

The Expansion of the Constitutional Court in Italy: Ruling the Void in Times of Political Instability

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The increasing involvement of judicial institutions in the realm of policymaking represents a widespread phenomenon in Western democracies. Especially when political actors enter periods of instability and low performance, courts increasingly and incisively intervene in policymaking. This is the case in Italy, where, over the last two decades, the Constitutional Court has often acted as a positive legislator. This article focuses on the activity of the Court from 2008 to 2018, through an investigation of 3536 judicial decisions. It analyzes the decisions of the Constitutional Court, with particular reference to those so-called “manipulative” judgments that may lead one to suspect a growing role for the Court in national lawmaking. Specific domains — such as electoral regulation and State-Region relations — are investigated to evaluate the shift of competencies from the Parliament to the judicial body. The final section of the article proposes possible reasons for the growing influence of judicial review on policymaking in Italy, focusing in particular on the idea that when political parties fail to intervene on important issues, the courts will tend to fill the void.

L'engagement grandissant des institutions judiciaires dans le domaine de l'élaboration de politiques représente un phénomène généralisé dans les démocraties occidentales. Surtout lorsque les acteurs politiques entrent dans des périodes d'instabilité et de faibles résultats, les tribunaux interviennent d'une manière précise et de plus en plus souvent dans l'élaboration de politiques. Cela est le cas en Italie, où le tribunal constitutionnel a souvent agi comme législateur positif au cours des deux dernières décennies. Cet article traite essentiellement de l'activité de ce tribunal entre 2008 et 2018, par le biais d'une étude de 3 536 décisions judiciaires. Les auteurs analysent les décisions du tribunal constitutionnel en tenant compte particulièrement des jugements soi-disant « manipulateurs » qui peuvent pousser à soupçonner un rôle grandissant pour le tribunal en matière de processus législatif national. Des domaines précis — comme le règlement électoral et les relations État-région — sont examinés afin d'évaluer le transfert de compétences du Parlement à l'organisme judiciaire. Dans la dernière section de l'article les auteurs proposent des raisons possibles pour l'influence grandissante des décisions judiciaires sur l'élaboration de politiques en Italie, se concentrant notamment sur l'idée que lorsque les parties politiques ne réussissent pas à intervenir sur des questions importantes, les tribunaux ont tendance à combler le vide.

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I. Introduction

The tension between *iurisdictio* and *gubernaculum* is at the core of every democratic regime.¹ It refers to the never-ending contraposition between the priority of political decision-making (*gubernaculum*) and judicial limits on the sphere of political decision-making (*iurisdictio*). In recent years, the two poles have appeared to merge: the expansion of judicial power, and the increasing tendency of courts to act as policymakers, have been global and widely recognized phenomena.² Most democratic countries have experienced “the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts.”³ This is especially true of constitutional courts, which have been set up in many European countries after the Second World War to safeguard national constitutions.⁴ Given that these institutions are removed from the democratic process, their power of constitutional review would often collide with the role of representative actors in a democratic state, where “the political decision-making power emanates from the people as the totality of the citizens.”⁵ This legal and political problem

1 The research leading to these results has been realized within the Relevant Research Project of National Interest (PRIN) 2020-2023 “Monocratic Government. The Impact of Personalisation on Contemporary Political Regimes.” Principal investigator: Professor Fortunato Musella.

2 See e.g. Neal C Tate & Torbjorn Vallinder, eds, *The Global Expansion of Judicial Power* (New York: New York University Press, 1995); Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, ed by C A Thomas (Oxford: Oxford University Press, 2002); Martin Shapiro & Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002); Ran Hirschl, “The Judicialization of Politics” in Keith E Whittington, R Daniel Kelemen & Gregory A Caldeira, eds, *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008) 119; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004); Diana Kapiszewski, Gordon Silverstein & Robert A Kagan, eds, *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge, UK: Cambridge University Press, 2013); Christine Landfried, ed, *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge, UK: Cambridge University Press, 2019); Luis Pereira Coutinho, Massimo La Torre & Steven. D Smith, eds, *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Cham, Switzerland: Springer, 2015).

