more "ideological" core, linked to the events of Fascism and its achievements (the Empire in the years 1935-36, for example) and to their implications in the sphere of justice (e.g. the institution of the Judge of minors and that of the Labour Tribunals were greeted with great approval). The central part of the speech (generally separated from the rest, which was a constant element of some importance) was more technical and was usually dedicated (as in the past) to the jurisprudence of the judicial offices of the district, not only with reference to statistical data, but also observations and judgments on trends in civil and criminal justice. This was the part of substance or content, and was in its own way, the most useful. Then followed the figures for judicial affairs of the district.[22]

If the rhetorical motifs followed one another repeatedly on a predetermined scale, they were nevertheless often (but not always) encased (almost "encapsulated") in the part of the speech intended for them, which was generally the introduction. It was almost as if the rhetoric should was not supposed to invade the space dedicated instead to the more technical aspects, in which the language remained more aseptic and "professional". As was also noted in the case of bureaucratic communication between administrations, the permeability of the linguistic system was not total during Fascism, instead a sort of invisible division seemed to combine style and vocabulary according to the topics.

Moreover the speeches were obviously influenced by the language of the time, expressing the "pivotal units of the semantic system" around which Fascist ideology and culture centred with a series of canonical themes that were continually drawn on in public communication, such as vitalism, virility and physical strength, war, mysticism and mythology, moralism, greatness and defence.[23] Frequently a pragmatic homage to the "moralising and pacifying" action of Fascism permeated the whole report or was put before the beginning of the individual parts. But sometimes the speech continued in the oppo-

22 Meniconi (2014).

23 Among others: Leso (1978).

site direction by highlighting the structural changes in crime and not, as the regime would have liked, of its disappearance.

At the same time, the speeches of the period were still characterised by linguistic expressions that originated not only from Roman Law but generally from ancient and traditional classical culture. This was typical of the training of the magistrates (and of the jurists in general) who wrote the speeches who reached maturity mostly at the end of the nineteenth century. For example, in 1934 the whole preamble in the speech made by the Deputy Public Prosecutor Piredda in Cagliari, together with extensive references to the specificity of his native Sardinia and its people, was punctuated with quotes from Dante and Virgil.[24] And this was not untypical.

On the other hand – as has been noted –[25] the degree of adherence to Fascism (and its styles) on the part of a public prosecutor could already be inferred from the title of the speech. There was a clear difference between those who simply and aseptically entitled their speech *Inauguration of the Judicial Year* (like the Venice Public Prosecutor Carlo Alberto Mandruzzato in 1934-35), and those who instead evoked *Fascist Justice* in the "second decade of the march on Rome" as did the very Fascist Public Prosecutor Marongiu in Ancona that same year.[26] Again, in the report by Palermo Public Prosecutor Carlo Bartolini in 1934, the central part was soberly entitled *Court Jurisprudence*, avoiding any reference to Fascism, but rather focusing exclusively on the decisions taken in 1934.[27]

In 1938 the inaugural speeches of the various Courts of Appeal were suppressed, perhaps to avoid that minimum of internal debate and freedom of expression that the inaugural rhetoric had nevertheless let seep out in the previous period. The only survivor was the report of the Public Prosecutor of the Court of Cassation. What was the reason for this radical decision? Perhaps the public – and in some way political – nature of the inaugural speeches, in which the bare judicial statistics district by district were exposed (albeit mediated through rhetoric which dispersed and in some sense hid the meaning), was not congenial to Fascism.[28] The same judicial statistics could appear in

24 See Piredda (1934).

25 Focardi (2012) 58.

26 Mandruzzato (1935); Marongiu (1934).

27 Bartolini (1934).

28 In fact, in 1937 there had been the case of a Public Prosecutor of the Court of Appeal, Francesco Saverio Telesio, who had been dismissed from his office in Bologna for mentioning the growth of crime in that district. See Archivio centrale dello Stato, Minis-

themselves "dangerous", even if they only showed the reality of crime or litigation in implicit contrast with the idea of public order and social coexistence propagated by the regime.[29]

3. Judicial speeches of transition

After the fall of Fascism in Rome in 1943, judicial speeches were progressively reinstated. At this time, their language was one of transition. The first inaugural speech was made on 4 January 1945, after the pause caused by the Nazi occupation of Rome, in the Aula magna of the Court of Cassation with the "traditional solemnity" (as is written in the introduction to the official text in italics), but was significantly entitled "Justice and national reconstruction" (this same title was also used in 1946). Even though its author, the new Public Prosecutor, Massimo Pilotti,[30] recognised that something had changed, if only because of the presence, duly noted, of many high-ranking officers of the Allied forces in uniform, his emphasis was on "continuity". The word recurs twice in the speech. He asserted to the Supreme Court (and through it to the whole judiciary) the merit not only of having refused to take the oath to the illegitimate government, but of having "represented the continuity of the State and justice" in a moment of deep crisis, almost as if to mark – he emphasised with pride – the "solidity of the ethical conscience of our judiciary". It should be stressed, however, that he used the words "democracy" and "democratic" (government) three times, referring to the need to repeal the laws of the past regime that were incompatible with the new system.[31] Pilotti concluded his speech with a paragraph on "The citizens, the State, the judges", underlining the value of the respect of human personality and the role of judiciary ("the judges are the State") in defence of the citizens. His whole speech was punctuated with ample quotations in latin from Dante (again!) and the Gospels ("we cannot but call ourselves Christians" were also his words, perhaps aware of his consonance with Benedetto Croce).[32]

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tero della Giustizia, Ufficio superiore del personale e Affari generali, Ufficio II, Magistrati fascicoli personali, IV versamento, b. 55, fasc. 69707.

29 In 1941, the discretionary power was given to the Minister of Justice to allow or not the speeches of the public prosecutors (art. 88 r.d. no. 12 of 1941). See Neppi Modona (1997) 823.

