SHORT ARTICLES

THE JUDICIAL POWER: THE WEAKEST OR THE STRONGEST ONE? A COMPARISON BETWEEN GERMANY AND ITALY*.

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Montesquieu, in his famous Spirit of Laws, stated that "Of the three powers above mentioned, the judiciary is next to nothing"[1]. One hundred and fifty years later, Alexander Hamilton confirmed this judgement, claiming that "the judiciary is beyond comparison the weakest of the three departments of power" [2].

Reading two recently published books leads one to question whether these definitions still reflect the reality of today's legal systems, particularly in Germany and Italy.

The German book is entitled "*Die schwache Gewalt?*"[3] that is precisely the weak power, while the Italian one is entitled "*Il governo dei giudici*"[4] that is the government of judges.

In the German book, the question mark at the end of the title plays a fundamental role. The authors wonder, in fact, whether the judiciary can still be considered "the weak power".

The book collects the contributions presented at a conference in Köln in September 2020. In the introduction, the editors clarify the theoretical sources from which they take inspiration to approach the question and the concrete cases that led them to ask this question. The cases are drawn from the national, European and international level.

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[1] Montesquieu, *Spirit of Laws* (1748) vol. I., p. 186.
[2] A. Hamilton, *The Federalist and Other Constitutional Papers* (1898) n. 78.
[3] T.P. Holterhus and F. Michl (eds), *Die schwache Gewalt?* (2022).
[4] S. Cassese, *Il governo dei giudici* (2022).

The elective source of inspiration for this volume is precisely Alexander Hamilton, who is later referred to in a more articulate and in-depth manner in several contributions, especially that of former constitutional judge Dieter Grimm. In the famous Federalist Papers, and particularly in No. 78, Hamilton states that the executive holds the "sword", the legislative holds the "purse" and sets the rules by which the rights and duties of citizens are regulated. In contrast, the judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments"[5].

The concrete cases that prompted the authors' reflections are briefly mentioned in the introduction but are then set out more analytically in various contributions.

At the national level, three cases from 2018 are recalled, which caused much uproar in Germany, in which the executive power did not execute final judgments of the judiciary by invoking the autonomy of politics with regard to political decisions, which must also respond to the people's sense of justice.

The first case takes place in Bavaria and is carefully reconstructed in Fabian Michl's contribution. A non-governmental organization for the protection of the environment lodges an appeal against the Bavarian Land to force it to adopt an "air quality plan" under Article 23 of Directive 2008/50 to ensure that the limit value set for nitrogen dioxide would be respected as soon as possible in the city of Munich. The administrative court upheld the appeal and in 2017 issued an injunction against the Land, ordering it to take the necessary measures to ensure that the limit values set by Directive 2008/50 were complied with, including "the imposition of driving bans on certain diesel-powered vehicles in certain urban areas"[6]. In the face of this res judicata decision, the Bavarian government decided not to execute the ruling and adopted an air quality plan in 2018 in which no bans on diesels were envisaged. To justify this non-compliance with the decision of the judiciary, the Bavarian President invoked the autonomy of politics, stating that it was an eminently political decision.

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[5] A. Hamilton, *The Federalist and Other Constitutional Papers,* cit at. 2, emphasis in original text.

[6] *Bayerischer Verwaltungsgerichtshof*, Order of 27 February 2017.

The second case takes place in Bochum, Nordrein Westfalen and is analyzed in the chapter by Till Patrik Holterhus. The immigration authority decided to deport Sami A., because he was considered very dangerous, with simultaneous deportation to his country of origin, Tunisia. Following an appeal, the administrative court annuls this measure on the grounds that Tunisia does not respect the rule of law. Despite this annulment ruling, the administrative authority proceeds with the repatriation anyway. In an interview, the Minister of the Interior of Nordrein Westfalen recognized the extreme importance of the independence of the judiciary, but at the same time stated that judges should always bear in mind that their decisions should reflect the people's sense of justice.

The third case takes place in the town of Wetzlar in Hessen, the seat, moreover, in imperial times, of one of the most important courts of the First Reich, where Goethe also went to practice law and fell in love with Charlotte, as recounted in "The Sorrows of Young Werther", set in Wetzlar. This small town, as described in Christian Waldhoff's essay, even ignores a decision of the *Bundesverfassungsgericht* (BVG, the Federal Constitutional Court). The NPD (*Nationaldemokratische Partei Deutschlands*, a far-right party) wanted to use a municipal hall for an election rally in view of the upcoming elections. The municipality denied the permission on rather specious grounds and the NPD lodged an administrative appeal against this refusal. The administrative court ordered the municipality to grant the permit but the administration did not comply with the ruling. Therefore, NPD applied to the BVG for a precautionary measure. The First Senate of the Constitutional Court upheld the appeal and granted the precautionary measure, ordering the municipality of Wetzlar to grant the municipal hall to the applicant party. However, the municipality continued to deny permission to the NPD, with great support from civil society. The Vice-President of the First Senate, Ferdinand Kirchhof, also wrote to the municipal administration pointing out their misinterpretation regarding the enforceability of the judgments, but the administration continued on its way, with broad popular support.