3 Tate & Vallinder, *supra* note 2 at 13.

4 Mauro Calise & Theodore J Lowi, *Hyperpolitics: An Interactive Dictionary of Political Science Concepts* (Chicago: University of Chicago Press, 2010).

5 Ernst-Wolfgang Böckenförde, “Constitutional Jurisdiction: Structure, Organization and Legitimation [1999]” in Mirjam Künkler & Tine Stein, eds, *Constitutional and Political Theory: Selected Writings* (Oxford: Oxford University Press, 2017) 186 at 187. The author analyzes the “particular nature” of constitutional jurisdiction by looking at different models and challenges concerning the structure, organization and legitimation of different constitutional courts in Western democracies. The author warns about the risks of such courts within the framework of state powers. In particular, preventing the guardian of the constitution becoming the master of the people represents the crucial issue for guaranteeing democratic legitimation of constitutional jurisdiction. The

appeared even clearer with the expansion of the prerogatives of the courts, an expansion that has typically occurred when political actors are experiencing periods of instability and low performance (as many national legislatures are at present). Indeed, amid the crisis of traditional party systems in contemporary democracies, constitutional courts have often assumed the position of a substitute for policymakers.⁶

This article focuses on Italy as an example of the judicialization of politics in recent decades, with the Constitutional Court adopting a growing role as a positive legislator.⁷ Starting in the Nineties, the Italian Republic has evolved from one of the most consolidated particracies in the world into a global forerunner of personal politics.⁸ During this epochal passage — according to several observers — the provisions adopted by judges have widened their margins of discretion, producing an explicit shift of power to the Constitutional Court.⁹ The expansion of the role of the Constitutional Court in the political arena has resulted in a “confusion over roles, undue substitution and pathological conflicts”¹⁰ that have assumed unusual dimensions over the last years. A recent example has been given by judgments 1/2014 and 35/2017, which have struck down two electoral laws.¹¹ In both of these cases, the Court has intervened on a clear parliamentary prerogative, strongly reducing political alternatives and

author also stresses that judicial attitudes need attention insofar as constitutional judges should be “immune to the temptation of engaging in politics by other means, that of constitutional interpretation, instead of asserting and maintaining the legal framework for politics” (*ibid* at 205).

- 6 Franklin D Roosevelt in his 1908 message to the Congress stated that “judges are the final voice of authority” — as also reported in the epigraph which introduces Mauro Cappellotti, *Giudici legislatori* (Milan: A Giuffrè, 1984). The question, however, is not whether judges have the last say in the interpretation of laws because of their widely recognized judicial creativity. The question concerns the extent to which judicial decisions determine final legislative texts.
- 7 Giampaolo Parodi, “The Italian Constitutional Court as ‘Positive Legislator’” in Allan R Brewer-Carias, ed, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge, UK: Cambridge University Press, 2011) 603; Allan R Brewer-Carias, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge, UK: Cambridge University Press, 2011).
- 8 Fortunato Musella, *Political Leaders Beyond Party Politics* (Cham, Switzerland: Palgrave Macmillan, 2018); Fortunato Musella & Paul Webb, “The Revolution of Personal Leaders” (2015) 45:3 Italian Political Science Rev/Rivista Italiana di Scienza Politica 223.
- 9 Raffaele De Mucci & Giorgio Armillei, *Giudici e sistema politico: Alte corti e cittadinanza in Italia* (Soveria Mannelli: Rubbettino, 1995) at 61; Patrizia Pederzoli, *La Corte costituzionale: Le istituzioni politiche in Italia* (Bologna: Il Mulino, 2008); Mary L Volcansek, *Constitutional Politics in Italy: The Constitutional Court* (London, UK: Palgrave Macmillan, 1999); Mary L Volcansek, “Constitutional Courts as Veto Players: Divorce and Decrees in Italy” (2001) 39:3 European J Political Research 347; Carlo Guarnieri & Patrizia Pederzoli, *The Judicial System: The Administration and Politics of Justice* (Cheltenham: Edward Elgar, 2020).
- 10 Enzo Cheli, *Il giudice delle leggi: la Corte costituzionale nella dinamica dei poteri* [The Judge of Laws: The Constitutional Court in the Dynamics of Power] (Bologna: Il Mulino, 1999) at 79.
- 11 Corte Costituzionale, 2014, n 1 (Italy); Corte Costituzionale, 2017, n 35 (Italy).

shaping the Italian form of government.¹² Alternatively, one may also recall the role of the Constitutional Court in shaping the development of Italian regionalism with the 2001 revision of Title V of the Italian Constitutional Charter.

