THE IMPORTANCE OF BEING OPEN. LESSONS FROM ABROAD FOR THE ITALIAN CONSTITUTIONAL COURT*

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Abstract

The article examines the institutional relations between Italian Constitutional Court and its stakeholders, as political bodies or courts. At the same time through a comparative overview it shows the specificity of our Court in relation to the others European Constitutional Courts.

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1. Different kinds of relationality

The Italian constitutional "style" - following the celebrated John Henry Merryman's definition[1] – has been labeled "cooperative" and the word "relationality" has been used to capture its essence[2].

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* This essay was delivered at the 2016 ICON-S Conference *Borders, Otherness and Public Law – Berlin*, June 17th-19th, 2016. The panel, composed also by M. Cartabia, O. Pollicino, P. Popelier and A. Simoncini, chaired by N. Lupo, discussed the main outcomes of the Volume *Italian Constitutional Justice in Global Context* co-authored by V. Barsotti, P. Carozza, M. Cartabia, and A. Simoncini.

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[1] J.H. Merryman, *The Italian Style: Doctrine,* in 18 Stan. L. Rev., 39 (1965); Id. *The Italian Style: Law,* in 18 Stan. L. Rev., 396 (1966); Id., *The Italian Style: Interpretation,* in 18 Stan. L. Rev., 639 (1966).

[2] V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini, *Italian Consitutional Justice in Global Context* (2016).

Whether 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. Like any judge in well-functioning systems of justice generally, the Italian Constitutional Court is indeed independent from other branches of Government. However, it always acts as part of a complicated machine, within which many other institutional gears have their part as well. Although granted the final word by the Constitution, it does not speak the only word in constitutional matters. Instead, it is embedded in a fabric of relations that affect its agenda, its deliberative process, its method of interpretation, the typology of its decisions, and even its vision of the persons, society, and state subject to its judgments.

Obviously, the Italian Constitutional Court is not always perfectly consistent and successful in maintaining its distinctive identity and is not alone within the European complex landscape in trying to enhance its cooperative and dialogical nature.

Two different kinds of relationality have been described for the Italian Constitutional Court. Institutional relationality: the ability of the Court to establish sound and vital connections with other institutional actors, both political and judicial, national and supranational. Interpretive relationality: the capacity of reading the constitution as a whole, as a system, avoiding a fragmented interpretation and adopting an inclusive and holistic approach to legal reasoning[3].

It has also been evidenced a more specific "external institutional relationality". This consists of the particular capacity of communicating with the European legal order both at the horizontal level (with other national courts) and at the vertical level (with the European Court of Justice and the European Court of Human Rights). "External institutional relationality" is an important feature belonging not only to the Italian experience but shared by many other European systems[4]. A new feature slowly

[3] V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini, *Italian Consitutional Justice in Global Context*, cit. at 2, 231-242.

[4] M. De Visser, *Constitutional Review in Europe. A Comparative Analysis*, 392-440 (2013).

becoming, in various degrees, a common trait of the European model of constitutional adjudication, and which is crucial within the European networked system for the protection of rights[5].

Relationality, in its multiple facets, is the positive core of the Italian model of constitutional justice. However, looking at the Italian system from a comparative perspective, two issues will be addressed which perhaps belong to the "dark side" of the Italian relational style. The issues are loosely linked. Both touch upon procedure and how it connects to models of constitutional justice - and, in the very end, to the democratic accountability of courts[6].

2. Separate opinions

Taking into consideration the rules of procedure and the ways in which the Italian Constitutional Court effectively works, a principle of collegiality comes in great evidence. In every step of the decision process, all the 15 judges – although coming from different backgrounds and having reached the Court trough different ways of appointment - work closely together and the final decision derives from the "the Court" in its entirety[7]. No concurring or separate opinions are allowed. A strict principle of collegiality distinguishes the Italian Constitutional Court not only from the supreme courts of common law countries but also from many of its European counterparts.

