ARTICLES

CONSTITUTIONAL LAW AND ITS METHODS*

Gaetano Azzariti[**]

Abstract

The article critically reviews the book "*Italian Constitutional Justice in Global Context*", analysing the extensive use of the case approach made in the text and examining the creative nature of the Italian constitutional Court. The essay underlines in particular the "style" adopted by the Italian Court, which, according to the authors, is characterised by a principle of relationality with other institutional actors: Courts, judges, policies, and citizens.

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1. Introduction

Italian constitutional law and its constitutional jurisprudence are not entirely unknown outside of Italy. It would therefore be an exaggeration to say that this book, addressed to non-Italian scholars, fills a knowledge gap. However, it is also true that, at the supranational level, there is only an occasional and sporadic perception of the Italian system, largely the result of dialogue between courts. So I feel that the specific contribution of

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** Professor of Constitutional Law, University of Rome "La Sapienza".

this text lies in the way it highlights the qualities of the overall model. The volume essentially provides a generally systematic overall view of the role of the Constitutional Court in Italy. It thus fosters a move away from the fragmented dialogue that has largely characterised the Court to a more open dialogue with the whole community of interpreters of law. This is a first significant element to be acknowledged with regard to this book.

The volume provides an analysis of the Italian model bearing in mind the different systems and global contexts, in close - though sometimes implicit - dialogue with the experience of others. The Italian model emerges favourably from the comparison.

The privileged yardstick is the US system, i.e., the oldest and most important constitutional justice on the planet, and he impression that emerges is very significant: despite their differences, comparison between constitutional justice systems provides useful insights, highlighting the shortcomings, but also the benefits, of their real life experiences.

Before offering some more direct considerations on the content of the book, I would like to mention another of its strong points, perhaps an *indirect,* but nonetheless important one (even though I feel perhaps it is not one of the aims of the volume). In times of fragility and debate regarding the Italian constitutional system, in a period when the Italian constitutional system in general, and Italian constitutional justice in particular, are often at the forefront of controversy, a text of this kind shows its vitality, and in some way contributes, albeit indirectly, to the strengthening of the central role of constitutional justice and the constitutional system as a whole.

Moving on to discuss the merits of the theses presented in the book, I would like to focus on three specific issues characterising this study addressed in the text. In particular, I look at a) the method used, b) the role of the courts within the system, and c) Italian style.

At this point, I present my overall assessment, which is not so much of the book, as, generally speaking, the phase that the whole constitutional justice system is going through, and not just the Italian one. This is the guiding idea running through the considerations I am about to offer.

My personal belief is that national constitutional justice in the global context should find - or perhaps simply consolidate - an equilibrium that as yet does not exist. In this situation of permanent instability, the greatest risk is that of losing the most solid certainties of the national tradition and becoming overwhelmed by events that can rock the entire constitutional justice system, with unfavourable consequences. I aim to explain and justify my impression, considering the three points mentioned.

2. The method

The text makes extensive use of the case approach. With respect to our dogmatic and systematic tradition, this is certainly a quick move forward. I think this is in part dictated by the need for international comparison, as well as the influence that the case approach has on the international level. In part though, I think it is also the result of a particular sensitivity by the authors to a trend that is becoming more widespread and that sees the case approach gaining ground also in the Italian system of constitutional justice, often at the expense of dogmatics and, perhaps, also systematics.

An example might clarify my point. We refer to the extended use, encouraged by the Italian Constitutional Court itself, of interpretation *compliant with*: compliant with the Constitution, compliant with the ECHR, compliant with EU regulations. This favours the spread of control over the constitutionality of laws (i.e., compliance with the ECHR or EU legislation), indirectly and informally placing specific limitations on interpretation by ordinary courts. Anyone wishing, however, to find unity in the system as a whole, must employ the case approach, having to examine each *compliant* interpretation by the different courts and then find - if there is one - a single fabric, a system, or dogmatics. The advantages of this perspective are obvious (basically: the spread and greater concreteness of the judgment on the constitutionality of the norms). It also brings with it some costs, however. Not so much the risk of losing the abstract character of a judgment or its centralised nature as that of the Constitutional Court losing its specific role as decision-maker of last resort, all the more so in a complex, global system where it seems that no one has the last word any longer, especially in a

peculiar order like the Italian one which does not envisage the doctrine of *stare decisis*. Basically, there is a risk that the system of constitutional jurisdiction will no longer have sole competence.

Furthermore, this greater difficulty of finding unity in the constitutional system does not only depend on causes "internal" to the Italian domestic system or the specific techniques of interpretation adopted, but, also in more general terms, it is due to the overall process of gradual integration and interference among national and supranational courts. While hoping for greater dialogue between courts, there is also the risk of eclecticism and an excessive diversity of languages, and the impossibility of the unambiguous and reliable protection of fundamental rights. One could find numerous examples of *different interpretations* by both national and supranational courts, that, from a substantive standpoint, favour a very different range and protection of the same rights; safeguards that at times are at odds with each other. Suffice it to think of the significant case, whose oscillations are sometimes strongly marked by the principle of dignity: "Constitutional Metavalue", made up of both domestic legislation and judge-made law, and that can be applied in very different ways.

