THE SUCCESS OF A CONSTITUTIONAL EXPERIMENT: WHEN HISTORY MATTERS. THE ITALIAN CONSTITUTIONAL COURT IN GLOBAL CONTEXT*

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Abstract

The paper takes the cue from the analysis offered by the book "*Italian Constitutional Justice in Global Context*" to suggest some remarks on the way the Italian Constitutional Court has become, in a relatively short period of time, a strong, stable and respected constitutional actor. In fact, despite having started its activity, in 1956, in a context of real hostility due to the strong role of the Parliament on one side and the weakness of the lower courts (that were supposed to bring cases before the Constitutional Court) on the other side, the new institution was capable to conquer its role by developing cooperative and collaborative relations with both the Legislature and the judiciary. In other world, the adaptive capacity of this institution and its "relationality" has been at the basis of its recognition and its acceptance by the others institutional actors.

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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, V. Barsotti, O. Pollicino and P. Popelier, 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. The "relational" Court: an answer to the "fact of constitutional pluralism"

Echoing a famous Rawlsian expression, the world today is characterized by what we might call the "fact of *[constitutional]* pluralism"[1].

Over the last decades we have seen the growth and increasing interaction of various national, international and supranational legal systems; all endowed with *constitutional* characteristics [2] and guaranteed by Supreme/Constitutional Courts.

This very "fact" represents the main interpretive conundrum for contemporary constitutionalism: is that plurality a dodecaphonic ensemble or a polyphonic choir? And, in this perspective, which are the distinctive voices and contributions of each element of this plural organism?

The book *Italian Constitutional Justice in Global Context*[3] clearly fits into that research stream, as it tries to single out the features that typify the Italian Constitutional Court in this global conversation.

The central claim of the book is that the peculiar feature of the Italian Court, what the authors call the "Italian style" in constitutional adjudication[4], is its "*relationality*".

The expression, taken from the sociological research lexicon[5], means, in an *institutional* dimension[6], the capacity of the Italian

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[1] J. Rawls, *Political Liberalism, Expanded edition* (2005), 441 ss.

[2] J.H.H. Weiler, *The transformation of Europe*, 100 Yale L.J. 8, Symposium: International Law (1991).

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

[4] *Ibidem,* 234; the expression was coined by John Henry Merryman.

[5] On "*relational*" sociology, among the others, see: M. Emirbayer, *Manifesto for a Relational Sociology*, Am. J. Sociology 103 (1997); A. Mische, *Relational sociology, culture, and agency*, in *The Sage Handbook of Social Network Analysis* (2011); P. Donati, *Birth and development of the relational theory of society: a journey looking for a deep "relational sociology"*,http://www.relationalstudies.net/uploads/2/3/1/5/2315313/donati_birth_and_development_of_the_relational_theory_of_society.pdf

[6] V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice*, cit. at 3, 235.

Constitutional Court to build cooperative relations with the other actors of the constitutional system and, in an *interpretive* dimension[7], its ability to combine and balance all the different sources of constitutional regulation of rights and powers.

The idea behind this is that, neither constitutional courts nor constitutional rights are "absolute" - in the Latin meaning of the word "ab-solutus" - that is "un-bounded" or "un-related" -; their power (as Courts), like their effectiveness (as rights) are always "*relational*", that is, proportional to the recognition offered by the other constitutional actors.

We could say that, although the Italian constitutional model belongs to a *strong* form of judicial review (entrusting the Constitutional Court with the power to declare the legislation "null and void"), it prefers to use this last-word power softly, thus acting like a *weak* form of judicial review (leaving a wide range of action not only to the Parliament, but also to the Judiciary power at large).

This circumstance produces a sort of "variable geometry model" in which either the *interpretive* or the *institutional* "relational" dimension may vary according to the issues involved.

2. The origin of the "Italian Style": how to survive in a hostile context. The historical perspective

Where does this "Italian Style" come from?

The hypothesis advanced in the volume is that it derives from a sort of *adaptive capacity* to survive in a *complex* and *hostile* constitutional context which has been developed by the Constitutional Court during sixty years of Republicanism[8].

[7] V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice*, cit. at 3, 238.

[8] The popular referendum to choose between Monarchy and Republic was held on June 2nd, 1946. On the same day, a Constitutional Assembly was elected to write the new Constitution. The Constitutional Court started its activity in 1956.

I will not here address the question of this *complexity* as it is quite intuitive how today constitutional adjudication at national level has become an increasingly complex function.

Courts (either constitutional or lower judges) are no longer the lonely guardians of nations; the constitutional landscape, in the meanwhile, has become densely populated. Different constitutional *charters*, different constitutional *courts*, new rights and also new violations; it is not surprising that *complexity* is among the most used words in contemporary legal literature. Rather, I would suggest some remarks on the question of *hostility*, taking the cue from the analysis offered by the volume.

Indeed, the story and the present practice of the Italian Constitutional Court is an extremely useful lesson for reconsidering the old and new *enemies* (and conversely the old and new *friends*) of constitutional justice and the key-factors of a successful constitutional review system.

To that purpose we must follow one important dimension of the book's inquiry: the historical perspective.