At the European level, two cases are recalled, both of which are very well known and therefore do not need to be illustrated: the weakening of the judiciary in Poland made by the executive power, and the much-discussed BVG judgment of May 2020 on the Public

Securities Purchase Programme (PSPP), in which the weakening of the authority of judgments occurs at the hands of another judge.

Two cases are also recalled at the international level. The first is the strategic blocking of the WTO Dispute Settlement Appellate Body by the United States. Since the United States has long refused to cooperate in the necessary filling of judicial vacancies, this body no longer has the minimum number of three judges as of December 2019 and is therefore unable to make decisions.

The second example of damage to the authority of international jurisdiction is the People's Republic of China's blatant disregard for the arbitral award on the South China Sea dispute issued in 2016. The arbitral tribunal's award, based on the United Nations Convention on the Law of the Sea, states that Chinese claims and activities in the aforementioned Pacific Ocean Sea are contrary to international law, but China denied any relevance to this decision and did not even find it necessary to attend the proceedings, which were being conducted regularly, through its legal representation.

Starting from these cases, the various authors of the volume ask the question whether the judiciary can really be considered the weak power, i.e. whether the authority of its decisions is weakening in favour of a stronger executive power.

The volume does not propose a homogeneous view on this question, presenting on the contrary even very divergent opinions.

Angelika Nußberger (former judge of the European Court of Human Rights) uses the theory of abusive constitutionalism[7] to frame the problem in light of certain events in other countries. As it is well known, the executive power's use of constitutional amendment mechanisms to erode the democratic order is a phenomenon that occurred not only in Poland and Hungary, but also in Venezuela, Ecuador and Bolivia. After changing the composition of the constitutional courts, the government is awarded by the courts thus modified the so-called *Persilschein* (a German untranslatable term, we could call it a certificate of legitimacy, *Schein* means certificate and *Persil* is the brand name of a famous bleaching soap, which therefore "cleanses" the government of its illegitimate actions).

[7] On this phenomenon, see D. Landau, *Abusive Constitutionalism*, 47 U.C.D. L. Rev. 189 2013.

Apart from the more extreme phenomena of abusive constitutionalism, Nußberger argues that she cannot give a unified and homogeneous answer to the question underlying the volume. The answer must necessarily vary from country to country. An initial diversification emerges from the degree of trust that citizens say they have in the judiciary, which is rather high in northern Europe, but gradually decreases as one moves south or eastwards. Another fundamental element in assessing the weakening of the judiciary vis-à-vis the executive power is the latter's ability to influence the former. For example, in Germany the Minister of Justice (both federal and local) holds the power of direction over the prosecutors (*Weisungsrecht*), being able to give them instructions. Even more relevant is the influence of politics on the judiciary in Switzerland: all judges are members of a political party and have to make an annual financial contribution to the party that appointed them; moreover, they are appointed for a fixed period of time, but are re-eligible, so they could be influenced by politics during their term of office with a view to re-election.

Hans Vorländer's essay also proposes an articulated and non-unified response. On the one hand, authoritarian populism may pose a danger to the democratic order and weaken the judiciary. On the other hand, however, in Germany the *Grundgesetz* enjoys a very broad trust in the people, and the *Bundesverfassungsgericht* makes use of this trust when it declares certain choices made by the legislature illegitimate.

Other authors advocate a definition of the judiciary as a weak power. Dieter Grimm lists seven reasons to demonstrate the weakness of judicial power, while Fabian Michl and Christian Waldhoff focus on a specific profile, namely the non-enforcement of judgments. Examples are given of property owners who often fail to regain possession of their property despite an enforceable eviction order and the case of a famous cut in the pension system (the so-called Hartz 4 laws) declared unconstitutional by the BVG. In the aftermath of the ruling, the parliament passed a constitutional amendment, introducing Article 91e to the *Grundgesetz*, which made the pension reform constitutionally legitimate.

Martin Nettesheim's essay, on the contrary, highlights the power of the judiciary, especially the Court of Justice of the European Union. The author is very critical of the European judge, who exercises nearly an excessive power not conferred by the

Treaties. The desire to impose homogeneous constitutional values on all Member States is a very risky game according to Nettesheim. Indeed, there is no federal homogeneity clause in the Treaty, and the EU is not a federal state in which the Member States have renounced their constitutional autonomy. The Commission and the CJEU have over time tried to construct a "constitutionalism" from above, without a democratic consensus at the grassroots level and despite the failure of referendums. According to Nettesheim, Europe is arrogating to itself the right to prevent some countries from making constitutional mistakes (as in the case of Poland and Hungary), but this vision of good judges fighting bad ones stems from a black-and-white view of reality that obscures the complexity of society.

