A Malfunctioning System

The Limited Use of the Italian Legal Framework for Party Bans

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The Italian Constitution is founded on a strong anti-fascist sentiment, which united all the political forces represented in the Constituent Assembly. Nonetheless, party bans do not represent a serious threat to neo-fascist movements. Despite a constitutional provision and an ordinary law regulating the issue, their use has so far been limited to associations of minor size and relevance.

The prohibition to reorganize, in any form, the dissolved fascist party

In the Constituent Assembly, during discussions on the regulation of political parties, communist leader Palmiro Togliatti proposed a single limitation to the right of citizens to associate in parties: the prohibition to reorganize, in any form, the dissolved fascist party. His motion[2], which would become the 12th transitory and final provision of the Constitution[3], was likely motivated by the fear that any rule on the internal democracy of parties might affect his own party. At the same time, the Constitutional Fathers agreed on the importance of clearly excluding from democratic competition the ideology that had already proven "to be [its] enemy"[4].

Unlike the German *Grundgesetz*, the Italian Constitution does not require political parties to adhere to fundamental principles, but only to conform to a concept of *procedural democracy* (see Art. 49): the Constitutional Fathers, in fact, preferred to rely on the *consent* of the citizens, who would naturally reject anti-system ideologies within ordinary political clashes, rather than on the *force* of a general prohibition. Thus, even a monarchic party could – and in fact did[5] – legitimately

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2 That is a list of 18 articles that are formally posed outside the Constitution, but that should be considered as constitutional provisions in all respects.

3 Senato della Repubblica, Constitution of the Italian Republic (1947), https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last visited Jul 17, 2024).

4 Togliatti in the C.A. on 19th November 1946.

5 In this regard, the presence of some parliamentary groups inspired by monarchist ideology was recorded in the early years of the republican system (all data are available on the websites of the Chamber of Deputies and the Senate of Republic). First legislature (*1948-1953*): National Monarchist Party (16 deputies); second legislature (*1953-1958*): National Monarchist Party (22 deputies e 15 senators); Popular Monarchist Party (17 deputies); third legislature (*1958-1963*):

participate in elections if it adheres to democratic rules. Fascism remains the only ideology with an irrebuttable presumption of being anti-democratic.[6]

The “Scelba law” and its problems

A few years after the adoption of the Constitution and in response to the emergence of the openly neo-fascist party MSI (Italian Social Movement), Parliament supplemented the constitutional provision – albeit inadequately – with Law no. 645/1952, better known as the “Scelba law”, named after the Minister of the interior who proposed it.[7]

The law provides a definition of the “reorganization of the dissolved fascist party”, which encompasses any association, movement, or group with at least five members, that, alternatively, pursues the same anti-democratic aims as the fascist party, glorifies its principles or leaders, or carries out external manifestations of a fascist nature (art. 1).

Art. 3 regulates the dissolution of neofascist associations by outlining two alternative scenarios. Given that the Scelba law also addresses certain crimes related to fascism, paragraph 1 states that, if by judgment of a (criminal) court it is established that the fascist party has been reorganized, the Minister of the interior, upon receiving the opinion of the Council of the Ministers, shall order the dissolution of the association.

Paragraph 2 states that in extraordinary cases of need and urgency, the Government, after verifying the conditions described in art. 1, can dissolve the association through a law decree, an act having force of law that should be converted by the Parliament into an ordinary law within sixty days, after which it loses effectiveness from the beginning (art. 77 Const.).

However, the system devised by the Scelba law appears inadequate in addressing the problem it seeks to tackle, both in terms of approach and the involvement of public institutions. Regulating both criminal (personal responsibility of leaders and members) and constitutional (dissolution of an association) issues with the same law reflects a flawed perspective on the problem. This approach fails to recognize that the issue cannot be adequately addressed solely within the framework of a criminal trial. A neo-fascist movement could be organized without its

National Monarchist Party (8 deputies); Popular Monarchist Party (12 deputies); fourth legislature (*1963-1968*): Italian Democratic Party of Monarchist Unity (8 deputies); fifth legislature (*1968-1972*): Italian Democratic Party of Monarchist Unity (5 deputies).

6 According to some renowned constitutional scholars, as Esposito and Crisafulli, the 12th disposition could have been utilized as a general clause against antisystem parties. However, this view remained isolated.

7 The original text has been slightly modified in some points by law n. 152/1975.

leaders being directly involved in criminal activities. As a consequence, the determination of the reorganization of the fascist party carried out by a criminal court leaves no room for the political and constitutional consideration that should be central to such a decision. On the other hand, the Government's expedited procedure, whether it is activated or not, is susceptible to exploitation in the political debate and could potentially be abused to take out political opponents. This is because the discretionary power granted to the Government by art. 3, par. 2, is not accompanied by a specific procedure to be followed.

The years following the adoption of the Scelba law have demonstrated the ineffectiveness of the system. It was not activated in response to a major neofascist party and has been used only twice against small groups. More recently, it has not been used even against smaller groups.

An ad-hoc law to ban parties?

The passing of the Scelba law had no effect on the party which, without being explicitly mentioned, the law's supporters presumed to be the main target of the dissolution measure: the MSI. Despite several criminal trials involving MSI leaders, none resulted in a ban and the party remained stable at around 5% of the votes. It even gained influence by lending its support to the majority.

In 1960, former President of the Council Ferruccio Parri proposed a special law that, by directly applying the 12th provision and completely disregarding the Scelba law, called for the dissolution of the MSI. Parri argued that the Scelba law had proved to be completely ineffective and that it was therefore the responsibility of the Parliament to rectify what he considered to be an "indulgence" toward the MSI which had "already become a fault". The proposal was met with widespread approval from scholars, jurists, and political activists.[8] However, representatives were hesitant to assume the responsibility of dissolving a party having a small, but significant, electorate.