Thus, I think there is a need to seek a balance that has not yet been found. To do this, I wonder if today we should not be thinking about instruments which, alongside the inevitable use of the case approach, might stem any possible excessive eclecticism and diversity of languages, in order to avoid succumbing to the chaos of the opinions of Courts, including the authoritative ones of Supreme Courts. From this perspective, then, our dogmatic and systematic tradition might find renewed strength in a role where it could restore balance, reducing *cases* to *reason*. In this dogma-centred effort, I believe that the national constitutional courts, and especially the Italian ones, can still play a decisive role, perhaps not becoming an "island of reason" - [1]to borrow Franco Modugno's famous phrase - but, at least, as a beacon indicating the route.

[1] F. Modugno, *L'invalidità della legge. Teoria della Costituzione e parametro del giudizio costituzionale* (1970).

3. The role of the Courts

The creative nature of the Italian Constitutional Court, which participates in its own insertion within the system, emerges very clearly in this book. It is not a question of the total self-determination of their role, but of a sort of co-determination of the Court and its judgments within the overall system of powers.

Looking at a possible constitutional role partly established by the courts themselves from this perspective, the parallel drawn in one chapter of the book between the first judgment of the Italian Constitutional Court, i.e., no. 1 of 1956, and *Marbury v. Madison*[2] is very significant. Moreover, the creative nature of the Constitutional Court or, more generally speaking, of "Supreme" Courts, must now be considered a universal given. Suffice it to recall the sensational case of the European Court that, in the absence of any explicit formal footing, at least until Maastricht, managed to establish a real system for the protection of fundamental human rights which was only later transposed, normalised, normatised, and perhaps expanded by the political and institutional system through the Charter of Nice.

Speaking of the "imbalances" to be highlighted here, it seems to me that we run today the risk of excessive judicial creativity. I do not pose the question in the more usual terms of excessive judicial activism. Still less would I hope for a simple return to textualism, also because, ultimately, I do not think one can draw an immediate parallel between adherence to the text and the self-limitation of the judges of the Constitutional Courts in particular. Looking at the US experience, the late Justice Scalia showed that, behind the screen of *original intent* he always justified - often brilliantly - daring interpretations of the US Constitution which, however, did not always conform to the spirit of the time and whose rate of creativity cannot be said to be insignificant.

The point I wish to raise, then, is another. It seems to me that an excess of creativity on the part of courts - and, in particular, Constitutional Courts - can sometimes be detrimental to the effectiveness and the very solidity of both the individual rulings and the rights they seek to protect. There is a real risk of

[2] 5 U.S. 137 (1803).

undermining the rights to be guaranteed and, ultimately, of delegitimising the Constitutional Court itself.

Also in this case I would like to recall only a couple of cases. They are quite well-known judgments. The first is the ruling on the jurisdictional dispute between State powers that [3]solved a highly sensitive question, operating at the core of the form of government, formally and substantively endowing the Head of State alone with the power to pardon. It is not my intention to enter into the merits of the decision here. I shall merely make the following observation: the creative *ratio decidendi* by which the issue was solved did not prove able to sustain comparison with reality. The "solely humanitarian basis" that the Court identified to legitimise the presidential power to pardon proved, in fact to be absolutely unfounded. Suffice it to refer to the subsequent pardons granted to Colonel Joseph Romano and other CIA agents involved in the Abu Omar case - where no humanitarian grounds can be discerned, but only political and diplomatic ones - to see how the power of presidential pardon is bereft of any supporting foundation. It is the outcome of a creation with no concrete basis that has rendered indefinite and anonymous such a sensitive institution as presidential pardon.

In this, as in other cases, one wonders how such a strong propensity for creativity on the part of the judges may be justified. I think the underlying reason lies in a radical political crisis that arises from an imbalance in the system and that ends up falling to the courts. We recall, and this is the second of the sentences I wish to refer to, the sentence of the Court on the electoral law[4]. Again - looking beyond the merits of the judgment - what else led to this decision if not the impotence or, perhaps, the arrogance of the political power, which proved unable to approve an electoral law despite three previous recommendations by the Court? This is what led the Constitutional Court itself to produce an electoral law compliant with the Constitution. This was not at all an obvious move; in fact until some time ago, it would have been unimaginable. It would never have been conceivable, in fact, that the most "political" of laws (the electoral law which establishes the basis of representation and is at the foundation of the very

[3] Judgment no. 200 of 2006.

[4] Judgment no. 1 of 2014.

legitimacy of representative democracy) could be created by the Constitutional Court *instead* of Parliament.

