The Political Process in Search of a Judge: The Case of the Reluctant Italian Constitutional Court

Edoardo Caterina[1]

It must be acknowledged: in Italy, a judgment such as that delivered by the German Federal Constitutional Court on 24 January 2023[2] on party financing is currently constitutional science fiction. With this ruling, the Court held that the legislative reasoning failed in justifying the need for additional financial resources for parties, with the result that the law (which had been passed in just ten days) had to be declared unconstitutional and void. By contrast, the Italian Constitutional Court has never really dealt with party financing (except for a few marginal aspects) and has never declared a law to be unconstitutional because of its lack of (credible) motivation. The Italian constitutional judges have never theorised, unlike their German colleagues, the need for closer scrutiny in certain matters where a „conflict of interest" of the legislature can be discerned. This also partly reflects a different understanding of their own role within the constitutional system. The Italian court has traditionally seen itself more as a „judge of the laws" than an „arbiter of the political process". Overall, it has recognised a wider margin of appreciation for the parliament than is apparent in German constitutional case law.

The case of electoral laws

However, this general point about the role of the Constitutional Court can be challenged by two developments that have emerged in recent years.

First, the court left an „open door". With Order No. 17 of 2019[3], the Court admitted individual parliamentarians to raise a dispute between powers of the State ("*conflitto di attribuzioni tra poteri dello Stato*" – a kind of Italian equivalent of the German *Organstreit*), thereby laying the groundwork for a possible greater „juridification" of political processes in the future. This broke with the narrow approach of the previous years, when the Court had ruled that political parties were not entitled to raise disputes before the Court (see Order No. 79 of 2006[4]).

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1 Dr. Edoardo Caterina is a postdoctoral fellow in Constitutional Law at Università degli Studi di Macerata and adjunct professor at Università degli Studi di Firenze.

2 BVerfG, Urteil vom 24. Januar 2023 – 2 BvF 2/18, https://www.bverfg.de/e/fs20230124_2bvf000218.html.

3 Constitutional Court, Order n. 17 of 2019, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_17_2019_EN.pdf.

4 Corte Costituzionale, Ordinanza n. 79 del 2006, https://giurcost.org/decisioni/2006/0079o-06.html.

The second concern relates to the case law on electoral laws. The Constitutional Court has only recently intervened in national electoral legislation, starting with the sensational Judgment No. 1 of 2014[5], by which the 2005 electoral law (the so-called *Porcellum*) was declared unconstitutional. The 2005 law had many critical, indeed irrational, aspects, highlighted by both jurists and political scientists (see for instance, in English language, here[6], here[7] and here[8]), which we cannot dwell on here. However, it should be recalled that it awarded an „electoral prize“ by automatically granting 55% of the seats in the Chamber of Deputies to the coalition of parties that had taken the most votes, without a minimum threshold being set. The arbitrariness of such a legal framework was due to the fact that the 2005 legislator had designed it to favour the electoral success of the centre-right coalition in the elections to be held the following year.

There was little doubt that the *Porcellum* could be regarded as, to use the German category, an „*Entscheidung in eigener Sache*“. Yet the Constitutional Court did not need to resort to such a category to justify strict scrutiny, given the blatant infringement of voting equality in this case. Nonetheless, it had to bend its own procedural rules to make a ruling. The Italian constitutional justice is centred on „proceedings by referral“ (the German *konkrete Normenkontrolle*). In this type of procedure, the referring court must demonstrate that a decision in a specific case depends on a statute of dubious constitutionality. As a result, electoral legislation had become a „free zone“ (*zona franca*) of constitutional justice, i.e. it had remained in the shadow until 2014, and the legislature could act in this matter without any substantial constraint. In order to get out of such a situation, the Court had to overrule its settled case law by admitting the questions raised in the context of *lites fictae*, i.e. arising from proceedings that had been specifically initiated in order to trigger the intervention of the Constitutional Court. The Court justified the creation of this kind of new proceeding (a sort of an „electoral complaint“) by stressing the significance of the right to vote within the democratic system. Ultimately, the jurisprudential innovation of the „direct“ constitutional complaint in electoral matters set off a new chapter It can be seen as a response to the need to supervise the legislature’s work on an extremely delicate field

[5] Constitutional Court, Judgment No. 1 of 2014, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/1-2014_en.pdf.

