

# EDITORIAL

## TOWARDS OPENNESS AND TRANSPARENCY: RECENT DEVELOPMENTS IN THE “ITALIAN-STYLE” CONSTITUTIONAL JUSTICE

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1. A new wind blows at *Palazzo della Consulta*. The reason is not only the election, for the first time in the history of the Italian Constitutional Court, of a woman, Professor Marta Cartabia, to the Court's Presidency, a development that, for a moment, has put this institution, often neglected by media and public alike, in the spotlight. The press release of 11 January 2020, under the momentous title “The Court opens up to hearing the voice of civil society”, announced that substantial changes were introduced by the Court in its collegiality to the rules governing its proceedings. This is an unprecedented innovation in its sixty-four years of activity and one that is likely to reverberate on the Court's relationship with society and, not least, on the attitude of citizens towards public authorities.

To better understand this ground-breaking development, we should begin by considering that the “Italian-style” constitutional justice has been recently labelled as “cooperative” and “relational” by a successful book aimed at presenting at an international audience the activity and accomplishment of the more than 60 years' experience of the Italian Constitutional Court<sup>1</sup>.

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<sup>1</sup> V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context* (2016).

The authors considered that in “its historical development, its internal workings and methods, its institutional relations with other political bodies or courts, or in its substantive jurisprudence on a number of issues of global concerns, the Italian Constitutional Court operates with a notable attentiveness to the relations between persons, institutions, powers, associations, and nations”<sup>2</sup>.

Nevertheless, other scholars pointed out that this relationality should at least be more carefully examined, as the Court only seldom explicitly refers in its reasoning to external arguments and materials. They pointed out that the Court’s approach towards “external materials” (i.e. foreign law, scholarships, third-parties and *amici curiae* intervention, legislative facts) is formally closed and not relational at all: thus its relationality should rather be considered as an “unofficial (or informal)” one<sup>3</sup>.

2. This was especially true for third-parties intervention and facts-finding powers. From the analysis of the legislative and autonomous framework (the “Supplementary Provisions Concerning Proceedings before the Constitutional Court”, hereinafter, S.P.) on one hand, and of the case-law on the other, the picture that emerged was labelled as “The III (Informal, Implicit, Indirect) attitude” (or “Triple I” attitude), in the sense that the Court acquires information on facts informally and reads briefs submitted mostly informally<sup>4</sup>.

As for third-parties intervention, lacking any legislative basis, the Court was at the beginning (from 1956 to 1990) completely closed in all the proceedings, including the incidental ones, based on the principle of the “formal coincidence between parties in the *principaliter* proceeding and parties in the *incidenter* proceeding”<sup>5</sup>.

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<sup>2</sup> As summarized in V. Barsotti, *The Importance of Being Open: Lessons from Abroad for the Italian Constitutional Court*, 8 Italian J. Pub. L. 28 (2016).

<sup>3</sup> T. Groppi, *Giustizia costituzionale "Italian Style"? Sì, grazie (ma con qualche correttivo)*, in 2 Dir. Pubbl. Comp. Eur. (2016).

<sup>4</sup> T. Groppi, A. M. Lecis Cocco Ortu, *Openness and Transparency in the Constitutional Adjudication: Amici Curiae, Third-Parties Intervention and Facts-Finding Powers*, in V. Barsotti, P.G. Carrozza, M. Cartabia, A. Simoncini (eds), *Dialogues on Constitutional Justice. Comparative Reflections on the Italian Style* (2020 forthcoming), 61.

<sup>5</sup> See critically on this phase, M. D’Amico, *Parti e processo nella giustizia costituzionale* (1991).