Moreover, the judgment on the electoral law that led to such controversy cannot be considered an isolated event, nor is it a mere case for the books, nor yet is it due to any alleged hyperactivity on the part of the Italian Constitutional Court. It reflects a general political imbalance. Ultimately, it is down to the instability and the inability of politics to put in place the constitutionally necessary actions that explain so many other creative choices by judges (and not only in the Constitutional Courts). We need only think of another kind of case of particular relevance today that has produced a very large number of supplementing judgments produced in various ways due to the lack of regulation protecting the fundamental human rights of individuals concerning their sexual orientation.

However, there is no denying that this imbalance, caused by political absence, has sometimes brought about an excess of judicial realism: an absolute pragmatism, with a tendency to self-referentiality that I do not think can be considered a possible goal for the global systems of constitutional protection. I refer to those tendencies that induce courts to over-emphasise the role of the legal fact on a case-by-case basis (cf. the above-mentioned presidential pardon and electoral law). Also to the strong propensity shown by the Courts to respond more to a presumed natural law (the idea of justice) than to the actual text of the Constitution (secularised justice). Not without fault is the increasingly intense dialogue between the Courts, which sometimes appears to absorb, rather than be mediated by, the regulatory and political context, at home, in Europe or internationally.

Each of the cases mentioned suffers from the effect of a *lost balance*. I see no other way to regain this balance than the return of politics to the Constitution, accompanied by the containment of the judiciary within the narrow scope of "negative creativity", defined by strict compliance with the rules of legal interpretation and constitutional principles.

4. The Italian Style

At this point, we come to the third and final topic that I wish to address. The last, pregnant, pages of the book are dedicated to *Italian Style*. The authors claim that this style is characterised by a principle of *relationality* with other actors: Courts, judges, policies, and citizens. I am unsure whether this may be interpreted as a way of seeking the lamented lost balance that we have mentioned here. But what I definitely want to remark is that this relationalilty (both "institutional" and "interpretative") might perhaps be a goal to aim for, but it cannot be considered as a consolidated given within the Italian constitutional justice system in today's context.

Let us start with "institutional relationality". There is no doubt that a great many virtuous changes can be attributed to the Italian Constitutional Court and its style. The Constitutional Court has often called on the other institutions - primarily Parliament - to adapt the political system and its norms to the Constitution. There have been countless advances related to this virtuous relationship, from the dismantling of Fascist legislation to that relating to family law. But it is also true that it is not always possible to discern any positive "relationality" actually pursued by the various institutions. The outcome of the rulings in legislation cannot always be said to be linear; indeed, it is sometimes non-existent.

I would also like to emphasise another aspect in an attempt to show how and to what extent I feel "relationality" can, or must, operate. Sometimes relationality should not be understood as a fair effort to cooperate on the part of the Court with the other powers. When fundamental rights or supreme constitutional principles are at stake, it must be acknowledged that the Court operates "intransigently". I think this should happen every time that, faced with a violation of supreme constitutional legality by a political majority, the counter-majority role of the Court has to be brought into play as a constitutional Court that asserts itself as an indefatigable guarantor of the Constitution and the rights of the individual against any majority temporarily in government.

Clearly, this does not concern only relations with Parliament or the political majorities, but in all cases when the Court interacts with the other powers; including that of the judiciary. In this case too it can not be forgotten that the hoped for harmony is not always present. There have been not a few "wars

between the Courts". A dose of conflict between different types of Courts is to be considered natural: there is always a crisis always lurking round the corner. So also in this case relationality must be understood as a goal to be pursued, and not a natural characteristic of Italian style.

But perhaps the most sensitive point that the book raises concerns "interpretative relationality", addressed in the closing pages. Different and competing methods of interpretation are presented in two parts of the book, be they originalist, teleological, related in varying degrees to the above, or the literal or systematic approach. At one point we read this sentence: "The constitutional court follows a comprehensive methodology, one that does not shy away from complexity[5]." I wonder if this is an elegant way of exposing the abuse of eclecticism. What is certain is that in reading the case law of this Court, occasional excess can be observed: with slightly forced balancing acts, excessively abstract reasonableness, and artificially induced proportionality, it is doubtful whether a balance has really been achieved. My impression is that there is a lot of work to be done by both scholars and judges in the field of constitutional interpretation, while some of the canons used, such as reasonableness and proportionality, at times prove too elastic, far too elastic. In these cases, the Court tends to over-widen the margin necessary to achieve a constitutionally acceptable result, thus risking to venture too close in the direction of interpretative subjectivism. So, in addition to interpretive relationality it is necessary to exercise care in maintaining close relationality with the text of the Constitution. This too can be of help in finding that constitutional balance which as yet does not exist.

[5] V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini, *Italian Constitutional Justice in Global Context* (2015) 238.