30 See his biography: Meniconi (2015).

31 Pilotti (1945); Pilotti (1946).

32 Pilotti (1945) 20f.

In fact, the calming wind of continuity was blowing in that courtroom; after all it was also felt in the same professional path of the high magistrate. According to Prime Minister De Gasperi, Pilotti was an "internationally renowned jurist" who represented the Italian government in the League of Nations from 1933 to 1937 (at the time of the Fascist conquest of Ethiopia in 1935 and the subsequent sanctions against Italy), and was, in the words of Justice Minister Togliatti, "a person of trust in the regime". According to others, however, the magistrate had not made a career during the regime. What was not said at the time of his confirmation as prosecutor by the Parri government (September 1945) was that the high magistrate was a monarchist.[33]

In the meantime, however, in the inaugural speech of the following year in 1946, a fearful caution seemed to mark the words of Pilotti, caution especially towards the nascent democracy. Therefore, in the context of a "circumspect revision" of Fascist legislation, the Court of Cassation had taken on the responsibility of "expressing from the experimental nature of individual cases the trends of the new democratic legal conscience". Ample space was then devoted to the political justice of the time, i.e. the activity of the special courts (Alta Corte di giustizia, Corti di Assise Straordinarie and the Sezione Speciale della Corte di Cassazione di Milano) set up to judge the crimes committed by the Fascists during the Repubblica Sociale Italiana (Italian Social Republic, which was the puppet government set up by the Germans after they reinstated Mussolini as leader in northern Italy). Finally, after the usual doctrinal and comparative excursus (from Corpus Iuris to Machiavelli), the Prosecutor hoped that a parliamentary assembly would soon be elected, as a full expression of the will of the people and the judiciary would be guaranteed full independence.[34]

However, it was Pilotti's subsequent preamble of his speech in January 1947 that demonstrated that even (and above all) during the time of the transition the words spoken in the "temple of justice" carried weight throughout the country. The speech, entitled *Justice and constitutional reform*, stood out for the almost total and deliberate absence of "textual" references to the new Republic (result of the referendum of 2 June 1946) and to the new the Head of State Enrico De Nicola, causing one of the first Republican scandals. De Nicola, present in the courtroom and in the front row, was deeply and visibly irritated. At the beginning, Pilotti's speech limited itself to a general reference to the need to engage in common work (which "was concord") and

33 Meniconi (2015).

34 Pilotti (1946).

to go "forward for the Homeland" as "the Italian people with many lives" were accustomed to do. The next part, relating to the institutional referendum on the form of a monarchic or republican state, stated only:

> The Supreme Court intensified its activities considerably compared to previous years. Its work was delicate and extensive, and included the opportunity of carrying out a task of verification of the highest manifestation of popular sovereignty.[35]

That was all. That reticent almost provocative prose and especially the vulnus of the absence of homage to the head of state was much discussed in the now free press and even at the Constituent Assembly.[36] It ended with the removal of Pilotti from the Supreme Court and his transfer as President of the Water Court, which was presented however as a "promotion".[37]

The post-war period did not mark a turning point with respect to tradition as far as the inaugural speeches were concerned (apart from the absence of some controversial episodes), however some small changes can be noted. The first thing that can be noticed is the attention paid now to the Constitution (the word is often quoted in 1948 and 1949 speeches) and the new bodies of the Republic (the President of the Republic and the Superior Council of the Judiciary, above all).[38] Another element is the re-proposal of a structure which – as we have seen – originated from the past. Thus, at the beginning, the greeting to the authorities, the mention of the main political and institutional innovations of the year (e.g. in 1950 and 1951, Italy's participation in the first European Union)[39] and the commemoration of the deceased colleagues. Then followed the sections dedicated to civil and criminal jurisprudence of the Court which generally referred to the necessity to strengthen the role of the judiciary. Furthermore, from 1949 the Court of Cassation's report also included data from the various Courts of Appeal, providing a more complete picture of the justice situation in Italy, although there were specific speeches of the different Courts. The necessity of a judiciary reform began to appear in

35 Pilotti (1947) 2. Another paragraph was dedicated to the central role of the Court of cassation in the forthcoming Constitution.

36 Archivio storico della Presidenza della Repubblica, Fondo Enrico De Nicola, Corte di Cassazione. Inaugurazione Anno giudiziario.

37 In 1952, Pilotti was the first President, representing Italy, of the Court of Justice of the European Coal and Steel Community (ECSC) until 1958.

38 Macaluso (1948); Miraulo (1949).

39 Miraulo (1950); Miraulo (1951).

1950 (and continued to be present) with reference to the increasing number of judicial affairs (and the "self-sacrifice" of the magistrates) and the problem of a skilled recruitment of young magistrates. In any case, sometimes – as in the pre-Fascist period – the preambles were the opportunity for the high magistrate to present his own point of view of the justice's problems, to reiterate that the judiciary was almost a "religious ORDER" (in capital letters) that requires "sacrifice" and "absolute dedication".[40]

Reading these speeches one can understand the self-representation of the Court of Cassation in those years, of a body that saw itself at the centre of the State not only as the highest jurisprudential interpreter, but also as a constitutional judge (conferred to it by the Constitution pending the establishment of the Constitutional Court). As is well known, already in 1948 the Court of Cassation tried to dilute the most disruptive constitutional innovations for the existing system. It elaborated, within the Constitution, the famous distinction between preceptive rules (that is to say, preceptive rules of immediate application and preceptive rules of deferred application) and programmatic rules, in which only the former were able to be directly applied, while the latter required the subsequent intervention of the legislator. This was not all. Through the cautious and technical (almost aseptic) words of the public prosecutors the difficulty of adapting, despite the statements of principle, to the new democratic order can be understood. A new order in which, for example, a licence for the bill posting of political posters was yet necessary because article 21 of the Constitution, which guaranteed freedom of expression of thought to all, was interpreted as a programmatic rule;[41] or the measures concerning police confinement (legacy of Fascism) were not subject to appeal to the Court because they were administrative and non-judicial decisions. In this case and in others a strict notion of "personal freedom" seems far from article 111 of the Constitution. In general we can perceive a tendency to maintain the law from the Fascist period, even if this was expressed according to democratic principles.[42]

40 Eula (1954) 33. The speech is very long indeed (69 pages instead of the usual 30-32), because from this year statistical data and analytical description of the jurisprudence are put apart.