Later, beginning in 1991, the Court started to admit third-party interventions on a case-by-case basis, pursuant to an interpretation of Article 24 of the Constitution (the right to defence), according to a fluctuating case-law, widely criticized by scholars who sought greater clarity in the eligibility criteria for third-party interventions. In order to address those critics, in 2004 the Court amended the S.P., explicitly recognizing the possibility of third-parties intervention in Article 4, paragraph 3, according to which “possible interventions of other subjects [other than the President of the Council of Minister or the President of the Region], without prejudice to the Court’s competence to decide on their admissibility, must take place with the same formalities”. Therefore, the reform did not introduce any procedural rules, and it refrained from establishing any admissibility criteria. As before, the decision on the admissibility of the intervention was made by the Court in the very moment of the substantive decision, by way of an order published as an annex to the judgement and it remained fully discretionary. The “intervention” mentioned by Art. 4 S.P. is reserved to “third-parties holding a special interest directly concerned with the *principaliter* case and thus susceptible to be directly and immediately affected by the judgment”<sup>6</sup>.

The Court constantly rejects those third-parties interventions whose interest is based on the general effects of the constitutionality judgment because this would be founded on merely factual interests. The range of groups whose applications to intervene have been rejected includes professional orders and trade unions, professional representative groups, civil rights groups, and other advocacy groups defending the rights of their members. Their representative role and their engagement to defend the collective interests of a category of people are not taken into account.

Despite this well-established case-law, interest and advocacy groups continue to file third-party briefs with the Court in defence of the collective interests that may be affected by the decision. Since the institutionalization of third-party interventions in the S.P. in 2004, they submitted almost half of the overall

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<sup>6</sup> See among others: Judgment n. 194/2018.

intervention requests received by the Court<sup>7</sup>. Even if the subject who drafted such brief does not acquire any formal procedural status, they can be read and informally taken into account, as pointed out some years ago the actual President of the Court, Professor Marta Cartabia<sup>8</sup>.

This means that even rejected interventions can serve as information sources, despite their formal non-admission. In addition, until recently, third parties who submitted a brief had the possibility to accede to the case file before the decision on the admissibility (or inadmissibility) of their intervention<sup>9</sup>.

Therefore, even though *amicus curiae* interventions were not allowed before the Italian Constitutional Court, we can consider that a form of *amicus curiae* procedure seems to have developed, at least informally.

Against this background, scholars have proposed the introduction of two different types of third-party participation, according to a double track model existing at comparative level in many countries: a true third-party intervention and the *amicus curiae*<sup>10</sup>. The third-party intervention *stricto sensu* would have been reserved for third parties possessing a right that can be affected by the decision, while the *amicus curiae* brief would have been reserved for groups or public establishments whose interest to intervene lies in the general effects of the decision on the rights and interests they represent. This distinction was aimed at permitting the Court to find a balance between the advantages

<sup>7</sup> See A.M. Lecis Cocco Ortu, *Les interventions des tiers porteurs d'intérêts collectifs dans les contentieux constitutionnels incidents français et italien* (2018) 302 ff.

<sup>8</sup> M. Cartabia, *Qualche riflessione di un giudice costituzionale intorno al problema dell'intreccio tra diritto, scienza e tecnologia*, in *BioLaw Journal - Rivista di BioDiritto*, 1/2017, 11.

<sup>9</sup> This practise was stopped by the Decision of the President of the Court of 21 November 2018, on the "Making the case file available to the interveners, before the declaration of admissibility of their intervention".

<sup>10</sup> A. Concaro, M. D'Amico, *Proposte di modifica delle norme integrative*, in A. Pizzorusso, R. Romboli, G. Famiglietti, E. Malfatti, *Le norme integrative per i giudizi davanti alla Corte costituzionale dopo quasi mezzo secolo di applicazione* (2002) 454 ff. especially 460; A. Cerri, *Corso di giustizia costituzionale* (2008) 226-227. More recently, see also A.M. Lecis Cocco Ortu, cit. at 7; A. Pugiotto, *Per un'autentica dialettica a Corte*, and T. Groppi, *Verso un giudizio costituzionale "aperto"? Riflettendo su interventi di terzi e amici curiae di fronte alle sfide per la giustizia costituzionale nel XXI secolo*, in *Quad. cost.*, 2/2019, respectively 361 ff. and 371 ff.

and disadvantages of *amicus curiae*, submitting the two types of intervention to different procedural rules, also to avoid the risk of the Court being overwhelmed by a large number of briefs or lengthening the duration of the proceedings, especially taking into account the public hearing.