This article analyzes the activity of the Italian Constitutional Court from 2008 to 2018, through an investigation of 3536 judicial decisions¹³ that collectively reveal significant differences with previous constitutional periods. It aims at analyzing the increasing number of judicial declarations of unconstitutionality of the Court, with particular reference to those so-called “manipulative” judgments that may lead one to suspect a growing role for the Court in national lawmaking. Specific domains — electoral rules, the State-Regions relationship, civil rights — will be investigated to evaluate the thesis of the shift of competencies from the Parliament to the judicial body. The final part of the article will then discuss the key role played by the Constitutional Court in Italian politics, relating this phenomenon to recent features of the Italian political system and suggesting that when democratic representatives abdicate their traditional responsibilities, including lawmaking, the vacuum will often be filled by the courts.¹⁴

12 Sandro Staiano, “Il giudizio sulla legge elettorale come decisione politica” (2017) 2 *Federalismi.it*: Rivista di Diritto Pubblico Italiano, Comunitario e Comparato 1; Sandro Staiano, “La forma di governo nella costituzione come norma e come processo” in Fortunato Musella, ed, *Il governo in Italia: Profili costituzionali e dinamiche politiche* [Government in Italy: Constitutional Profiles and Political Dynamics] (Bologna: Il Mulino, 2019) 29; Elisabetta Catelani, “Giustizia costituzionale tra ‘anima politica’ ed ‘anima giurisdizionale’ e sua incidenza sulla forma di governo” (2017) 8 *Federalismi.it*: Rivista di Diritto Pubblico Italiano, Comunitario e Comparato 1; Michela Troisi, 2019 “Il governo nelle decisioni della Corte costituzionale” in Fortunato Musella, ed, *Il governo in Italia: Profili costituzionali e dinamiche politiche* [Government in Italy: Constitutional Profiles and Political Dynamics] (Bologna: Il Mulino, 2019) 95.

13 Data refer to the total number of judicial decisions issued by the Italian Constitutional Court from 2008 to 2018. We collected data from the annual reports on the Constitutional Court’s activity and jurisprudence (see “Annual Reports” (2019), online: *Corte Costituzionale* <https://www.cortecostituzionale.it/jsp/consulta/link/Annual_Reports_en.do> [<https://perma.cc/2QTW-25A6>] For more detail see Appendix A, *below*).

14 Theodore J Lowi, *The End of Liberalism: The Second Republic of the United States* (New York: Norton, 1979).

II. The expansion of the role of the Constitutional Court in the political arena

An effective thermometer to understand the expansion of the role of the “Consulta”¹⁵ in the political arena is the analysis of judicial declarations of unconstitutionality. Over the last decades, the influence of judicial review on policymaking in Italy has been emerging as an accomplished fact, especially now that the party system has lost its bipolar character.

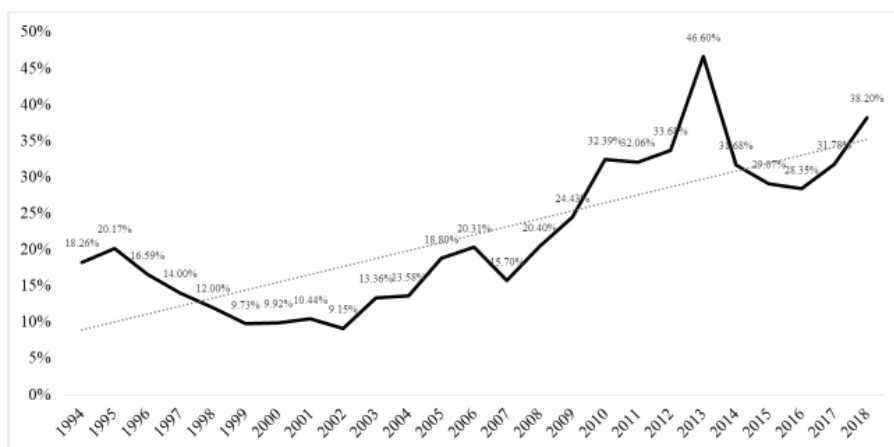


Figure 1. *Percentage of declarations of unconstitutionality on the total number of judicial decisions (1994–2018)*

Source: Pederzoli (2008) for the time period 1994–2007; own elaboration on data provided by the Constitutional Court for the time period 2008–2018.

