THE CONSTITUTIONAL LIMBO

The constitutional assembly with delayed action.

The constitutional situation confronting the Italian people since the proclamation no. 151 calling for a constitutional assembly on June 25, 1944, is indeed a paradoxical one; from a political standpoint it is a "monstrum unicum" without precedents in history.

Even non-lawyers realize that a constitutional assembly implies reconstruction of the entire constitutional system "ab imis", from the bottom. At a certain moment in its history a people becomes aware that its constitutional structure no longer satisfies its political needs and, casting aside every legal obstacle arising from the old order, it takes upon itself the power to determine those institutions which seem most compatible with the present desires of the majority and to establishe them in a free manner. The act of calling together a constitutional assembly is therefore in itself a break from the old institutions and an implicit declaration of distrust in the old order, and consequently an unavoidable break in the juridical continuity between the old and the news. With the constitutional convention there begins a new life, "incipit vita nova"; the proposition of a radical constitutional renovation is apparent even in the title and first article of the proclamation calling for the constitutional assembly and charging it to "deliberate on the new constitution of the state".

All this would be most simple and clear if it were not for the extraordinary "de facto" situation confronting the Italian people at the time when the constitutional assembly was proclaimed (and still confronting them as I write these lines) and which has given rise to a number of complications and uncertainties. This situation can be summed up under two points, which are only two aspects of the continuing state of war: first, the enemy occupation of northern Italy that makes it practically impossible for the present to call a constitutional assembly where the will of all the

Italian people could be freely expressed; second, the priority given to matters favoring the war effort which, on our territory, as long as there are Nazis and Fascists to fight against, does not permit an internal debate to be opened which would totally absorb the political forces of the nation and would distract them from the immediate aim of a common victory over the foreign enemy.

It is precisely this international and military situation which has set the stage for the decree of June 25, 1944, laying the way for the constitutional assembly, but separating its "proclamation" from the actual "convocation"--in fact, while on the one hand the decree proclaims the determination of the Italian people to take back in their own hands the power to deliberate on the new organization of the state in a constitutional assembly, on the other hand the actual convention had to be put off to a more suitable time, i.e., "after the complete liberation of the national territory". The result has been a sort of constitutional assembly with "delayed action" whose explosive effects can only be felt at the expiration of a period which remains for the present of uncertain duration.

After all the tribulations of the war the Italian people, in having to wait indefinitely, must endure a rigorous ordeal which is imposed on their nervous system, already frayed by war, an ordeal only a people profoundly civilized and aware of its responsibilities can bear. And it will be borne to the end; but our foreign friends who with a certain irony have spoken about the "contortions" of the Italian people should bear in mind the exceptional spirit of tolerance that such an ordeal has demanded and still demands of a nation.

A forced stop between two stages of one revolution.

From a juridical standpoint all revolutions, even the fortunate ones which take place without street fighting, can be ideologically divided into two phases: a "destructive" phase, consisting in the demolition of the preceding juridical order, and a "constructive" one, consisting in the rebuilding of the new system. Between these two phases there is usually no historical or chronological break in continuity; almost always

negation of the old legal order is also an affirmation of the new order. A juridical vacuum cannot occur without placing in mortal peril the very existence of society for we can say of law, as of nature, that it abhors a vacuum. That is why in revolutionary periods the two phases of constitutional transformation, which the jurist can treat in the abstract as a dichotomy, actually almost always interlace and overlap, just as in the early spring buds start to appear when shrubs are pruned and green shoots can be seen bursting forth from the ground under the pile of branches.

In Italy, however, the fate of war has not only brought about a real separation between these two theoretically distinct moments, but has moreover divided them by a perceptible period of time. As a result of this, we are living at present through a prolonged intermediate phase characterized by a most singular state of juridical vacation, during which the Italian people is forced to remain suspended between two worlds, one a juridical order already condemned to death, the other an order which though greatly desired is yet unborn.