41 Eula (1954) 29. Article 113 of the T.U. on Public Security of 1931 was later declared unconstitutional by the Constitutional Court in its first decision in 1956. Another example is the art. 53 Cost. on the progressiveness of taxes, which was judged also to be a programmatic rule. See Manca (1955) 13-14.

42 Manca (1955) 18; Eula (1950).

In 1952, the inaugural address of the judicial year was pronounced by Antonio Azara, the new Public Prosecutor of the Court of Cassation, at the time also senator of the Democratic-Christian Party and future minister of Justice (1953-1954). Azara had been a member of the National Fascist Party from 1932 and he had supported its movement, ideas and doctrines with words, writings and action. As a member of the scientific committee of the journal "Diritto razzista" ("Racist Law"), in 1945 he was subjected to the purge process for "the apology of Fascism", from which he came out unscathed and managed to prove, among other things, that he had served "not a party" but his "country"[43]. In his speech of 1952 the high magistrate explained the rulings issued by the Court in matters of the right to strike guaranteed by article 40 of the Constitution[44]. After correctly recognising that article 40 was a preceptive and non-programmatic rule, and therefore immediately applicable, Azara went on to present other rulings, which had placed limits on the right to "political" strike. And then, by way of comment, he added:

> The Supreme Court observes that the strike, whether or not it is a crime, as a purely economic-social act, determines in any case a disruption and an imbalance in the orderly development of the relations of associated life; in the worsening of the contrasts between the opposing categories (in the case of an economic strike) and between the various social classes (in the case of a political strike). There may, then, be widespread discomfort, an eventual exaltation provoked by verbal and press propaganda, an easier suggestionability, so that, also due to the feeling of greater difficulty of the police bodies in protecting the public and private rights of the citizens, fanatical and audacious strikers can draw incentives to commit damages which, in addition to violating the right of others to property, can endanger and cause serious injury to the entire community.[45]

These strong words, among which the expression "fanatical strikers" stand out, reveal much of the underlying values of the high judiciary of those years, but also, obviously, of its instinctive reactions, so to speak, to the political and

43 Archivio centrale dello Stato, Ministero della Giustizia, Ufficio superiore del personale e Affari generali, Ufficio II, Magistrati fascicoli personali, IV versamento, b. 193 bis, fasc. 70689.

44 Art. 40, "The right to strike is exercised within the framework of the laws that govern it", but see also art. 39 "The trade union organization is free. No other obligation may be imposed on trade unions other than their registration at local or central offices, in accordance with the provisions of the law".

45 Azara (1952) 17-19.

social conflict taking place in the country (it was the time of the occupation of the lands in the South; the massacre of Portella della Ginestra had taken place on May 1, 1947).[46] From the highest bench of the Italian justice apparatus the words of Azara sounded like a very clear pro-government position.

In the first twenty years of the Italian Republic, the speeches were (and continued to be) moments of exaltation of the vision of the world and of the values placed at the base of the judicial decisions, more than a public account of the activity carried out by the various organisms, as prescribed by the new Superior Council of the Judiciary. It could be affirmed that the "interdict" (in the Foucauldian sense) of those years consisted in the absence of references (or in the presence of only negative references) to the social and political changes that the Italy of reconstruction was facing.

Meanwhile, the structure and terminology used remained practically unchanged compared with the previous model in their "stylistic lexical stereotypes". One cannot be surprised, for example, if in the speech of 1953 the words of condolence for the death of Vittorio Emanuele Orlando echoed the rhetoric of the early years of the century (the Homeland ecc.); or if the family (with the emphasis placed on the value of "family cohesion" against divorce) remained the pivotal unit of the social order represented in those courtrooms; or if the concern for modesty, pornography and minors were always present in those complicated and contradictory 1950s.[47] This was the case in a speech of 1954, pronounced by Ernesto Eula,[48] Public Prosecutor who would become the first President of the Court later that year. He, another magistrate who had been closely tied to the Fascist Regime, underlined the importance of the "Christian morale" for the "strengthening of the Nation" and the pure "italianissimo" love of the Homeland.[49] We could say that also in this case tradition seemed to win against innovation.

As was highlighted by Antonio Santoni Rugiu and Milly Mostardini in their book from 1973, in these speeches the language remained "immobile, outside time and historical space" and took care to transmit "principles and

46 In 1950-51, 62 workers were killed by the police, 3,000 were wounded, more than 90,000 were arrested and 20,000 were sentenced to a total of 7,598 years in prison. See Scarpari (1976) 136; Spriano (1986).

47 Macaluso (1953) 4; Miraulo (1951) 6; Miraulo (1950) 26.

48 Archivio centrale dello Stato, Ministero della Giustizia, Ufficio superiore del personale e Affari generali, Ufficio II, Magistrati fascicoli personali, IV versamento, b. 497, fasc. 81806.

49 Eula (1954) 5.

values" that were considered "universal, immovable and immutable". In this regard the public prosecutors felt as though they were yet "priests of Justice", while society was – in the 1960s and 1970s – in full ferment.[50] Therefore, the words pronounced in this "theatre" constitute an important window on judicial life, where continuity and ruptures were harshly confronted (at least, from the end of the 1960s). From 1969, indeed, "counter-inaugurations" were organised to coincide with the official speeches of Public Prosecutors, which were defined by the young protesters of the Magistratura democratica as "rancid choreographic representations, made of tinsel and pompous disguises". These demonstrations were also the symbolic expression of an iconoclasm – sustained Michele Luminati – which aimed to undermine the myth of the magistrate-priest and to put the judiciary in relation with social change, not without contradictions.[51]

But prior, when the new Constitutional Court was finally established in 1956, the speeches also reflected the conflict, albeit softened, that was arising between the two bodies,[52] defined, in the usual classical way, the "Vestal of the Law" and the "Vestal of the Constitution".[53] The prosecutors tried to react to the loss of the central role of the Court of Cassation in the system and to the growing criticism in the only way they could outside the judiciary openly, and that is in these speeches.[54] The same speeches, that since 1865 had constituted the official but also freer way to express the high judiciary's point of view on the world, for a determined historical period became the seat of this extreme resistance: the last bulwark of a model of magistracy that was by now fading.