In the context of crisis of political parties, also expressed in terms of the fragmentation of Parliament, the percentage of judicial declarations of unconstitutionality has increased, with the figure going from 18.2 per cent in the overall number of judicial decisions in 1994 to 38.2 per cent in 2018 (see Figure 1). It may be noticed that there is a sharp difference between the beginning of the so-called “Second Republic” that was introduced by the majoritarian electoral law in 1993, and the more recent phase (2013–present) when the party system has resulted in two highly fragmented coalitions, the latter of which was ultimately toppled by a new populist party: the Five Star Movement promoted

15 This is a term often used to refer to the Constitutional Court of Italy, taken from the name of the Court’s official residence at the Palazzo della Consulta in Piazza del Quirinale in Rome.

by Beppe Grillo.¹⁶ Quite symbolically, the two peaks of declarations of unconstitutionality may be detected in 2013 and 2018, the two years of national elections that paved the way for the electoral success of the Five Star Movement.

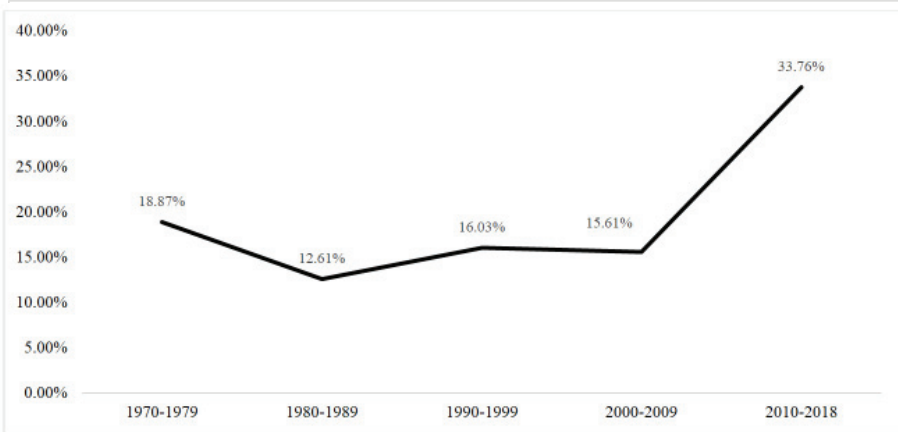


Figure 2. Percentage of declarations of unconstitutionality on the total number of judicial decisions per decade (1970-2018)

Source: Pederzoli (2008) for the time period 1970-2007; own elaboration on data provided by the Constitutional Court for the time period 2008-2018.

If one aggregates judicial decisions per decade, it is easier to understand the rise of declarations of unconstitutionality in the period 2010-2018, with an increase from an average value of 15.78 per cent between 1970 and 2009 to a percentage of 33.7 over the latest years (see Figure 2). The high number of declarations of unconstitutionality suggests a more general active role in these years for the Constitutional Court, which has become increasingly prone to the invalidation of legislation on constitutional grounds.

The same may be said for percentages of judgments (*sentenze*), which passed from 50.1 per cent over the period between 2008 and 2012, to 65.5 per

16 Mauro Calise, *Fuorigioco: La sinistra contro i suoi leader* [The Left Against its Leaders] (Rome & Bari: Laterza, 2013); Mauro Calise, *La democrazia del leader* [Democracy of the Leader] (Rome & Bari: Laterza, 2016). The 2013 national election gave a tripolar character to the Italian party system, when three parties (the centre-left Democratic Party, the centre-right Forza Italia, and the populist Five Star Movement) each received more than 20% of the vote. See also Johannes Karremans, Giorgio Malet & Davide Morisi, “Italy—The End of Bipolarism: Restructuration in an Unstable Party System” in Swen Hutter & Hanspeter Kriesi, eds, *European Party Politics in Times of Crisis* (Cambridge, UK: Cambridge University Press, 2019) 118.

cent between 2013 and 2018 (Figure 3). To clarify this point, suffice it to say that the Court can issue orders (*ordinanze*) or judgments (*sentenze*); the former involving a ruling on a procedure or question that does not settle the case, the latter constituting a final order that concludes the case.