The proclamation of the constitutional assembly by the decree of June 25, 1944, was undoubtedly a revolutionary act, a legislative consecration of a revolution on the march, the closing of the revolution's destructive phase and the opening of its reconstructive phase. Perhaps the revolutionary portent of that decree was not immediately and fully appreciated by everybody, either in Italy or abroad, for the simple reason that it was not brought forth amid uprisings and barricades. But this happened because the traditional mise-en-scene for revolutionary violence had no function in our case, since war had swept over the entire world with a devastating fury far superior to that of any revolution. When liberty was brought to Italy by the victorious armies of the Allies, the Italian people became aware that under the debris of their cities their institutions also lay crumbled. There was no longer need for the destructive action of a revolution, since after the passing of a war destruction was an accomplished fact.

The proclamation of the constitutional assembly has been, therefore, the expression of the desire of the Italian people to set about immediately to the task of a constitutional reconstruction amid the ruins of a crumbled regime. But here is where the obstacle arises: this unique revolution, without historical precedent is, as it were, a revolution "in slow motion". The proclamation of the constitutional assembly should logically have led to immediate preparations for its convocation, since the same revolutionary impulse which overthrows the old institutions has within itself, in the case of true revolutions, the power immediately to create the institutions designed to replace them. But circumstances have placed the Italian people in such a position where reconstruction is a constitutional impossibility. The convoking of the already proclaimed constitutional assembly, which would permit putting to work the revolution's potential for reconstruction, has been postponed to a distant and indefinite future date, perhaps years away. Thus we must live in this kind of constitutional limbo, amid the debris of old laws, fallen in disrepute, which infest the air and yet cannot be replaced by new laws because for the moment we lack the constitutional machinery for their preparation.

When we start analysing this situation of enforced waiting, we are led to think of the tragic lot of the inhabitants of devastated zones who are compelled to live among the rubble of their shattered homes. Since they are unable for the time being to rebuild the roofs over their houses, they must content themselves with a tent or some planks fastened over their heads between two unsteady party walls.

During this difficult period in our national life we, too, are forced to live in makeshift constitutional shelters.

The pious illusion of constitutional continuity.

There is no need of detailed study to understand how fond is the illusion of those who seek to find a so-called "constitutional continuity" in this "de facto" situation where only political forces designed to prepare the juridical structure, and therefore still to be sanctioned by it, are in operation. It is as if the proclamation of a constitutional assembly

could be considered as a normal development of a pre-existing legality instead of as a complete rupture of every legal tie with the past.

We need not let ourselves be deluded by appearances just because in almost every field of social life we are still observing laws of the fascist period, including the codes, which might lead us to believe that nothing has changed around use, and that the old legal system is still in force. Actually, a break in constitutional continuity does not imply that many laws of the preceding regime may not temporarily outlive the fall of the old institutions. If it wants to avoid anarchy no revolution can wipe out by a single blow all the laws that previously regulated social relations among the citizens, but even when many of these laws remain provisionally in force the constitutional continuity is broken by the sole fact that, pursuant to the eruption of political forces which the preceding constitution neither foresaw nor regulated, the basic institutions which have exercised sovranty have either been abolished or transformed. It is these institutions which are called "constitutional", that we must examine in order to determine whether or not constitutional continuity has been broken.

Now, in our case, what would be the point of origin from which constitutional continuity should stem? Certainly not from the fascist regime previous to July 25, 1943, whose constitutional structure--Duce, Grand Council, Chamber of Guilds and Fasces--suddenly fell apart at the moment the regime ended, like a long putrescent carcass bringing to mind the immddiate liquidation of the magnetized corpse which Poe describes in one of his more gruesome tales. In search for the point from which constitutional continuity would stem we must go further back to the pre-fascist constitution which was in force up to 28 October[28] 1922.

This seems to be, indeed, the backward path suggested by the zealous proponents of this thesis who, to sustain their position, argue in this manner: until October 28, 1922, there was in Italy (they say) a constitutional and representative monarchy based on the Albertine constitution, article 65 of which empowered the king to appoint and to dismiss the ministers. The

installation of fascism was not a revolution but only an ordinary application of this power. The triumphal result of the March on Rome persuaded the sovran to place confidence in Mussolini's policy and to ask him to form the new government. The confidence of the sovran's persisted more than 20 years but after this period, because of some displeasing event, the king began to doubt that that great statesman might perhaps not have been guilty of a certain exaggeration, and dismissed him. Mussolini's arrest by order of the king on July 25, 1943 was not a constitutional crisis, but simply a change in the government. Rather than an arrest, it was a "protected" dismissal which the sovran accorded a minister who had nothing more to give. And the appointment of Badoglio was a pure and simple return to the constitution which preceded fascism.