The German *Bundesverfassungsgerichtshof* is one of the best known examples of a civil law country allowing constitutional judges to issue separate opinions (*Sondervotum*). While judges

[5] V. Barsotti, *Relationality. New Colors for the European Model of Constitutional Adjudication*, (forthcoming). "External institutional relationality" can be considered a new common feature of the European model of constitutional adjudication to be added to those pointed out by V. Ferreres Comella, *Constitutional Courts and Democratic Values* (2009). See also T. Groppi, *Introduzione: alla ricerca di un modello europeo di giustizia costituzionale*, in T. Groppi, M. Olivetti *La giustizia costituzionale in Europa*, (2003).

[6] I like to thank Tania Groppi for having intelligently and constructively commented on the book *Italian Constitutional Justice in Global Context*. Her remarks helped me to better consider some problematic aspects of the Italian relational style. See T. Groppi, *Giustizia costituzionale "Italian Style"? Sì, grazie (ma con qualche correttivo)*, in 2 Dir. Pubbl. Comp. Eur. (2016).

[7] V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini, *Italian Consitutional Justice in Global Context*, cit. at 2, 43-49.

sitting in ordinary courts are bound to respect the secrecy of deliberations and votes, since 1971 constitutional judges represent an exception to this rule.

A slightly different case is that of Spain, which has allowed separate opinions for the Constitutional Court from the very beginning of its functioning, in 1979, and constitutional judges are used to write separately much more frequently than their German colleagues. Moreover, in Spain, ordinary Supreme Court's judges can publish separate opinions also and this is quite unique in continental Europe.

After the breakdown of the socialist regimes, most Central and Eastern European countries largely adopted a German model of constitutional adjudication including the possibility of publishing separate opinions.

A comparative overview clearly shows that the vast majority of European Constitutional Courts, although following different practices, and the European Court of Human Rights permit judges to hand down multiple decisions[8]. As for the European Court of Justice, the issue is under serious discussion. This is the case notwithstanding the civil law tradition that decisions come from the entire court and represent a single will, therefore precluding the identification of individual judicial personalities. Since many European countries follow the common law style and allow constitutional judges to publish concurring and dissenting opinions, they have taken advantage of the migration of constitutional ideas[9].

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[8] A very useful and instructive study, which takes into consideration both Supreme and Constitutional Courts, is published by the "Policy Department of Citizens' Rights and Constitutional Affairs of the European Parliament": *Dissenting opinions in the supreme courts of Member States* (2012).

[9] The traditional distinction between common law and civil law is becoming more and more blurred. The "converging trend" is common language among comparative scholars (although not universally agreed upon). This is particularly true when it comes to style of opinions. Taking into account both constitutional courts and ordinary courts, the divide between common law and civil law is far from sharp. A simple example. On one side, in Spain, a traditional civil law country, the practice of *voto reservato* is historically known and presently both ordinary judges and constitutional judges write separate opinions. On the other side, Ireland represents a rare exception since the constitution explicitly prohibits the Supreme Court the publication of separate opinions in most constitutional cases. A seminal article on style of opinions in comparative perspective and which describes the historical and procedural

This is not yet the case in Italy. After an intense debate that considered both the strengths and the weaknesses of separate opinions, as well as the historical, cultural and institutional reasons that explain the difference between common law and civil law judicial style, the principle of collegiality - and the related, but not necessarily inseparable, principle of secrecy of deliberation - still prevails[10].

The debate on separate opinions is commonplace in comparative law discourse and pros and cons are well known.

Separate opinions favor courts' accountability and the transparency and sharpness of their reasoning; a plurality of opinions candidly shows the complexity of constitutional interpretation; moreover, the dissenting opinion of today can become the majority of tomorrow and therefore separate opinions can contribute to the dynamism of case law.

On the other hand, the principle of collegiality is a way of protecting the Court from the pressures and interferences of politics: allowing judges the opportunity to express their views freely, without having to justify their position outside the Court. This is particularly important in a system where constitutional judges have no life tenure but a fixed term of nine years, as in Italy. In addition, the prohibition on disclosing individual opinions favors judicial modesty and is thought to discourage from excessive emphasis on the judge's person as an individual rather than in the institutional role of the judge. In the Italian case, it is also underlined the importance of crafting the Court's decisions through compromise, which unfortunately does in some cases contribute to cryptic and opaque reasoning, but it is said to corresponds in part to the nature of the Constitution itself, which represents a compromise among many fundamental principles that all need to be balanced.