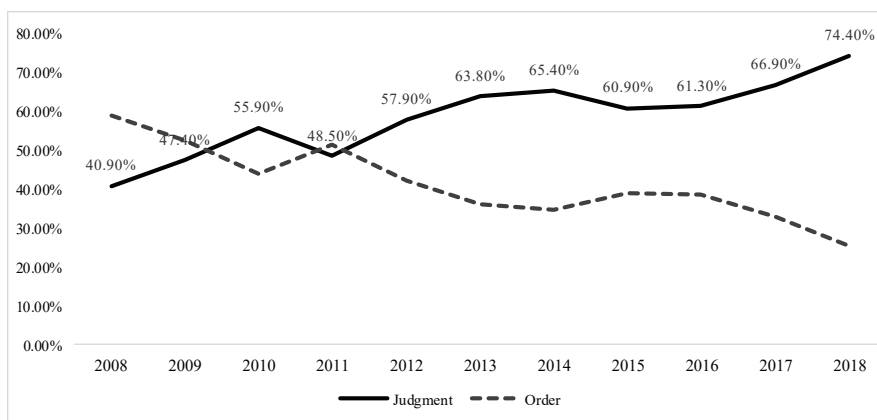


Figure 3. Percentage of judgments and orders on the total number of judicial decisions (2008-2018)

Source: own elaboration on data provided by the Constitutional Court.

Therefore, if one observes the passage from *ordinanze* to *sentenze* in recent times, *sentenze* (judgments) have become the most used acts since 2011, showing an increased inclination of the Constitutional Court to take definitive decisions on disputed issues compared with the recent past. Moreover, it should be noted that in Italy no dissenting opinions are allowed: the decision always appears on its face as the decision of the whole Court. To produce this appearance of unanimity, the *Consulta* is involved in a two-step decision making process, which involves debate on the result to be reached and then on the written opinion to be issued. “The general practice of the Court is to allow its decisions to stand — especially if a vote has been taken, regardless of whether the decision was unanimous or supported only by a majority — unless none of the members of the college object to the modification.”¹⁷ Consequently, if the Court does not define a common line of reasoning for a given issue, the decision-making process might be never-ending.¹⁸

17 William J Nardini, ed, *The Italian Constitutional Court*, 8th ed, translated by Clare Tame & Sarah Pasetto (Rome, 2006) at 48.

18 See also Roberto Romboli, ed, *Aggiornamenti in tema di processo costituzionale, 2014-2016* [Updates on the Constitutional Process, 2014-2016] (Torino: Giappichelli, 2017).

Yet probably the most significant trend in the Constitutional Court's activity over the last decade regards rulemaking. A peculiar form of judicial decision — the “manipulative judgment” — involves the alteration of legislation by adding (*additive*), subtracting (*ablative*) or replacing (*sostitutive*) legislative provisions. Through such decisions, the “Constitutional Court transforms itself into a creator of legal rules, thereby playing a role that in the Italian system belongs almost exclusively to the Parliament.”¹⁹