3. As for facts-finding powers, the Court refers to non-legal arguments in many decisions, especially to assess the “reasonableness” (*ragionevolezza*) of a legislative provision (that is, to measure the proportionality of the regulation to the factual situation) or to assess in advance the impact of its decisions (especially in terms of financial impact) However, very often the factual arguments are formulated very generically, without any reference to the source of the information and without using the formal fact-finding provisions contained in the rules on Constitutional Court proceedings (Articles 12-14 S.P.). As for its own *ex-officio* fact-finding, in the vast majority of cases the Court acquires facts or other non-legal arguments informally during the preliminary investigation carried out by the judge rapporteur and by his clerks. The Court does not mention this activity in the text of the decision – not even in the “in fact” section. In order to formally regulate this informal activity, in 2004 the S.P. were amended to allow the documents acquired to be made available to the parties, but this rule does not seem to have had any impact on the use of arguments (Article 7, paragraph 2, S.P.).

The Court has made use of its formal fact-finding powers, requiring a collegial deliberation and an evidence-gathering order, in very few cases. The analysis of those cases does not show any coherence, with regard to both the circumstances that prompted the Court to start a formal factfinding proceeding, the documents requested, and the recipients of the requests. The haphazard nature of the evidence-gathering orders has generated doubts, repeatedly raised by scholars, that these orders may likely be used by the Court in order to postpone complex decisions or to give notice to the legislature of a possible forthcoming declaration of unconstitutionality. In addition, once the Court has received the information requested in the order, only rarely has it referred to the order and to the evidence gathered in the actual judgment addressing the question of constitutionality. It may happen that no reference to the order is made in the judgment, either in the “facts of the case” (*fatto*) or in the “conclusions on points of law” (*diritto*).

This makes it even more difficult to understand the role played by the formal fact-finding procedure.

Against this background, scholars have pointed out the importance of using consistently the formalized facts-finding powers, for improving the transparency of the decisions<sup>11</sup>, or have proposed to introduce new facts-finding tools, as the hearings of experts, according to the German model<sup>12</sup>.

4. In conclusion, until today the Court appeared willing to keep some distance from society (from both facts and people), almost expressing a preference for relying on some mediation instances. This picture corresponds to the Italian model of judicial review as an indirect model (lacking a direct individual complaint), in which the Court turns primarily to ordinary judges, who are the main gatekeepers and implementing actors of its decisions. In addition, if we consider that courts always talk to their “supposed” audience, we can understand why the Italian Constitutional Court adopts an approach to external contributions which is consistent with the tradition of civil law judges.

However, more recently, this approach has been increasingly challenged by the evolving attitude of ordinary and supranational judges, who themselves have become more and more open to third-parties briefs and *amici curiae* and by the Court’s compelling need to preserve its legitimacy in an increasingly polarized political context. The Court has showed to be conscious of the new challenges, especially by developing in the last few years a new communicative attitude, by tailoring more carefully its press-releases, by making use of social media and by organizing dissemination activities, such as the “Travel in Italy” initiative (where judges of the Court visited schools and prisons), or a photographic exhibition open to the public in the building of the Court in March 2019, called “The face of the Court”. More precise signs of the dissatisfaction of the Court with the external relationality have been the seminar on “Interventions of third parties and ‘Amici Curiae’ in assessing the constitutional legitimacy of laws, also in the light of the experience of other national and supranational courts”, organized by the

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<sup>11</sup> T. Groppi, *I poteri istruttori della Corte costituzionale nel giudizio sulle leggi* (1997).