This kind of reasoning is too good to be true since, as everyone knows, during the twenty year experiment there was not only a change in men and in policies, but there was a progressive and radical process of juridical dismantling of all those constitutional devices which, before the advent of fascism, had formed the constitutional physiognomy of the Italian monarchy. Under fascism the monarchy changed its appearance so as to become unrecognizeable; it ceased to be "representative", because the representatives of the people became an official hierarchy appointed by the executive. And it ceased to be "constitutional" because "toute société sans laquelle la garantie des droits n'est pas assurée ni la separation des pouvoirs déterminée, n'a point de constitution" (Declaration des droits, August 26, 1789, article 16). But if we look below the surface we discover that it is also ceased to be a "monarchy"; whoever thinks otherwise would be hard put to determine who was the monarch. The increasing pre-eminence continually given to the "head of the government" at the expense of the "head of the state", whose constitutional prestige was steadily becoming increasingly meager as his traditinal prerogatives were serving to fatten the virile figure of the former; the increasingly severe limitations to the king's constitutional power to choose and dismiss the ministers, which almost reached the point of complete revocation (laws December 24, 1925 and December 9, 1928); the encroachments of the

Grand Council even upon the field of succession to the throne and the attributions of the crown (law December 9, 1928)--all this makes it difficult for the unbiassed historian who among the baroque constitutional entanglements of the fascist regime would attempt to play the children's old game of patience of "finding the king". The truth is that in the last period of the fascist regime nothing else remained of the monarchy but a name and an effigy on the stamps (and even this was about to go). The monarch had shrunk to a sort of perpetual stand-in of the "Duce". Some people who comprehended the state of affairs defined this obscure constitutional situation as a "diarchy", but perhaps this was too much of a concession. With greater precision, the regime's cleverist constitutionalists, not daring to call it openly and sincerely a "dogato" or "ducarchy", used the less compromising and more anfibolous expression "head of the government regime".

Consequently it would be contrary to historical reality if we considered the change that took place on July 25, 1943 as a sort of Arcadian "return to constitutionality", which revivified the traditional institutions that had ceased to function under fascism. Fascism was not one of those benign tumors which a surgeon may cut out at a certain stage without leaving any contamination in the vital tissues. Monarchy and fascism had become a single constitutional entity, resulting from a process of unhealthy and unnatural grafting, a diseased interlacement that had joined them in life and death. Once fascism had fallen the constituion could not function for the very simple reason that it had long since ceased to exist. In a system so "flexible" as the Italian, where even the constitution could be amended by ordinary legislation, the constitution ceased to exist as soon as the king began to sanction those fascist laws which absorbed it piece by piece. Fascism became the constitution, and behind fascism there was nothing left but a constitutional vacuum. It is useless, therefore, to try to treat the collapse of July 25, 1943 as a resumption of constitutional continuity. The events of that day had only one meaning: that fascism was over and the monarchy along with it. Since that time there has been only a de facto situation wherein, because all juridical continuity with the former institutions had been broken, only purely political aspects of present problems have been treated.

How the decree of June 25, 1944 broke the constitutional continuity.

This interruption in the constitutional continuity is clearly apparent to anybody who examines with impartial legal judgement the provisions of the decree-law June 25, 1944, which represents in Italy the only provisional constitutional charter during this period of waiting for the convocation of the constitutional assembly.

If it were possible to make here an analytical comparison between the legislative provisions enacted in Italy by the Badoglio government in the period July 25 to September 8, 1943 and those enacted by the government that followed the liberation, it would clearly appear that between them there has been a definite divergence of constitutional aims. While the former sought a restoration of the monarchy as it was constituted previous to fascism, the latter (and they are the only ones that count now) are intended to open the way for a renovation of the constitution without a priori commitments to the constitutional forms of the past.

To be convinced of this, it is sufficient to read the first article of the decree which proclaims that "after the liberation of the national territory the basic institutions will be chosen by the Italian people", without adding "with the consent of the monarchy", as continuity with the Albertine constitution would have required. The decree clearly affirms that the constituent power has been taken back by the people (by the whole people, by nobody else but the people), and that the former constitution which the old constitutionalists considered a covenant between the king and the people, has been definitely denounced and rejected. This does not mean that if the majority of the people so desired the Constitutional Assembly could not retain the monarchic form; but at any rate, it would be a new monarchy created by the sovran deliberation of the people and not a negotiated monarchy, the outcome of a deal between the people and the old dynasty which has already been fired.