Generally speaking, a great deal of the "Italian style" is due to history. The problem is that the knowledge of Italian history - legal history included - often stops at the Roman Empire, the Middle Ages or the Renaissance, while in our case the "key" period is contemporary history.

As we know, the Italian Constitution was written immediately after World War II and, at that moment, the legal and cultural context was deeply hostile to a system of judicial review of legislation.

The success story of the Italian Constitutional Court, which, in a relatively short period of time, has become a strong, stable and respected new constitutional actor, is really surprising if we look back to the historical trajectory and consider Italian culture immediately following Fascism, when the Court was founded.

It is a fact that although the new Italian Constitution entered into force on January 1948, we had to wait until 1956 – eight years after - to see the effective start of the new Court.

The reasons of that "long gestation" – as it is defined in the book[9] - were many.

On the one hand, the complexity of the task for the new Parliament to outline a proper institutional "dress" for this entirely new Constitutional body[10].

On the other hand, the political deadlock between the two main opposing parties (Christian-Democrats and Communist Party) in reaching a compromise on the nomination of 5 (out of 15) Constitutional Justices[11].

But the most important reason for this long delay in the activation of the new Court, was the difficulty in legal and political circles of understanding the true nature of this new Institution.

An insightful example of that reluctance of the constitutional system to understand and accept the Constitutional Court is the story, mentioned in the volume, known as the "War of the Thrones": the first two Presidents of the Constitutional Court - until the end of 1960's - refused to participate in any official ceremonies of the Republic, - so, symbolically, a very strong protest - because the official protocol did not provide a proper seat for the President of the Court.

As the Constitutional Court was an entirely new institution, the Ceremonials Officers of State decided to put the President of the Court in fifth place (after the President of the Republic, the President of Senate, the President of the Chamber of Deputies and the Prime Minister). This was unacceptable for the Court.

Until the Ceremonial Protocol was amended and the president of the Court was placed- after the President and the Parliament, but - *before* the Executive, the Constitutional Court did not participate in any official event.

The Court, therefore, began its activity in a remarkably hostile situation or - what is even worse - in a profoundly *un-aware* context.

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[9] V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice*, cit. at 3, 19.

[10] *Ibidem*, 21.

[11] *Ibidem*, 23.

As an entirely new constitutional actor, it had to physically "conquer" its place in a constitutional map that did not deem it worthy of consideration.

To understand the reasons for this difficulty we have to move backwards again, because the 1948 Republican Constitution is not the first "constitution" of Italy; the first one was "conceded" by the King of Italy Carlo Alberto exactly one century before: the so-called *Statuto Albertino*.

If we consider that older constitutional regime, we can easily understand the resistance to the new Court.

The two main features of the pre-fascist constitutional mindset were a strange mix of British and French legal tradition. On the one hand, according to the British legal tradition, the principle of the "sovereignty of the Parliament" was undisputable: the legislature was the unique institution vested not only with the law-making power but also with a "permanent constitution-making" power[12].

On the other, unlike the British, but very close to the French tradition, the Kingdom of Italy was characterized by an extremely weak judiciary, made up of King-appointed bureaucrats, without any tradition of independence[13].

This is one of the reasons why, during the XIX Century, despite theoretically being in a condition very similar to the US – because the Statuto also proclaimed itself as a "perpetual, irrevocable and supreme law of the land" - we did not have our "*Marbury vs. Madison*" and the constitutional system remained "flexible".

That was the reason why, after the War, almost nobody among the constitutional actors was able to recognize the role and the function of the new Court. The Parliament was still linked to its "omnipotence"; so it waited 8 years to approve all the implementing legislation and to elect 5 out the 15 judges, practically blocking for almost a decade the effective implementation of the constitutional review in Italy.

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[12] G. Arangio-Ruiz, *Istituzioni di diritto costituzionale italiano* (1913) 466.

[13] M. Bignami, *Costituzione flessibile, Costituzione rigida e controllo di costituzionalità in Italia (1848-1956)*, (1997), 19.

3. The judicial hostility: "programmatic *vs.* preceptive" doctrine

Furthermore, the Judiciary power was extremely lukewarm regarding the new Constitution, and this was an even bigger problem, because the Italian model of the *incidental* access[14] to the Constitutional justice relies greatly on a positive and effective cooperation with the lower courts to bring cases before the Constitutional Court. Without relations with other ordinary judges, the Italian Constitutional Court cannot do its job.

However, the large majority of the judges on the bench in the 1950s –at the beginning of the new Constitutional era - had studied and been formed during the Fascist period or even earlier, therefore they had been educated under the "parliamentary omnipotence" doctrine.

It was not easy for them to realize the new role of a *rigid* constitution, which is a super-law endowed with a superior hierarchical rank within the legal system.

As a matter of fact, the Supreme Court of Cassation adopted a very conservative jurisprudence, known as the "programmatic *vs.* preceptive" doctrine.

The conceptual background was that the new Constitution was largely made up of very broad "principles" (equality, freedom, regionalism, separation of powers) and not by strict "preceptive rules"; and those principles were defined as *programmatic norms*.