So, while the parliamentary majority declined to vote on the proposal, they simultaneously approved an order of the day identifying the Constitutional Court as the most appropriate body to rule on the ban of political parties. However, this act did not lead to any further parliamentary action and thus remained a non-binding parliamentary act.

[8] In 1961 a conference in support of the approval of the proposal was organized in Florence. Its reports were published in the same year in a book with a strongly evocative title: "*Un adempimento improrogabile*" (A mandatory fulfilment).

The Scelba law in jurisprudence

The reorganization of the fascist party was confirmed in four cases and the dissolution was ordered in two of those. The limited impact of the Scelba law, however, is evident in the way it has been used: It was successfully applied against small neo-fascist groups, while the larger one (the Italian Social Movement) remained unaffected.

The most notable decision occurred in 1973, involving the “Political Movement New Order”, issued by the Criminal Tribunal of Rome.[9] Over forty leaders and members were tried and subsequently sentenced for activities that “denigrated democracy and its institutions”. The Minister of the interior adopted the dissolution decree[10] of the organization solely based on the court’s decision, without awaiting the reasons for the judgment. Some scholars criticized the Minister’s haste, given that the judgment was not yet final.[11] However, the Council of State, to which the decree had been appealed, found no fault with the decree.[12]

In a couple of instances following the “New Order” case, criminal courts confirmed the reorganization, but the decision was not communicated to the Minister of the interior.[13] There was only one other case in which the judge communicated his findings, leading the Minister to adopt a dissolution decree.[14]

Since then, the instruments provided by the Scelba law have not been used, despite several relevant cases. For instance, in 2000, the “National Front”, a group with a fascist ideology, was banned under the so-called “Mancino law” [15], which regulates hate crimes, as it was considered a preferable and easier method. More recently, in 2023, the leaders of “New Force” – a small party with clear fascist inspiration – were convicted[16] for acts committed during a violent demonstration in Rome but the provisions of the Scelba law were never invoked during the trial.

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9 Criminal Tribunal of Rome, 21st November 1973, regarding the “Political Movement New Order”.

10 Gazzetta ufficiale, 23.11.1973, https://vocicostituzionali.org/wp-content/uploads/2024/04/1973-11-gazzuff-scioglimento-ord.nuovo_.pdf (last visited Jul 17, 2024).

11 For example, P. Petta, *Il primo caso di applicazione della “legge Scelba*”, in: Giur. cost., 1974, 486.

12 Council of State, 21st June 1974, https://vocicostituzionali.org/wp-content/uploads/2024/04/1974-452-consiglio-di-stato-ordine-nuovo.pdf (last visited Jul 17, 2024).

13 Criminal Tribunal of Bologna, 17th December 1975, regarding the associations “Young Italy”, “University Front of national action” and the Movement “Ugo Venturini”; and Criminal Tribunal of Padova, 16th July 1976, regarding the “Youth Front”.

14 Criminal Tribunal of Rome, 5th June 1976, regarding the Movement “National avant-garde”.

15 Gazzetta ufficiale, 09.11.2000, https://www.gazzettaufficiale.it/eli/id/2000/11/20/00A14459/sg (last visited Jul 17, 2024).

16 Giuseppe Scarpa, Assalto sede Cgil, condannati i leader di Forza Nuova Fiore e Castellino. In aula saluti romani e cori dopo la sentenza: “Non molliamo mai.” (2023), la Repubblica, https://roma.repubblica.it/cronaca/2023/12/20/news/assalto_sede_cgil_condannati_forza_nuova_fiore_castellino_video_saluti_romani_cori_in_aula-421710893/ (last visited Jul 17, 2024).

Making the protection of democracy work

The current party ban system in force in Italy has demonstrated its weakness in two respects: firstly, in the face of the emergence of a major neofascist party like the MSI, which was deemed too significant to be dissolved, and secondly, in dealing with smaller neofascist parties such as "New Force" or "CasaPound", which are considered too minor a threat to warrant a ban.

It should be clear that a ban itself is insufficient to eradicate the political appeal of a party, so that public institutions might be less inclined to pursue this alternative, which not only risks not solving the problem but even exacerbating it if dissolved parties present themselves to voters as victims of the establishment.

At the same time, the refusal of the Constitutional Fathers to establish a system of "protected democracy" cannot justify the current scenario in which there are substantially no limits on the ideologies of political parties. If anything, the only exception to the concept of "procedural democracy" should be upheld even more rigorously.

In Italy, furthermore, the lack of a public financing system for political parties prevents the use of a tool like the limitation of economic resources which, without incurring the risks of radicalization caused by a party ban, can be no less effective in limiting the ordinary activity of neo-fascist parties.

Consequently, public institutions should contemplate the significant underutilization of the 12th final disposition and devise an appropriate remedy, such as a significant revision of the Scelba Law that could give a proper and complete implementation to the Constitutional disposition.

The most appropriate solution would be to entrust the Constitutional Court with the decision to ban a party, as is the case in countries with similar provisions, such as Germany or Portugal. Even in Spain, where jurisdiction belongs to the *Sala Especial* of the Supreme Tribunal, the *Tribunal Constitucional* can be involved through a *recurso de amparo* against the judgment. A Constitutional Court possesses the broad perspective required to address such a question, a perspective that a criminal court – which might only examine the members of a local section of a party and not the entire party on a national level – might lack.

In the face of the threat posed by neofascist groups, the very existence of the constitutional order could be at stake. Therefore, while the dissolution of a party should remain a remedy of last resort, it should be effectively available to defend democracy.