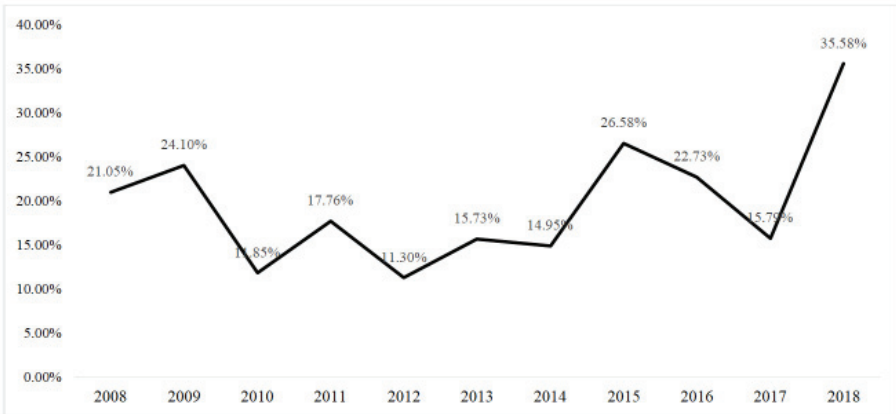


Figure 4. Percentage of judgment-laws (*sentenza legge*) on the total number of declarations of unconstitutionality (2008-2018)

Source: own elaboration on data of the Italian Constitutional Court.

This activity is enabled by the fact that the Constitutional Court is endowed with ample discretion in defining its role in the Italian legal system, and is clearly superior to ordinary courts whose procedure and practice are regulated in detail in the civil and criminal procedure codes.²⁰ With this discretion in its hands, the Court has tended, instead of simply striking down the law as unconstitutional, to refashioning legislation by creating new norms. As reported in Figure 4, the average value of manipulative judgments issued rises above 20 percent after 2013, with a peak of 35.5 percent in 2018. The idea behind such judgments is that it is not so useful to “eliminate the law,” rather

19 Tania Groppi & Irene Sapigno. “The Constitutional Court of Italy” in Andràs Jakab, Arthur Dyevre & Giulio Itzcovich, eds, *Comparative Constitutional Reasoning* (Cambridge, UK: Cambridge University Press, 2017) 516 at 524.

20 Tania Groppi, “The Italian Constitutional Court: Towards a Multilevel System of Constitutional Review” (2010) 4:1 *Indian J Constitutional L* 1 at 8.

subdue it to the Constitution.²¹ Yet very often the act of “reinterpreting” laws to render them constitutionally acceptable opens the door to what is effectively political activity.²²

As we will notice in the next sections, although the prerogative to modify laws has been frequently justified by the aim of guaranteeing a collaborative institutional dialogue between the Constitutional Court and the legislative assembly, the Court may end up usurping the legislative role, especially in a phase when the Parliament is not still animated by a secure and stable political majority and/or is not able to respond to pressing demands from civil society.

III. Shaping Italian politics through judicial review

Since its creation in 1956, the Constitutional Court has often played an essential and progressive role in Italian republican history. Though it is impossible to summarize the impact of the Court’s constitutional jurisprudence, it is worth recalling some specific cases in order to show the Court’s increasing capacity to shape politics over the latest decades.

First, one may think of the key role played by the Constitutional Court in blocking the repeated efforts of the center-right leader Berlusconi in solving his own legal problems through *ad personam* laws. Indeed, most of the laws and reforms concerning the judiciary approved by the Berlusconi governments have been abrogated by rulings of the Constitutional Court.²³ These decisions contributed considerably to the termination of Berlusconi’s “long-running crusade” against judges and the Italian judicial system.²⁴ Nevertheless, over the following years, a mounting tension arose between the *Consulta* and other political leaders.²⁵ During the Renzi government (2014-2016) the Constitutional Court shaped and deeply influenced the policy-making process, especially through declarations of unconstitutionality against key policies of the government. The strategic importance of these policies was exalted by the

21 Gustavo Zagrebelsky & Valeria Marcenò, *Giustizia costituzionale: Oggetti, procedimenti, decisioni* [Constitutional Justice: Objects, Proceedings, Decisions] 2nd ed (Bologna: Il Mulino, 2018) at 174.

22 Antonio Ruggeri, *Itinerari di una ricerca sul sistema delle fonti: XXI Studi dell'anno, 2017* [Itineraries of a Research on the System of Sources: XXI Studies of the Year, 2017] (Torino: Giappichelli, 2018).

23 Corte Costituzionale, 2004, n 24 (Italy); Corte Costituzionale, 2009, n 262 (Italy); Corte Costituzionale, 2011, n 23 (Italy).

24 Cristina Dallara, “Powerful Resistance Against a Long-running Personal Crusade: The Impact of Silvio Berlusconi on the Italian Judicial System” (2015) 20:1 *Modern Italy* 59.