Those kinds of norms were, *per se*, not justiciable, because they were too broad.

In order to become effective parameters for the Court's review, they needed an implementing legislation from the Parliament. As long as such legislation was not approved, the Constitution remained essentially ineffective and incapable of affecting the validity of the previous legislation.

[14] V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional* Justice, cit. at 3, 54.

The reaction of the Court in this context and the way it interacted with its enemies is a clear example of what we call "relationality".

On the one hand, in order to have sound relations with others, you must have a clear notion of your identity and this the Court clearly did.

With its very first decision, n. 1 of 1956 - defined by the authors as the "Italian *Marbury vs Madison*" - the Court explicitly rejected the "programmatic" doctrine of the Cassation, affirming clearly both the preceptive value of the entire Constitutional text and its own authority to use that text to invalidate previous and subsequent legislation.

With this seminal decision the Italian Constitutional Court broke explicitly with the old fascist and pre-fascist Italian legal tradition which was, still rooted in the political and judicial institutions.

But, on the other hand, this self-consciousness of the new Court coupled with positive action to have this constitutional identity accepted in the legal context, including both the institutional system and civil society.

To that end the Court over the 60 years of its existence has constantly sought and still seeks *institutional* relations, mainly with the Parliament, and *interpretive* relations, mainly with the Judiciary.

4. A "relational" style: on the Parliament side

Every Constitutional Court, reviewing acts of legislation, is *per se* an antagonist of the Parliament. Nevertheless, the Italian Court developed a great number of doctrines to enhance cooperative relations with the Legislature: some of these doctrines are very well-known to comparative constitutional law, like the self-restraint from "political questions", but in the history of the Italian Court probably the most distinctive element is the diversification of decisional instruments.

Consider, for example, the invention of the "interpretive judgments", through which the Court, separating the interpretations

from the texts, strikes down an interpretation, while keeping the parliamentary "text" alive.

The volume describes many other relevant decisional tools derived from this original idea[15].

This creativity of the Constitutional Court in finding new sentencing techniques aims - to the greatest possible extent - not to displace the Parliament in its law-making power.

Moreover, this creativity does not belong only to the past history of the Court but it is still producing very many innovations.

An example is the recent 2015 decision on the so called Robin Tax[16] - where the Court for the first time ruled on the time-span effects of its own decision, deciding it will not affect the pending case. One of the reasons for this momentous innovation was to "enable the legislator to act promptly". A further example is the growing number of decisions - even on politically hot issues[17] - in which the Court explicitly asks the national parliament to find a reasonable solution.

5. (cont'd): on the Judiciary side

But also on the Judiciary side - despite some very problematic periods in which the dialogue seemed to be almost lost - the Court has always sought and still seeks a collaborative relation.

If lower courts do not activate the constitutional procedure, the Court performs its function.

This is the reason why in the very beginning the Court enormously enlarged the prerequisites to obtain access to its jurisprudence and then, when it started to be overwhelmed, it changed orientation.

Generally speaking, the Constitutional Court shows a great deal of trust in the interpretive function of the ordinary judiciary, for

[15] V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional* Justice, cit. at 3, 82 ss.

[16] Dec. n. 10/2015.

[17] Like those on frozen embryos (Dec. n. 84/2016) or on the requirements to build mosques (Dec. n. 63/2016) both available in English on the Court's website.

example, through the doctrine of the "living law" (that is, interpreting a legislative text according to the common confirmed interpretation of ordinary courts) and also by promoting creative methods of constitutionally compatible interpretation by lower courts.

Finally, as regards the relations with other European constitutional judges, the Italian Court followed a very unique path, trying to join neither the "pro-European" nor "anti-European" aprioristic camp. Instead it engaged in a dialogue with the European Court of Justice through the preliminary ruling procedure and accepted the Strasbourg Court's interpretations, but always keeping its role and trying to interpret this dialogue as we say in the book as a "two-way relation among peers".

The case of the Italian Constitutional court shows a strong path-dependency; its "relationality" stems from its adaptive capacity developed not simply to *use* its constitutional power, but also to let the other constitutional actors *understand* and *accept* it.

The lesson we may learn from the Italian experience is that Constitutional Courts like Constitutional systems, need not only to be respected, but also *understood* and, given the growing *complexity* of their task, they increasingly need to be helped in their function.

Constitutional norms (especially constitutional rights) are not simply legal rules to be applied, they are principles requiring a common understanding, a multilevel implementation and, moreover, a *cooperative normative effort* [18] of different institutional actors (international organizations, state, regions; public powers and civil society; national and supranational courts).

This "organic"[19] nature of contemporary constitutionalism is particularly evident if you read the text of the Italian Constitution and of a great number of all the European post-World-War II constitutions.

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[18] "*Law as a normative cooperative effort*" see I. Trujillo, F. Viola, *What Human Rights Are Not (Or Not Only). A Negative Path to Human Rights Practice* (2016).

[19] "Organic" as related to an "organism", that is a systemic whole made up of interrelating parts.

This very nature explains why "relationality" – intended as an institutional and interpretive connecting capacity - can be considered the Italian Constitutional court's distinctive feature and the reason for its success.