4. To write judgments in times of change

In his famous *Elogio dei giudici scritto da un avvocato* Piero Calamandrei wrote that the judgments should be composed by the magistrate "with his head in his hands gathered and motionless" in his office, sheltered from outside influences.[55] As is well known, however, these acts are intended, if issued by a collegiate body, for discussion in the council chamber (secret discussion,

50 Santoni Rugiu/Mostardini (1973).
51 Luminati (2002) 307.
52 Manca (1956); Pafundi (1957).
53 Pafundi (1957) 14-15.
54 See also Pafundi (1958); Giglio (1959).
55 Calamandrei (1999) 32.

in which dissenting opinion is not allowed, contrary to what happens in other countries) and then for publication. The judgments should – according to Calamandrei – avoid any extraneous influence (here the jurist was referring above all to the Fascist regime that had just fallen), but in reality beyond their specific object and content they reveal how much the magistrates had welcomed and shared (or not) the new democratic values in the years of transition.

Certainly, judgments constitute a very different and more complex source compared to judicial speeches destined as they are to affect people's subjective situations, while the latter are limited to describe the orientations of jurisprudence and, if necessary, indicate the limits of judicial policy. Also, the form is obviously different with the former intended only for reading, the latter enjoying instead a public performance, an orality (although they are then corrected and eventually amended for publication). Yet, if we disregard the content of these acts and focus on the style, some complementary traits emerge; traces of a common judicial language, marked by the era in which it was articulated, but also by a permanence in time beyond the political (and constitutional) changes that seems undeniable. However, a study on the style of judgments would require – as is evident – much greater research than what we can and propose here. Hoping that more in-depth and systematic research will follow from this work, we will limit ourselves to provide some suggestions for further reflection.

In Italy, but not only, in the last twenty years the language of judgments has been thoroughly analysed by numerous scholars, jurists, but also recently linguists. Different types of judgments (criminal and civil, of merit and legitimacy) have been examined, a corpus of databases have been built with new computer tools.[56] Recently, conferences promoted by the University of Florence and the Accademia della Crusca, as well as by the Scuola Superiore della Magistratura (High School of the Judiciary), have focused on the language of judgments.[57] After all, the attention is more than justified if, using Bambi's acute definition, it is true that the trial represents a real "forge of a new vocabulary",[58] or a container of a plurality of levels of discourse (of lawyers and judges) in the civil trial[59] and,

56 Mortara Garavelli (2001); Bellucci (2002); Cortellazzo (2003); Ondelli (2006); Ondelli (2012); Dell'Anna (2013). From an historical point of view, see Mazzacane (1998).

57 Bambi (2016); since 2004 first the Csm then the High School of the Judiciary have organised courses on the language of jurisprudence for magistrates.

58 Bambi (2016) 8.

59 Dell'Anna (2013) 100.

again, a linguistic "melting pot" (the criminal proceedings).[60] It is also worth remembering the perhaps most complete definition that belongs to the greatest scholar of the Italian language, Tullio De Mauro, according to whom the trial is a true "linguistic amalgam", in whose different phases "all types of texts and speeches, all types of linguistic acts and all possible types of (in)comprehension are crowded and pressed". From what De Mauro calls a "crucible without equal" he claims the "judge must know how to extract the crystal of the sentence".[61]

Before the recent profusion, there were two seminal studies each different from the other, that provided the foundation for subsequent in-depth work. In 1970 a book edited by a magistrate engaged in the running of Magistratura democratica, Federico Governatori, entitled *State and citizen in court. Political evaluations in the judgments*, critically examined the interpretative schemes used by the Court of Cassation and several courts of merit in some judgments concerning the "political" crimes (e.g. outrage, violence, resistance to public officials, vilification of constitutional institutions, demonstration and seditious gathering).[62] The intent was to investigate the "socio-cultural values expressed in jurisprudence"; the work was also part of a wider research including the themes of family ethics, labour relations and obscenity: in particular it was an analysis of the political-ideological conception of magistrates as it emerged from the 613 judgments analysed.

The subject matter chosen was clearly delicate and sensitive in its own right, capable of revealing the complex relationship between the authority of the State (not only the judicial apparatus but also the police apparatus, among other things) and the individual, in what is called the authority/liberty dialectic.[63] In short, the researchers who collaborated in the book edited by Governatori – magistrates, sociologists, for the most part (the research was promoted by the National Center for Prevention and Social Defense of Milan, founded in 1948 and very active in the field of sociology of law throughout the 1960s and 1970s) – analysed the rulings of judges issued against the same crimes, in different historical periods: the liberal period (1905-1915), a decade of the Fascist period (1925-1935), and the first twenty years of the Italian

60 Bellucci (2016) 117.

61 De Mauro (2002) XI.

62 Governatori (1970) 5 ss. and 109f.

63 A theme in the same years at the centre of another book by Giuliano Amato, dedicated to the figure of the public prosecutor: Amato (1967).

Republic (1949-1963). Although well aware of the limits and difficulty of the analysis they hoped that it could be a road to be explored in depth, so that it could be demonstrated – these are their words that also reveal the ideal intent of those years – "in concrete terms that justice can and must be for man and not vice versa".[64]

What were the results of this "experimental" work aimed at revealing the inspiring "values" of judgments as keys to interpreting the law? It was found that the value judgements denoted a continuity in the decisions that went beyond the specific historical-political moment (certainly important all the same) in which the judgments were pronounced. Indeed, what emerges is a degree of the judges' adherence to the ideology transfused into the current legislative system they were called to apply, but also, and most interestingly, that it involved all judges. It also concerned the vision of the values to be protected and defended by the State, which were already present in the current legislative system of the period prior to the one under examination. More explicitly, among the particularly significant interpretative attitudes what stood out was an authoritarian and classist vision of the role of the State that did not seem restricted to the Fascist era, but extended from the liberal period up to the first twenty years of the Italian Republic. However, a strange yet justified time misalignment also emerged, so that in the first years of Fascism the judgments for opinion crimes had been milder, while in the first part of the Republican age the punishment of these crimes had become more severe. In short, it was not only the political time that mattered, but also the culture of the individual magistrates formed in the different eras which evidently influenced their judgments.