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roots of the common law –civil law distinction is G. Gorla, *La struttura della decisione giudiziale in diritto italiano e nella "common law": riflessi di tale struttura sull'interpretazione della sentenza, sui "Reports" e sul "Dissenting"*, in Giur. It., Parte I, Sez. I, c. 1232 (1965).

[10] The Italian Constitutional Court itself has organized, from time to time, seminars for the discussion of separate opinions. See http:/www.cortecostituzionale.it/documenti/convegniseminari. See also S. Cassese, *Lezione sulla cosiddetta opinione dissenziente*, in 4 Quad. Cost., 973 (2009).

However, while views about separate opinions vary, there is a general agreement that these best serve their purpose if they are limited in number, circulate in advance, and are drafted in a respectful manner.

In the end, Italy belongs to a small group of European countries (Italy, Austria, Belgium, France, Luxembourg, and Malta) not allowing separate opinions for constitutional court's judges[11]. From a comparative perspective, something is missing.

3. *Amici curiae*

Something else is missing in the Italian model of constitutional adjudication. It is well known that the Italian system is a centralized one, and constitutional questions reach the Constitutional Court mainly through the referral of the ordinary judge that has been considered the "gatekeeper" of the Constitutional Court[12]. This is the incidental method of judicial review, which helped ordinary courts and the Constitutional Court to build a loyal cooperation; and which is an important part of the Italian relational style.

In the constitutional proceedings, that is, in the process that unfolds before the Constitutional Court, once the case is referred to it, only the parties to the original case can present briefs and oral arguments. The absence of subjects advocating interests different or complementary to those of the parties to the case from which the constitutional issue originated is remarkable.

The rules of procedure and the tradition have created an extremely "closed" system. The idea of *amici curiae* is foreign to the Italian Constitutional Court.

Again, this feature of the Italian model is important from a comparative perspective - given the fact that a great number of courts performing constitutional adjudication are more open than the Italian one.

Almost every common law jurisdiction in the world, in which generally a diffuse system of judicial review is at work, recognizes some form of amicus curiae participation. The most

[11] K. Kelemen, *Dissenting Opinions in Constitutional Courts*, in 14 Germ. Law J., 1345 (2013).

[12] P. Calamandrei, *Il procedimento per la dichiarazione di illegittimità costituzionale*, in *Opere giuridiche*, Vol. III, 372 (1965).

renowned and obvious example is that of the United States where significantly the role and number of *amici* briefs changed with the shift from what Abram Chayes called a private law model of litigation to a more public one[13]. Australia, Kenia and Hong Kong can also be mentioned. The Constitutional Court of South Africa is another important case. In many systems of Latin America friends of the courts (supreme and constitutional) are well known: Argentina, Brazil, Ecuador, Mexico, Panama, Paraguay, and Peru.

In Europe, the European Court of Human Rights acknowledges the participation of interest groups to the judicial process.

The German *Bundesverfassungsgerichtshof* permits "knowledgeable third persons" to submit written brief in proceedings before it. This mechanism appears to have been frequently used by unions, churches or other religious institutions, refugee organizations, representatives of the government or administration, and university professors.

Amicus participation is allowed in some form, although not expressly codified in procedural rules, in the constitutional courts of the Czech Republic, Slovakia, and Latvia.

In France, friends are welcome not only, since the constitutional reform of 2008, in the *Conseil Constitutionnel*, but also in the ordinary supreme courts.

Presenting to the court all the different perspectives and interests involved in the litigation can be crucial, especially when it comes to fundamental rights that often must be balanced one with the other; or when it comes to cases that involve the public general interest, such as environmental issues.