This is enough to show how out of date the Albertine constitution became after the decree of June 25, 1944. That constitution, as is well-known, belonged to the category of so-called "octroi" constitutions, i.e., a con-

into effect "by his certain knowledge and royal authority" (as the preamble reads) without consultating the people's will. It is evident that under such a constitution a renovation of constitutional forms by the people without the consent of the king would not be possible. Since this is the principle on which article 1 of the decree of June 25, 1944 is based, this decree stands like a tomb-stone marking the end of the "representative monarchy" of 1848.

It is true that at the beginning of Italian constitutional history the monarchy promised to have a constitutional assembly called as a complement to the plebiscites and that later on, during the fifty years of monarchical rule when the leftist parties periodically brought up this promise which the monarchy had not made good, there always were some monarchists ready to reply that at any rate the constitutional assembly was bound to operate within the monarchic system. But those who maintained this point founded their arguments on the Sardinian law of July 11, 1848, no. 747, under which the constitutional assembly promised by the King of Sardinia had been prudently circumscribed by a formula that was to render it innocuous: "A general constitutional assembly elected by universal suffrage shall be called for the purpose of discussing and establishing the bases and the forms of a new constitutional monarchy under the House of Savoy...." It was to be, therefore, a constitutional assembly after a preconceived pattern, with the permission of higher authorities. It could write a new constitution as long as it supported monarchy and the dynasty. But neither of these limitations set by the law of July 11, 1848 are to be found in the decree of June 25, 1944. The constitutional assembly proclaimed in 1944 will really be the first "national covenant" of the type that Giuseppe Mazzini wanted. A century and two world wars had to pass before Italy could cease to be "a mere appendix of the Savoy kingdom ruled by divine right", and finally have before her the open road that leads to a national state created by the free will of the people.

The confirmation of this resolve, clearly expressed in article 1 can be found in other provisions of the same decree and in subsequent legisla-

four months after the cessation of hostilities), signified that the proclamation of the constitutional assembly had rendered forever impossible a resurrection of the legislature of the old representative monarchy. In article 9 of decree-law July 27, 1944, no. 159, which, by placing the members of the legislature under the jurisdiction of the High Court created by this decree, showed that the immunities set forth in articles 37, 45 and 51 of the constitution were no longer effective. Above all, article 3 of the often-cited decree June 25, 1944 which replaces the oath of loyalty to the king and the constitution required of former ministers with an oath "to perform their functions in the supreme interest of the nation", has not only marked the formal break of the new constitution from the old one, but has buried once and for all the king's prerogative to appoint and dismiss the ministers (article 65 of the constitution). In this way the cabinet has lost the function of a liaison agency between crown and parliament which it had under the parliamentary system, where by possessing the confidence of both the king and the legislature it represented the meeting point between the monarch's and the people's will. In this way the mediating function of the government has disappeared which was the corner-stone on which the theory of representative monarchy was built. The government which under that system was also the mouthpiece of the crown, has ceased to be "the king's government" and is now only "the people's government".

In order to reach this conclusion it is unnecessary to recall the episodes of the constitutional crisis when, immediately after the liberation of Rome, all democratic parties unanimously demanded and obtained the condition that the ministers should from then on be representative not of the crown but of the Committee of National Liberation, i.e., of those political forces which sprang up during the clandestine period and which ought to be considered as the sole representatives of the people's will until such time as a general election could be held. There is no need to recount here the preliminaries leading up to the decree of June 25, 1944 since this fundamental constitutional innovation appears by now to be sanctioned under legal formulae of unequivocal meaning and indubitable authority. The power to choose the constitutional forms is entirely restored to the people and meanwhile, pending

the convocation of the constitutional assembly, the government is no longer bound by the interests of the dynasty or by the old constitution, but is only required to served "the supreme interest of the nation". The constitutional formula of"the inseparable good of king and country" is no more than a memory. The decree of June 25, 1944 has separated them in the sense that the good of the country, considered apart from any other factor, remains the sole end of the renascent legal system.