What always prevailed, in reality, was the cultural formation of jurists over the existing legal systems, therefore, without any doubt, the upper echelons of the judiciary in the 1950s were more conservative than those of the 1920s and 1930s, which had formed in the liberal culture between the late 19th and early 20th centuries (for example, having been taught by a professors such as Lodovico Mortara). If this factor – the cultural climate of the judges' formative years – is not taken into proper consideration, one cannot understand the delay and slowness with which the Italian judiciary, in the first decades of the post-war period, would assimilate and implement (in its jurisprudential activity) the new constitutional values.[65]

64 Governatori (1970) 276.

65 Borgna (2017).

The second early study is the one carried out by Giuseppe Barbagallo and Mario Missori, who analysed a sample of the civil jurisprudence of the Courts of Cassation from 1870 to 1923 (and, in another study, the decisions of the Council of State),[66] also based on the important considerations of Gino Gorla on the "style of judgments".[67] They defined seven criteria through which to read the form of the judgments, among which – we point out – the one related to "value judgments", and reached some conclusions that – in extreme synthesis – leaned towards the "detached style rule", that is, the judgments examined did not present value judgments, at least in civil matters, "while more frequent exceptions are found in criminal matters".[68] But here further judgments should be analysed on a sample basis to verify the presence or absence of extrajudicial evaluations. Some surveys carried out on criminal judgments produced instead by bodies of the so-called transitional justice, such as the Extraordinary Assizes Courts of 1945, show how – perhaps unsurprisingly – "the detached and technical style" gave way to "the political passions of the time", that is, there was no lack of personal or value judgments expressed at the juncture of the war that had just ended.[69] Moreover, it is also true that – as the antifascist jurist Mario Bracci wrote in 1947 – from the orientations of the Court of Cassation in relation to the application of the sanctions against Fascism and the subsequent amnesty of 1946 there appeared an "ill-concealed dislike" for the "new" world, which perhaps emerged disorderly, but which wanted to revive the country from its ruins. Above all the high judiciary seemed almost to practice a sort of "isolation" from the turbulent reality, within the well-guarded fortress of law and tradition against an alleged revolution.[70]

From these two analyses, as confirmed by more recent work (here I am thinking of that of Maria Vittoria Dell'Anna),[71] emerges a tendency, almost a permanent character of the sentence, of the so-called "hiding" of the judge in the traditional and outdated legal syllogism (in his being the *bouche de loi*, the "mouth of the law"). This was in order to affirm more clearly the impartiality of the law and its neutrality with respect to all parties involved

66 Barbagallo (1998).

67 Barbagallo/Missori (1999). See Gorla (1968a) and Gorla (1968b); and the pages that Tullio De Mauro dedicated to legislative Italian language: De Mauro (1963) 424 ss.

68 Barbagallo/Missori (1999).

69 D'Alessandro 53. See also Di Massa (2019).

70 Bracci (1947) 1107.

71 Dell'Anna (2013).

through the use of the impersonal "the question is unfounded" in itself;[72] or in the "total" choice of the historical narrative past continuous tense, with which the facts of the controversy and the reasons given by the parties are reported, which serves to distance the judge from the questions and exceptions of the lawyers, but which flattens the events in an indistinct past, not being used, as would be correct, to express an action of duration (e.g. "riteneva Tizio, disponeva Caio").[73]

The structure of the criminal sentence, as has been noted from an examination of a corpus of documents, appears to be the product of a historical tradition that resists in particular in those of the Court of Cassation, fully confirming the self-preserved and self-repeating force of what is considered a sign of sociolinguistic prestige within that professional and social community.[74] Moreover, more generally, an analysis of the "physiognomy of the sentence" (civil) has confirmed the tendency of Italian judges toward linguistic conservation. According to Michele Taruffo, this is almost a cultural habitus, which often ensures that they do not even identify value judgments that they make for the purposes of the formulation of their decisions.[75] For example, in their rulings, they give little space to facts, referring when necessary to experience or common sense in order to avoid an analytical evaluation that implies a value judgment. After all, this would be the result – besides an ancient tradition of the Rotal Tribunals of 1600 and 1700 (as pointed out by Gorla in his studies) – of the "bureaucratization of justice" and of the judge who would find his archetype, according to Taruffo, in the Napoleonic reforms. The judgment, therefore, as a bureaucratic act, at the level of style, referred in an abstract way to the office and not so much to the subject who resolved the controversy, becomes "the formal justification of an impersonal decision". The "impersonal" *stylus curiae* would obviously reverberate in the language, which still presents today (beyond the different jurisdictions and attempts at reform) a strong uniformity, to the point of moving away from common language even when it would be possible (in the part of the narration of the facts, for example).

The continuity of this cultural and ideological model of the judgment perhaps also explains the persistence – even in the phases of constitutional in-

72 Sabato (2016) 80.

73 Cortellazzo (2003) 83.

74 Ondelli (2012) 349-350.

75 Taruffo (1989) 1097.

novation – of an ideal type of magistrate who is merely a law technician, detached from the political temperament and value judgments, extraneous by his nature from social conflicts.[76]

To verify how much this has corresponded to reality in the Italian transition is a very difficult task if you want to start from the judgments. On the other hand – as mentioned above – in judicial speeches the model of magistrates indifferent to political passions and the values of society seemed not be predominant, and, on the contrary, their active participation in the innovation-continuity debate would stand out.

To confirm these considerations, the characteristics of the Italian judgment can be synthesised as follows: the summary of the narration of the facts presented by the writer in a selective way (the higher the degree of judgment the more the facts are intertwined with the law); great importance attributed to the jurisprudence, to the related intertextual references and to articles in the codes; the compulsoriness (the only imposition of the code) of the reference to the laws (and therefore other intertextual references); finally, the impersonality (it has been said) of a system – as Cortelazzo points out – in which judges hide their personal opinion and subordinate it to a collegial vote (if the judge is not monocratic). This entails, in Cortelazzo's words:

> a quantitative and argumentative prevalence of the legal motivation over that relating to the facts which are almost exclusively instrumental in the construction of the ruling and reflect the dominant concern of the judge in demonstrating that the judgment always derives from the consistent application of the laws.[77]