25 Luigi Rullo, “The Italian Constitutional Court in the Personal Leaders’ era” (Paper delivered at the 2019 Interim Meeting IPSA Research Committee 9 (Comparative Judicial Studies), ‘Democracy, Populism and Judicial Power: Where to from Here?’ Monash University, Prato, 24-26 July 2019) [unpublished].

fact that votes of confidence were raised on them. Very significantly, the Court declared part of the “Renzi-Madia public employment reform” unconstitutional (ruling 251/2016),²⁶ depriving some implementing legislative decrees of their legal basis, including the decree to save Italy’s largest steelworks ILVA (ruling 58/2018),²⁷ and the increasing protection contract which was the core of the labour market reform “Jobs Act” (ruling 194/ 2018).²⁸ The result has been uninterrupted exchanges of accusations and recriminations along with a state of mutual mistrust that has become even stronger in the light of the rise to power of new populist parties in government.

Second, the Constitutional Law no. 3/2001, revising Title V of the Constitution, favoured the consolidation of the Constitutional Court as a pivotal actor in the intergovernmental relationship and as a “coauthor” of Italian territorial politics. The reform enhanced the power of the Regions in a significant number of policy domains and tried to realize a new scheme of territorial governance. However, the new framework has also displayed significant ambiguities which may explain the relevance of the Constitutional Court’s decisions in the process of decentralization in Italy.²⁹ After listing a series of subjects falling exclusively under the legislative jurisdiction of the central State, the 2001 constitutional reform also indicated subjects for which the central State and the Regions share legislative competence. This distribution of competences appeared problematic, leading the Constitutional Court to take steps to avoid incongruencies and overlapping activities, and to better specify competencies through judicial review.³⁰ However, as Randazzo observed, “the role of substitution of the Court has become an unacceptable substitution of the legislator making constitutional justice the main character rather than an arbiter of the new asset introduced by the reform.”³¹ The Constitutional Court’s landmark

26 Corte Costituzionale, 2016, n 251 (Italy).

27 Corte Costituzionale, 2018, n 58 (Italy). The ILVA is the largest steelworks in Italy. In recent years, it has been rocked by several judicial inquiries because of the high level of risk that its activities pose to public health and the environment. At the same time, it employs over 20,000 people and its production is critical for the whole Italian industrial system. According to the Constitutional Court, decree law 92/2015, commonly called the “Save ILVA steelworks decree,” would have favoured industrial interests in an excessive way by neglecting rights such as the protection of life and health.

28 Corte Costituzionale, 2018, n 194 (Italy). See also Tommaso Nannicini, Stefano Sacchi & Filippo Taddei, “The Trajectory of the Jobs Act and the Politics of Structural Reforms Between Counter-reforms and Ambiguity” (2019) 11:3 Contemporary Italian Politics 310.

29 Stelio Mangiameli, ed, *Italian Regionalism Between Unitary Traditions and Federal Processes: Investigating Italy’s Form of State* (Cham, Switzerland: Springer, 2014).

30 Nicola Viceconte & Paolo Colasante, *La giustizia costituzionale e il ‘nuovo’ regionalismo* [Constitutional Justice and the ‘New’ Regionalism], vol 2 (Milan: Giuffrè, 2013); Andrea Morrone, “Lo Stato regionale e l’attuazione dopo la riforma costituzionale” (2016) 2 Rivista AIC 1.

31 Barbara Randazzo, “La ‘manutenzione’ del giudizio in via principale” (2012) 2 Rivista AIC 1 at 5.

rulings in this area have affected the pillars of the 2001 constitutional reform on statutory,³² legislative,³³ administrative,³⁴ and financial³⁵ autonomy. In subsequent rulings, the Court's jurisprudence on the balance between regional and national governments has tilted toward the central government, limiting regional autonomy. These decisions have paved the way for a more limited form of decentralization, and have underlined the fundamental role played by the Court in the regulation of the State-regions relationship.