But at this point a question arises in our minds quite spontaneously: just what is a lieutenant expected to do in this provisional government of the people.

The compromise of the "institutional truce".

To this question the constitutionalist will find no satisfactory reply in juridican formulae. In order to understand why this intrusive institution was inserted, which seems incompatible with the basic premise of the provisional constitution of June 1944, we must take into account the military and international situation in which Italy found herself at that time. Only by keeping in mind the external constraint exercised by such circumstances is it possible to understand the reasons for this hybrid constitutional compound which otherwise would be absurd.

If in June 1944 Italy had not been cut in two by the war and her entire territory made a battlefield requiring sacrifice of all other needs to military ones nobody would have thought of inserting in the provisional constitution an archaic figure like that of the "Lieutenant General of the Realm", so archaic that a literal-minded jurist, finding unexpectedly such a personage mentioned under article 4 of this decree, might be induced to wonder what could be the "realm" to which this lieutenancy refers.

But history, as everybody knows, is always less distinct than precise juridical concepts. In our case, on one hand a revolutionary break in constitutional continuity was effected (articles of decree of June 25, 1944), acting as an indispensable premise for the proclamation of the constitutional assembly. On the other hand, considerations connected with the immediate necessity of a greater participation of the Italian army in the war of liberation led responsible people to think it advisable (this does not mean that such an opinion was

mands of the army, thus avoiding that dangerous restlessness among the fighting forces which might have been caused by a sudden shift in the traditional authority. In spite of its open contrast with the proclaimed constitutional discontinuity the lieutenancy is the device that was found for the purpose of achieving such a provisional military continuity. At least it had the advantage (or it was hoped it would have) of permitting those whose only thought until the end of the war was to be the prosecution of the fighting, to work on, unperturbed by political dissents or by their consciences. And this compromise solution was no doubt supported by the Allies (who were certainly justified in their concern) lest a failure to eliminate or postpone any sort of political agitation might handicap military operations), in accordance with the English constitutional tradition which, faithful to the principle of "quieta non movere", is always ready to maintain the continuity of form even where the substance has changed.

Thus the so-called "institutional truce", legally established under articles 3 and 4 of decree June 25 came into being, a type of compromise under which the people's government on one hand and the Lieutenant on the other, "aliquo dato, aliquo retento", accepted a modus vivendi that was the result of reciprocal recognitions and concessions. On the one hand we have the Lieutenant who in order to maintain his position as the formal head of the state during this intermediate period signed and thus recognized the decree, the provisions of which meant, as has been seen, the return of all constitutional power to the people and consequently the exclusion of any control by the lieutenant over the choice of the ministers. On the other hand, the government, while affirming the concentration of all sovranty in the people, permits the lieutenant to continue to exercise during this period of transition those formal powers of sanction and promulgation of legislative acts which under article 7 of the constitution were once attributes of the sovran.

Along with this compromise came the so-called "institutional truce" which has not only been a de facto political agreement, but also a legal obligation explicity established under article 3, which changes the ministers' oath from a pledge of loyalty to the king and the constitution to a pledge "not to do anything pending the convocation of the constitutional assembly that might prejudice the solution of the constitutional question". Some remarks on this

truce may be of interest.

The reciprocal obligation of good faith.

First of all it may be noted that, although article 3 literally interpreted may appear to limit the pledge to a unilateral promise on the part of the government, the fact that the agreement was a compromise leads to the obvious conclusion that, if the good faith of the parties is of any consequence in constitutional agreements of this kind, this was a bilateral and reciprocal obligatinn. As can easily be seen, an extremely delicate situation had thus been created w which, if complications were to be avoided, ought to have been of short duration, as at that time it was expected to be. At any rate, the situation required from both parties a spirit of absolute loyalty and discretion, almost one might say of chasteness. The Lieutenant and the government undertook to take no official action (including the delivery of speeches and the granting of interviews) that could have perturbed the reserve which should have been maintained on the most pressing question: "Pensarci sempre ma non parlarne mai" (to be ever thought of but never spoken). Until the end of the journey the Lieutenant and the government were to behave like the bashful newlyweds just starting off on their honerymoon: their embarrassed silence was first broken by the bride who asked, "What are you thinking about, dear"? And the bridegroom with a smile: "Just what you are". She, blushing: "For shame!" And during the rest of the journey they sat in silence.