Of course, here too we need to distinguish between civil and criminal proceedings, between judgments of merit and legitimacy, and – I would stress – between different historical periods. I have in mind some magistrates' judgments of the 1970s (which at the time were not published in legal journals) published in the first issues of "Qualegiustizia", the magazine of Magistratura democratica. Some of them from 1972 were about "Police authority and freedom of assembly", while the police continued to crack down on unauthorised marches, despite the decisions of the Constitutional Court, even by force. Beyond the merits (i.e. the acquittal of defendants for having promoted the assemblies), what is striking is the language used by these magistrates which aims to criticise legislation ("the legislative discipline of these social facts is

76 Taruffo (1989) 1098-1099 and 1103.

77 Cortellazzo (2003) 83.

often inadequate and inapplicable") and which, in general, appears to be very similar to common language.[78]

In short, from these young magistrates came not a "pernicious esotericism" (according to Bellucci's definition), not an "anti-language", as stigmatised by Italo Calvino in a well-known article for "Il Giorno" in 1965,[79] but a language that was plain, and comprehensible to all, and moreover was inspired by democratic criteria and constitutional values.

5. Conclusion: words matter

Since the 1960s, the judicial world has been clearly divided into two blocks (the conservatives and the innovators), and the "words" of the judges' speeches, albeit in a different way to their decisions, have become one of the topics of confrontation, even symbolic.

After this "long" transition, with the lost war, the fall of Fascism, the division of the country in two, the Resistance, the establishment of the Republic and the promulgation of the Constitution, the field of confrontation was undoubtedly represented by the application of the Constitution as a disruptive innovation in Italy. Once the ideology of the judiciary, organised in a unitary way, had been blurred, starting from the 1950s, the model of the bureaucrat judge, of the law technician dedicated exclusively to the formal interpretation of the law and detached from political and social change, also entered into crisis. Whether the model was also in the past a real one or just an ideal type can be questioned even in the light of the most recent studies, but it remained thus fixed in the ideology of the judiciary for many years.

Therefore, the commitment of the judge regarding the value and meaning to be given to the implementation of constitutional innovations is at the centre of this analysis.[80] We have tried to understand how much of the innovative project elaborated by the constituents in 1948 has been filtered in the judgments, in the judicial speeches, therefore in the words

78 Qualegiustizia 1, (1972) 16 ff.

79 "The main characteristic of the antilanguage is what I would define 'semantic terror', that is, the escape in front of every word that has a meaning in itself, as if 'flask', 'stove' 'coal' were obscene words, as if 'go', 'find', 'know' indicate foul actions. In the antilanguage the meanings are constantly removed, relegated to the bottom of a perspective of words that in themselves do not want to say anything or want to say something vague and elusive". Calvino (1965).

80 Governatori (1970) 112.

of the judges, until it has become a common, widespread discourse within society.

In reality, the democratic "discourse" struggled to establish itself especially in the first twenty years of the Republic. Well-established permanence and recurring styles were not only verbal tics, but they were expressions of a real ideology, almost a narrative, that favoured continuity over innovation in the democratic sense. In short, the technical-bureaucratic style in the opinion of the rulings (but also in the speeches) may have excluded a "widespread control over the exercise of judicial power, entrusting it in reality only to the class of jurists". The nature of the judgment that has been described may have ended up becoming the main instrument for "the occult exercise of power and for removing responsibility from the judge", conditions that, according to some, continue today.[81] One may wonder if and to what extent the constitutional principle of autonomy of the judiciary itself, often recalled and extolled in judicial speeches, found application in judicial practice in those early Republican years. Or again, one may wonder if the same autonomy has remained a screen behind which to conceal the close consonance with the power that once again characterised the high judiciary. Ultimately, the rise of the centrist governments from 1948 certainly had the effect of "freezing"[82] the scope of innovation contained in the constitutional norms. But this happened also with the active collaboration of an old (and entirely male until 1965) judiciary class, which reached the top of its career passing through the rules imposed by the Fascist regime, often shared by the magistrates themselves.

Perhaps it is no coincidence that in a speech in 1957 the prosecutor Pafundi began with the "bimillenary lesson of Roman wisdom" namely "Servants of the law to be free", claiming that it was echoed in the precept of Article 101 of the Constitution: "Judges are subject only to the law".[83] A motto which, on closer inspection, had been recalled, albeit not literally ("*Sub lege libertas*"), by Procurator De Falco in 1877.[84]

81 Taruffo (1989) 1104-1105.

82 Calamandrei spoke of "freezing" of the Constitution: Calamandrei (1955).

83 Pafundi (1958) 3.

84 De Falco (1877).

References

Amato, Giuliano (1967), Individuo e autorità nella disciplina della libertà personale, Milano, Giuffrè

Bambi, Federigo (2016), Prefazione, in: Bambi, Federigo (ed.), Lingua e processo: Le parole del diritto di fronte al giudice, Atti del convegno, Firenze, 4 aprile 2014, Firenze, Accademia della Crusca, 7-10

Bancaud, Alain (1993), La Haute magistrature entre politique et sacerdoce ou le culte des vertus moyennes, Paris, LGDJ

Barbagallo, Giuseppe (1998), Stile e motivazione delle decisioni del Consiglio di Stato, in: Paleologo, Giovanni (ed.), I Consigli di Stato di Francia e Italia, Milano, Giuffrè, 233-258

Barbagallo, Giuseppe, Mario Missori (1999), Il linguaggio delle sentenze, in: La nuova giurisprudenza civile commentata, 2, 91-100

Bellucci Patrizia (2016), Il procedimento penale: un crogiuolo linguistico, in: Bambi, Federigo (ed.) (2016), Lingua e processo: Le parole del diritto di fronte al giudice, Atti del convegno, Firenze, 4 aprile 2014, Firenze, Accademia della Crusca, 117-132

Bellucci, Patrizia (2002), O onor del vero: Fondamenti di linguistica giudiziaria, Torino, Utet

Boni, Massimiliano (2018), Il figlio del rabbino: Lodovico Mortara, storia di un ebreo ai vertici del Regno d'Italia, Roma, Viella

Borgna, Paolo (2017), Ricostruire la giustizia penale nel dopoguerra: I nuovi valori costituzionali e l'indipendenza del giudice, in: Questione Giustizia 10 ottobre 2017, <https://www.questionegiustizia.it/articolo/ricostruire-la-giustizia-penale-nel-dopoguerra_i-nuovi-valori-costituzionali-e-l-indipendenza-del-giudice_10-10-2017.php>