The book contains, therefore, a plurality of visions and opinions, and is focused on the examination of the German situation, while considering the European and international level, and while citing other countries such as Poland, Hungary, Switzerland, and Venezuela as examples of the weakness of the judiciary. The Italian reader cannot but wonder about the situation in Italy, a country never mentioned in the book.

In Italy, judicial power could be defined - to borrow the title of the German book - as a *superstarke Gewalt*, a very strong power, with an exclamation mark and not a question mark.

The power of the judges has not only not weakened over time, but has increasingly shown great strength against the executive and legislative powers. There are other examples in the world, such as Brazil, where judicial power has disrupted politics and changed the course of national policy. However, the Italian case remains unique: only in our country the judicial power brought down an entire political system, erasing from the political scene the five parties that had governed the nation for decades in different compositions (DC-Democrazia Cristiana, PSI-Partito Socialista Italiano, PSDI-Partito Socialista Democratico Italiano, PRI-Partito Repubblicano Italiano, PLI-Partito Liberale Italiano).

The growth and distortions of the judges' power are well illustrated in Sabino Cassese's book *Il governo dei giudici*[8]. In addition to providing data on the growing ineffectiveness of the

[8] S. Cassese, *Il governo dei giudici*, cit. at 4.

judicial system, Cassese reconstructs the path of the rise of judges' power[9], highlighting its criticalities.

We could say that in Italy we are witnessing an inverse process to the one that emerges from the German volume, with judges and prosecutors acquiring a preponderant power, a "leading role" (p. 66)[10] so much so that it led the author to speak of a "Republic of Prosecutors" (p. 6). A series of distorting phenomena and mechanisms are linked to this excessive power of the judges, which Cassese highlights with great accuracy.

Among the phenomena on which Cassese focuses his attention is the "monstrous union" (p. 50) between legislative power and judicial power that takes place through the constant and widespread presence of judges in the various ministries.

Cassese also denounces the instrumentalization of the constitutional dictate concerning the mandatory nature of criminal prosecution, which he even calls a "fictitious cloak" (p. 5). The power of the judiciary became decisive in political life when the independence of the judiciary became self-governing and the judiciary obtained a popular consensus favoured by the "direct circuit between the holders of the prosecution power and the media" (p. 80), so much so that Cassese goes so far as to define the Italian judiciary as the "first populist force"(p. 81).

A decisive role in this process is attributed to the Consiglio Superiore della Magistratura (CSM), which has "exercised neither of its two functions" (p. 7), i.e. the function of defending judges from being influenced and that of guaranteeing the containment of their function within the judicial sphere. Moreover, the CSM is "dominated by small groups called currents" (p. 45) mainly led by prosecutors.

Historically, it is interesting to note that we have privileged documentation on the failure of the CSM, which dates back to 1984. It is the volume *Soliloquio sulla magistratura*, by Giuseppe Ferrari[11], magistrate, professor of constitutional law, member of the CSM and then constitutional judge. This book provides an insider's account of the CSM, reproducing and commenting on all of Ferrari's

[9] A strong critique of judicial activism of the US Supreme Court in the early XX Century can be found in E. Lambert, *Le Gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (1921).

[10] All the following citations are referred to the book of Sabino Cassese *Il governo dei giudici*, cit. at 4.

[11] Giuseppe Ferrari, *Soliloquio sulla magistratura* (1984).

speeches during his four-year membership of the CSM (1972-1976). Thus, deleterious phenomena come to light, such as the substantial elimination of the merit criterion for promotions, leading to an "anti-democratic egalitarianism" (p. 101)[12]. A particularly alarming phenomenon is that of magistrates showing evident mental imbalances in court, of which Ferrari documents the events and the length of time they spent as judges (pp. 110 ff.). Ferrari states that the evolution of the role of the judiciary has led to a deviation from the constitutional system prefigured by the Constituent Assembly "also due to the fact that the CSM has abdicated all power" (p. 109).

In conclusion, the German volume, despite the question mark in the title and nuances in the opinions of the various authors, qualifies the judiciary in Germany as a weak power. On the contrary, from the two Italian surveys mentioned above, a picture emerges that goes in the opposite direction, moreover confirmed several decades later: judicial power in Italy appears as a very strong power. Perhaps too much?

[12] All the following citations are referred to the book of Giuseppe Ferrari, *Soliloquio sulla magistratura,* cit. at 11.