But the agreement was in no way intended to imply that the constitutional question could not be discussed in the free press and in party meetings, since it is the task of the parties to orient public opinion on the problem which at the end of the war will be the central issue of political reconstruction of Italy. It meant only that neither the government nor the Lieutenant was permitted to use the constitutional powers provisionally granted them to attempt to alter the legal structure of the modus vivendi until such time as the whole country should be liberated.

With this in mind, it can be understood how justified was the alarmed reaction of public opinion last December when the prime minister offered his resignation not to the Committe of National Liberation by which he had been appointed butto the Lieutenant and when he accepted a new appointment from the Lieutenant, that is to say from an authority which according to the constitutional

agreement lacked the power to choose and appoint the ministers. The ministers, being reappointed by the Lieutenant, no longer represented the Committee of National Liberation (i.e., the people) but became once more the faithful servants of the Lieutenant (ie., the crown). This was a violation of the agreement and brought back a form of government which resembled an absolute government more than a democratic one because, if the ministers became once more the expression of the will of the crown, the people lost the only government organ through which they could express their will until the constitutional assembly was convened. Therefore, the question could be asked if, after the cabinet crisis of last December which was resolved in a manner contrary to the terms of the agreement of June 25, the institutional truce should still be considered in effect.

A truce in epuration as well?

In the second place it should be pointed out that an institutional truce could not fail to signify at the same time a truce in the application of sanctions against fascism. But this has been clearly demonstrated by the ensuing events which have caused no surprise to those who, from the beginning, had understood that article 2 of the legislative decree 27 July 1944 no. 159, which provides for the punishment of "those who are gound guilty of annulling the constitutional guarantees, of destroying individual liberty, of creating the fascist regime, of betraying the country and bringing it to its present catastrophe" was destined to remain for the most part an impotent velleity so long as the government was bound by article 3 of the decree 25 June to do nothing "that might prejudice the solution of the constitutional question".

It does not take a highly trained legal mind to understand that the question of the responsibility for the annulment of constitutional guarantees is not only related to but is identical to the constitutional question.

When we complain of the slowness and uncertainty with which epuration and punishment of fascist crimes is proceeding in high circles and when we charge the high commission or the high court with ineptitude or lack of energy, we fortet that both of them in spite of all their good intentions to administer justice in earnest are blocked at every step by the invulnerable gates of the institutional truce. From a strictly legal point of view it is clear that article 4 of the Albertine constitution which established the principle of royal irresponsibility (and the corresponding article 279 of the penal code which was its

corollary), has not been in force since the breaking of every bond of continuity with the constitution in question. But in this temporary compromise forced upon us by military necessity, in place of the royal irresponsibility we find the institutional truce which leads to practically the same paralysis. As long as this truce lasts it is foolish to expect a serious application of the sanctions against fascism.

It is good to state this clearly and not to go on believing that by slight modifications in the eupration procedure things might run differently. They will not, so long as this constitutional situation continues. The Roatta trial should teach us that.

On the eve of a provisional government.

This condition of constitutional paralysis will not go on forever. It was necessitated by war expediency but it will end with the war.

The temporary character of the compromise from which the Lieutenant's authority is derived is repeatedly shown by the very form of the decree that created it. It has already been seen that article 3 states that the institutional truce will last "until the constitutional assembly convenes" and that article 1 proclaims that the constitutional assembly will be called "after the liberation of the national territory". The institutional truce will end, therefore, as soon as the liberation of the national territory is completed which menas, if I am not mistaken, that as soon as Italy is liberated the present compromise government should automatically give way to a provisional government of the people to which will be entrusted the task of calling together and making preparations for the constitutional assembly and of guaranteeing that the people, and the people alone, will be able to express their will in it freely.

If we are to accept the terminology of the constitutionalists who call a government provisional that rises over the ruins of a crumbled regime and takes over the task of preparing and laying the way for the establishment of a new order, we must come to the conclusion that the present Italian government is not even a provisional government; it is, as it were, the antechamber or prelude of the provisional government which should take shape when the whole of Italy is liberated. It is a provisional government to the second power because it has no other task than that of waiting in this interval of the institutional truce for the true provisional government which in its turn will precede and