Bourdieu, Pierre (1986), La force du droit. Elements pour une sociologie du champ juridique, in: Actes de la Recherche en Sciences Sociales 64, 3-19

Bracci, Mario (1947), Come nacque l'amnistia, in: Il Ponte III, 11-12, 1090-1107

Calamandrei, Piero (1955), La Costituzione e le leggi per attuarla, in: Dieci anni dopo 1945-1955: Saggi sulla vita democratica italiana, Bari, Laterza, 209 ff

Calamandrei, Piero (1999), Elogio dei giudici scritto da un avvocato, Firenze, Ponte alle Grazie, [1st ed. 1935]

Calvino, Italo (1965), L'antilingua, in: Il Giorno, 3 febbraio 1965

Cazzetta, Giovanni (2013), Introduzione: Prolusioni, prelezioni, discorsi: L'identità nazionale nella retorica dei giuristi, in: Cazzetta, Giovanni (ed.), Retoriche dei giuristi e costruzione dell'identità nazionale, Bologna, Il Mulino, 11-29

Cortellazzo, Michele (2003), La tacita codificazione della testualità delle sentenze, in: Mariani Marini, Alarico (ed.), La lingua, la legge, la professione forense, Milano, Giuffrè, 78-88

D'Alessandro, Leonardo Pompeo (2019), Per uno studio delle sentenze della Corte di assise straordinaria di Milano: il giudizio sulla Rsi e sulla sua classe dirigente, in: Nubola Cecilia et al. (eds.), Giustizia straordinaria tra fascismo e democrazia. I processi presso le Corti d'assise e nei tribunali militari, Bologna, Il Mulino, 31-56

Da Passano, Mario (1991). Linee di politica criminale nei discorsi inaugurali dei rappresentanti del pubblico ministero: 1879-1888, in: Materiali per una storia della cultura giuridica, XXI, 1, 93-129

De Mauro, Tullio (1963), Storia linguistica dell'Italia unita, Bari, Laterza

De Mauro, Tullio (2002), Introduzione, in: Bellucci, Patrizia, A onor del vero. Fondamenti di linguistica giudiziaria, Torino, Utet, IX-XIV

Dell'Anna, Maria Vittoria (2013), In nome del popolo italiano: Linguaggio giuridico e lingua della sentenza in Italia, Roma, Bonacci

Di Massa, Maria (2019), La Nazione e l'"anti-Nazione" nella giurisprudenza del dopoguerra (1945-1954): i giudizi sulla Repubblica sociale italiana nelle sentenze ordinarie e militari, in: Qualestoria, 2, 12-31

Focardi, Giovanni (2012), Magistratura e fascismo: L'amministrazione della giustizia in Veneto: 1920-1945, Venezia, Marsilio

Foucault, Michel (1971), L'ordre du discours: Leçon inaugurale au Collège de France prononcée le 2 décembre 1970, Paris, Gallimard

Foucault, Michel (1981), The Order of Discourse: Michael Foucault Inaugural Lecture at the Collège de France, given 2 December 1970, in: Young, Roberto (ed.), Untying the Text: A Post-Structuralist Reader, London, Routledge, 62

Garapon, Antoine (2007), Del giudicare: Saggio sul rituale giudiziario, Milano, Raffaele Cortina Editore

Gorla Gino (1968a), Lo stile delle sentenze: Ricerca storico comparativa, in: Raccolta di saggi sulla giurisprudenza, Quaderni de Il Foro italiano, 314-361

Gorla Gino (1968b), Lo stile delle sentenze: Testi commentati, in: Raccolta di saggi sulla giurisprudenza, Quaderni de Il Foro italiano, 362-544

Governatori, Federico (1970), Stato e cittadino in tribunale, Valutazioni politiche nelle sentenze, Bari, Laterza

Leso, Erasmo, Michele Cortellazzo, Ivano Paccagnella, Fabio Foresti (1978), La lingua italiana e il fascismo, Bologna, Consorzio prov. pubblica lettura

Luminati, Michele (2002), Linguaggi e stili della magistratura italiana nel secondo dopoguerra, in: Varni, Angelo, Guido Melis (eds.), L'impiegato allo specchio, Torino, Rosenberg & Sellier, 297-326

Mariani Marini, Alarico, Federigo Bambi (eds.) (2013), Lingua e diritto: Scritto e parlato nelle professioni legali, Pisa, Pisa University Press - Accademia della Crusca