<sup>12</sup> V. Marcenò, *La solitudine della Corte costituzionale dinanzi alle questioni tecniche*, in *Quad. cost.*, 2019, 393 ff.

Constitutional Court on 18 December 2018 and a decision of the President of the Court regulating the access of subjects asking for intervention to the trial files and documents on 21 November 2018.

5. In what has been described as “an astonishing move”<sup>13</sup>, on January 11, 2020 a press release was posted on the web page of the Constitutional Court, titled “The Court Opens up to Hearing the Voice of Civil Society”, announcing that on January 8 the Court approved some amendments to the Supplementary Provisions. The amendments were published on the Official Journal some days later and then they entered into force.

They completely changed the legal framework, by introducing a “triple track route”, identifying three separate types of intervention of external subjects.

In particular, the new Article 4-ter introduces the most significant novelty of *amicus curiae* briefs in the Italian constitutional procedural law. It states that all non-profit social groups and all institutional bodies representing collective or diffuse interests relevant to the questions discussed in the proceedings can submit by email a brief (no more than 25,000 characters). The President, after consulting the judge rapporteur, may admit them, if s/he is persuaded that the briefs provide useful information to understand and evaluate the case, given its complexity. This provision would apply to all the proceedings falling within the competences of the Court, including principal proceeding and conflicts between State powers and State and regions.

In addition, with regard to incidental proceedings, the Court amended Article 4, codifying its previous case-law. The range of potential third-parties intervenors is now extended – in addition to the parties to the case and the President of the Council of Ministers (and the President of the relevant Regional Council, if a regional law is concerned) – to other subjects, provided they have a valid and directly and immediately relevant interest in the decision. Prospective third parties may, when appropriate, be also authorised to access the case files of the constitutional proceedings prior to the hearing before the Court, as stated by Article 4-bis.

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<sup>13</sup> M. Romagnoli, *The Italian Constitutional Court Opens Up to Hear the Voice of Civil Society*, *VerfBlog*, 2020/2/15, <https://verfassungsblog.de/the-italian-constitutional-court-opens-up-to-hear-the-voice-of-civil-society/>, as the reference to the “triple track”.

The Court also amended Article 14-*bis* on facts-finding, introducing the possibility for the Court to call renowned experts when it deems it necessary to acquire information on specific areas of knowledge. The experts will be heard in chambers, in the presence of the parties to the case.

In its press release, the Court itself pointed out the aim of the reform, by beginning with these words: "From now on, civil society too will be able to make its voice heard on issues discussed before the Constitutional Court". It also referred to the sources of inspiration, by underlying that the amendments (and especially the new provision on *amicus curiae*) are "in line with the practice followed by the supreme and constitutional courts of many other countries". We should add that they are also in line with proposals that have been advanced by many Italian scholars for decades.

Those provisions represent an important step (we could say a real "revolution of openness and transparency") towards a "true" relational approach in constitutional adjudication, which not only implies a positive and constructive dialogue, but also requires accepting the challenge of confrontation in a more open and transparent manner.

The Court accepted the challenge and the opportunity to move from the "triple I attitude" to the "FED (formal, explicit, direct) approach". However, the Court retains a large discretionary power on the admissibility and selection of *amici curiae* briefs and the experts to be heard, following "a calibrated approach that accommodates interpretative room for manoeuvre and recognizes that the judge very much remains a legal professional, primarily using formal legal reasoning and legal methodologies to ply her trade", as it has been suggested by renowned international scholars<sup>14</sup>. Therefore, the Court made the first move, but only future practice will tell us how this revolution in the rules will really influence the "Italian-style" constitutional adjudication.

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<sup>14</sup> M. de Visser, *Procedural Rules and the Cultivation of Well-Informed and Responsive Constitutional Judiciaries*, in V. Barsotti, P.G. Carrozza, M. Cartabia, A. Simoncini (eds), cit. at 1, 79 ff.