The comparative approach shows a widespread *amici* participation and its importance in litigation that involves hard choices between conflicting rights and values.[14]. However, the analysis also highlights some possible downsides of a very open system of constitutional adjudication. First, it can amplify the discretionary power of courts: What are, for instance, the criteria for the admission of amici briefs? Who are the persons, groups,

[13] A. Chayes, *The Role of The Judge in Public Law Litigation*, in 89 Harv. L. Rev., 1281 (1976).

[14] Unfortunately, comparative studies and research on *amicus curiae* are not as developed as those on the decision making process of Supreme and Constitutional Courts in general and on separate opinions in particular.

associations allowed to present *amici* briefs? Various procedural solutions can be adopted for such problems, but the issue is a delicate one. Second, and probably more important, in a global context of litigation, within a "global community of courts"[15], powerful lobbies tend to be extremely active and the same groups and organizations (generally non-governmental organizations) present with force their interests to different courts belonging to different cultures. If a positive general effect of this phenomenon is a world where comparative law arguments are becoming "inevitable"[16], the negative effect is that it can favor an excessive politicization of the system of adjudication, emphasize the trend towards "juristocracy"[17], and promote a standardization of values with the prevalence of the most economically or culturally strong.

4. The importance of being open

Despite the awareness of some negative effects of separate opinions, and of the possible dangers of a system of constitutional adjudication which becomes very much open to external (global) influences, the comparative mirror reflects a couple of dark spots for the Italian relational style of constitutional adjudication.

The countermajoritarian difficulty, although theorized and perceived in slightly different ways on the two sides of the Atlantic, is always around the corner[18]. Concerns about the accountability and transparency of legal institutions are common to many systems. Courts can overcome the countermajoritarian difficulty by implicitly engaging in societal debate and allowing political institutions to respond. They have the possibility of enhancing the legitimacy of constitutional decision-making as they provide opinions with reasoned based justifications. They are able to facilitate and encourage consensus, and provide a forum

[15] A.M. Slaughter, *A Global Community of Courts*, in 44 Harv. Int'l L. J., 191 (2003) and Id., *A New World Order* (2005).
[16] M. Tushent, *The Inevitable Globalization of Constitutional Law*, in 49 Vand. J. Int'l L., 985 (2009).
[17] R. Hirschl, *Towards Juristocracy. The Origins and Consequences of New Constitutionalism* (2007).
[18] A.M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics,* 14-33 (1962).

where differences can be smoothed and compromises reached[19]. An essential role of constitutional courts is that of enabling broad, deliberative exchanges for which they are an appropriate forum. Deliberative judicial lawmaking is a multifaceted phenomenon, making constitutional courts actors in society-wide deliberation; in this capacity, courts can also engage in institutional dialogue and reinforce political deliberation.[20]

Opposed forces are at work in Europe. The constant search for cultural cohesion clashes with the strong desire of protecting constitutional identities. The ideal of an inclusive society is often at odds with a rapidly evolving multiculturalism. The tension between global and local is becoming dramatically evident. The process through which Constitutional Courts decide cases is an essential tool for dealing with conflicts connected to the new European scenario. European Constitutional Courts must take advantage of an open deliberative approach to decision making in order to find their way to tame the complexities of the new plural societies and to mediate between conflicting values.

Separate opinions favor transparency, honesty and represent an important choice for candor. A more open court is a more legitimate court, and the participation of all the interests and values involved in the litigation favors public acceptability. Both instances, in the end, can improve mutual and responsible understanding between the Italian Constitutional Court and the people. Both instances can contribute strengthening the relational nature of the Italian Constitutional Court.

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[19] A. Mazmanyan, *Majoritarianism, Deliberation and Accountability as Institutional Instincts of Constitutional Courts*, in P. Popelier, A. Mazmanyan & W. Vandenbruwaene (Eds.) *The Role of Constitutional Courts in Multilevel Governance*, 167 ff. (2013).

[20] P. Popelier, A. Mazmanyan & W. Vandenbruwaene, *Constitutional Courts and Multilevel Governance in Europe. Editors' Introduction*, in P. Popelier, A. Mazmanyan & W. Vandenbruwaene (Eds.) *The Role of Constitutional Courts in Multilevel Governance*, cit. at 19, 11.