Mazzacane, Aldo (ed.) (1998), I linguaggi delle istituzioni, Napoli, Cuen

Meccarelli, Massimo (2012), Mortara, Lodovico, in: Il Contributo italiano alla storia del Pensiero – Diritto, Roma, Istituto dell'Enciclopedia Italiana, <https://www.treccani.it/enciclopedia/lodovico-mortara_%28Il-Contributo-italiano-alla-storia-del-Pensiero:-Diritto%29/>
Meniconi, Antonella (2014), Inaugurazioni giudiziarie: tre discorsi ufficiali (ma non troppo), in: Le Carte e la Storia, 2, 104-116
Meniconi, Antonella (2015), Pilotti, Massimo, in: Dizionario biografico degli Italiani, Roma, Istituto dell'Enciclopedia Italiana, 83, <http://www.treccani.it/enciclopedia/massimo-pilotti_(Dizionario-Biografico)/>
Meniconi, Antonella (2017), La magistratura nella storia costituzionale repubblicana: Continuità e rottura nella magistratura come problema storico-istituzionale, in: Nomos: Le attualità del diritto, 1, <http://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2017/05/meniconi.pdf>
Meniconi, Antonella (2018a), La magistratura e la Prima guerra mondiale: Prassi e discorsi giudiziari, in: Procacci, Giovanna, et al (eds.), La Guerra e lo Stato 1914-1918, Milano, Unicopli, Biblioteca di storia contemporanea, 195-216
Meniconi, Antonella (2018b), Verso l'indipendenza della magistratura (1944-1948), in: Rivista trimestrale di diritto pubblico, 1, 395-431
Mortara Garavelli, Bice (2001), Le parole e la giustizia: Divagazioni grammaticali e retoriche su testi giuridici italiani, Torino, Einaudi
Neppi Modona, Guido, Marco Pellissero (1997), La politica criminale durante il fascismo, in: Violante, Luciano (ed.), Storia d'Italia, Annali 12: La criminalità, Torino, Einaudi, 757-847
Ondelli, Stefano (2006), Il genere testuale della sentenza penale in Italia, in: Benelli, Graziano, Giampaolo Tonini (eds.), Studi in ricordo di Carmen Sànchez Montero, Trieste, EUT Edizioni Università di Trieste 1, 295-309
Ondelli, Stefano (2012), La sentenza penale tra azione e narrazione. Un'analisi paralingustica, Padova, Cleup
Raffaelli, Guido, A. (1945), Il sacerdote di Temi, Milano, Gentile
Ramat, Marco (1961), L'indipendenza della giustizia, in: Il Ponte, 6, 848 ff
Sabato, Raffaele (2016), Il linguaggio nel contesto comunicativo del sistema giudiziario italiano, in: Bambi, Federigo (ed.), Lingua e processo: Le parole del diritto di fronte al giudice, Atti del convegno, Firenze, 4 aprile 2014, Firenze, Accademia della Crusca, 61-82
Santoni Rugiu, Antonio, Milly Mostardini (1973), I P.G. Linguaggio politica educazione nei discorsi dei procuratori generali, Rimini, Guaraldi
Sarzotti, Claudio (2004), Linguaggio e cultura giuridica: Il contributo dell'analisi linguistica allo studio socio-giuridico delle relazioni inaugurali dell'anno giudiziario, in: Febbrajo, Alberto et al. (eds.), Cultura giuridica e politiche pubbliche in Italia, Milano, Giuffrè, 137-184

Sarzotti, Claudio (2006), Cultura giuridica e culture della pena: I discorsi inaugurali dell'anno giudiziario dei procuratori generali, Torino, L'Harmattan
Scarpari, Giancarlo (1976), La Democrazia Cristiana e le leggi eccezionali 1950-53, Milano, Feltrinelli
Spriano, Paolo (1986), Le passioni di un decennio 1946-1956, Milano, Garzanti
Taruffo, Michele (1989), La fisionomia della sentenza in Italia, in: Studi in onore di Enrico Allorio, Milano, Giuffrè I, 1069-1105

Sources

Archivio centrale dello Stato, Ministero della Giustizia, Ufficio superiore del personale e Affari generali, Ufficio II, Magistrati fascicoli personali, IV versamento, b. 55, fasc. 69707; b. 193 bis, fasc. 70689; b. 497, fasc. 81806
Archivio storico della Presidenza della Repubblica, Fondo Enrico De Nicola, Corte di Cassazione, Inaugurazione Anno giudiziario
Azara, Antonio (1952), Discorso per l'inaugurazione dell'anno giudiziario 1952 (pronunciato il 5 gennaio 1952 nell'Assemblea Generale della Corte di Cassazione), Roma
Bartolini, Carlo (1934), Inaugurazione dell'anno giudiziario XIII dell'E.F., Assemblea Generale del 3 novembre 1934-XIII, Palermo, 1934
De Blasio, Alfonso (1918), Regia Corte di Cassazione di Roma, Inaugurazione dell'anno giudiziario 1918, Discorso del Procuratore generale del Re Senatore del Regno all'Assemblea Generale del 5 gennaio 1918, Roma
De Falco, Giovanni (1877), Discorso pronunciato dal senatore Giovanni De Falco Procuratore generale presso la Corte di Cassazione di Roma, "Sub lege libertas", Assemblea generale del 1° gennaio 1877, Roma
Eula, Enesto (1954), Discorso per l'inaugurazione dell'anno giudiziario 1954, Roma
Giglio, Ugo (1959), Discorso per l'inaugurazione dell'anno giudiziario 1959, Roma
Macaluso, Giovanni (1948), Discorso per l'inaugurazione dell'anno giudiziario 1948, Roma
Macaluso, Giovanni (1953), Discorso per l'inaugurazione dell'anno giudiziario 1953, Roma
Manca, Antonio (1955), Discorso per l'inaugurazione dell'anno giudiziario 1955, Roma
Manca, Antonio (1956), Discorso per l'inaugurazione dell'anno giudiziario 195, Roma
Mandruzzato, Carlo Alberto (1935), Inaugurazione dell'anno giudiziario 1934-35-XIII alla Corte d'Appello di Venezia, Venezia

Marongiu, Antonio (1934), Giustizia fascista, La giustizia nel distretto di Ancona nel secondo anno del secondo decennale della marcia su Roma, Ancona
Miraulo, Gaetano (1949), Discorso per l'inaugurazione dell'anno giudiziario 1949, Roma
Miraulo, Gaetano (1950), Discorso per l'inaugurazione dell'anno giudiziario 1950, Roma
Miraulo, Gaetano (1951), Discorso per l'inaugurazione dell'anno giudiziario 1951, Roma
Mortara, Lodovico (1912), Regia Corte di cassazione di Roma, Inaugurazione dell'anno giudiziario 1912-1913, Discorso pronunziato dal Procuratore generale Lodovico Mortara senatore del Regno nell'Assemblea generale del 9 novembre 1912, Roma
Pafundi, Donato (1957), Discorso per l'inaugurazione dell'anno giudiziario 1957, Roma
Pafundi, Donato (1958), Discorso per l'inaugurazione dell'anno giudiziario 1958, Roma
Pilotti, Massimo (1945), La giustizia e la ricostruzione nazionale, Discorso per l'inaugurazione dell'anno 1945, Roma
Pilotti, Massimo (1946), La giustizia e la ricostruzione nazionale, Discorso per l'inaugurazione dell'anno 1946, Roma
Pilotti, Massimo (1947), L'amministrazione della giustizia e la riforma costituzionale. (Discorso per l'inaugurazione dell'anno giudiziario 1947), Roma, 1947
Piredda, Amerigo Amedeo (1934), Discorso pronunziato il 3 novembre 1934 per l'inaugurazione dell'anno giudiziario, XIII E.F., Cagliari