[6] Matteo Garavoglia, Das neue italienische Wahlrecht: immer noch verfassungsrechtlich fragwürdig?, VerfBlog, 14.03.2014, https://verfassungsblog.de/neue-italienische-wahlrecht-immer-noch-verfassungsrechtlich-fragwuerdig/, https://doi.org/10.17176/20170203-175301.

[7] Antonia Baraggia, Italian Electoral Law: A Story of an Impossible Transition?, Election Law Journal: Rules, Politics, and Policy, Vol. 16, Issue 2, 2017, Available at SSRN: https://ssrn.com/abstract=2983335.

[8] Giovanni Piccirilli, Maintaining a 4% Electoral Threshold for European Elections, in order to clarify access to constitutional justice in electoral matters: Italian Constitutional Court Judgment of 14 May 2015 No. 110, *European Constitutional Law Review* 2016*, 12*(1), 164-176, https://doi.org/10.1017/S1574019616000109.

where there is a strong risk that the majority in parliament will abuse its position to create its own tailor-made regulatory framework.

Referendums are not enough

So far on the Constitutional Court. But in Italy, when one thinks of ways to control and correct the legislature acting „in its own cause", there is also another important actor: the electoral body. Indeed, the history of electoral legislation and party funding in Italy is also a history of referendums. The instrument of the referendum has frequently been used to attempt correcting a „captured" legislature. The main case concerns the public financing of parties, which was repealed by a referendum in 1993. Another case can be seen in the 2011 referendum on „legitimate impediment", i.e. the provision exempting the Prime Minister and the Ministers from appearing in court. The referendum is a theoretical alternative to the „juristocracy" that is very appealing from a democratic point of view, and which perhaps has not been considered enough in other countries. However, it poses problems that are not easy to solve. The referendum is a straight „yes" or „no" answer. In complex areas of legislation such as party funding and electoral law, this dry answer is not enough; more complex reasoning is required, which only a Court can carry out.

The electoral body is the most appropriate subject to condemn the excesses of self-referentiality of the political-institutional bloc, but it does not really dispose of the tools to force the reluctant lawmaker to „course-correct", laying the foundations for lasting reform. See the case of the public financing of political parties: while in Germany it was the Constitutional Court that intervened, with its well-known ruling of 9 April 1992[9], in Italy the law on the public financing of political parties was repealed in its entirety by the electoral body in the referendum of 18-19 April 1993. Thirty years later the difference is there for all to see: in Germany, the principles dictated by the Constitutional Court have remained firm and the structure of the *Parteiengesetz* has not undergone any major changes since the 1994 amendment; in Italy the legislature has been free to ignore the outcome of the referendum, re-approving a law on the public funding of parties (just changing its name to „electoral reimbursement"). This created a greater distance between the people and political institutions and ultimately favoured the rise of populist parties. In other words, one of the main concerns of the Karlsruhe Constitutional Court seems to have come true in Italy, namely a crisis of confidence in political institutions, or rather a „loss of acceptance" (*Akzeptanzverlust*) towards the political system. In conclusion, the Constitutional Court's control of the legislature's decisions *„in eigener Sache"* may prove constructive, whereas the

[9] BVerfGE 85, 264 ff, https://www.servat.unibe.ch/dfr/bv085264.html.

control of the electoral body by means of referendum is bound to be destructive and may paradoxically lead to a spiral of distrust.

The need for (some) judicial oversight of the political process

In light of these brief considerations, it can be argued that the Italian Constitutional Court has undertaken a journey that has not yet been completed. Its oversight role in the political process has so far been sketched out and applied in some areas, but not fully realised. Abrogative referendums are an important tool for getting the electoral body to express itself on issues where there may be a distance between representatives and voters, but they rarely succeed in laying the ground for durable reforms in the area of „the law of politics“. The Court's reluctance to assume the role of an „arbiter of the political process“ is partly explained by a desire not to be perceived as a political actor. And yet, in an alarming context of a permanent crisis of confidence in representative institutions, constitutional judges should give serious thought to how they can contribute to safeguarding the credibility of the democratic process.