Third, we note a new and synergic relationship between the Constitutional Court and civil society.³⁶ The Constitutional Court has responded to the growing citizens' demand for justice, positioning itself as an alternative channel for the resolution of rights issues.³⁷ In this regard, the Court increasingly represents an access point for citizens to pursue changes to contentious policies that have been neglected and overlooked in the legislative arena, giving it the potential to function as a driver for social change. For example, some landmark decisions have favoured a greater level of protection for individual and civil rights, such as ruling 80/2010,³⁸ where the Court issued a declaration of unconstitutionality against a provision of the 2008 National budget law which impeded public schools from contracting teachers for students with disabilities due to budgetary reasons. In the same vein, ruling 138/2010³⁹ — concerning the right to marry a person of the same sex — established that, although people of the same sex were not constitutionally entitled to marry, they had the fundamental right to live out their situation freely and to obtain legal recognition thereof along with the associated rights and duties. Moreover, a series of Constitutional Court decisions⁴⁰ have led to a substantial abrogation of the contested law 40/2004 on medically-assisted reproduction. In these decisions, the Court overturned

32 Corte Costituzionale, 2004, n 2 (Italy); Corte Costituzionale, 2004, n 372 (Italy); Corte Costituzionale, 2004, n 378 (Italy); Corte Costituzionale, 2004, n 379 (Italy); Corte Costituzionale, 2007, n 365 (Italy).

33 Corte Costituzionale, 2005, n 50 (Italy); Corte Costituzionale, 2010, n 226 (Italy).

34 Corte Costituzionale, 2003, n 303 (Italy).

35 Corte Costituzionale, 2003, n 370 (Italy); Corte Costituzionale, 2007, n 169 (Italy).

36 In this respect it is worth recalling the work of the former Court's president, Marta Cartabia, on a more structured and involved role for civil society, and on the relevance of "openness" for the Constitutional Court's work. For more detail, see the report of the 2019 Annual Conference: Marta Cartabia, "L'Attività Della Corte Costituzionale Nel 2019" (28 April 2020), online (pdf): *Corte Costituzionale* <https://www.cortecostituzionale.it/documenti/relazione_cartabia/1_relazione.pdf> [<https://perma.cc/KST8-KQW7>].

37 De Mucci, *supra* note 9; Guarnieri & Pederzoli, *supra* note 9.

38 Corte Costituzionale, 2010, n 80 (Italy).

39 Corte Costituzionale, 2010, n 138 (Italy).

40 Corte Costituzionale, 2009, n 151 (Italy); Corte Costituzionale, 2014, n 162 (Italy); Corte Costituzionale, 2015, n 96 (Italy).

key aspects of the law on the grounds that they would limit a couple's right to have access to the best possible medical treatment, thereby opening the door to heterologous assisted reproduction and granting fertile couples with genetic diseases the right to access medically-assisted reproduction.

More recently, end-of-life questions have also been pushed more and more to the Constitutional Court.⁴¹ In this respect, we may recall major constitutional cases involving euthanasia and assisted dying — Englaro (2008) and Cappato (2018), respectively — in which Italian judges have appeared intolerant with the inertia of lawmakers regulating end-of-life issues. This phenomenon becomes especially clear in the widely discussed Cappato case, when the Constitutional Court recalled Parliament to create an end-of-life legislative framework “within one year” — otherwise the Court would declare the unconstitutionality of the law under review.⁴² With this judgment — according to legal scholarship — the Court enacted a “revolutionary” decision both in terms of merit and procedure, because it introduced a “postponed declaration of unconstitutionality.”⁴³ Subsequently, Parliament and government confirmed their inertia, leading judges to partly fill the legislative vacuum through ruling 242/2019,⁴⁴ which introduced specific conditions that would “legalize” assisted suicide in Italy.⁴⁵

Yet it is in the field of electoral law — the principal channel for political change in Italy — that the Italian Constitutional Court has realized its most unexpected foray into the political arena by exercising what is typically a parliamentary prerogative.

IV. The Constitutional Court in the electoral arena

In this section a peculiar case of party inability to produce effective legislation will be presented to explain the expansion of the role of the Constitutional Court. During the first forty republican years in Italy, proportional rule was a crucial element for the consociational system that defined the Italian parti-

41 Jorg Luther, “The Judge’s Power over Life and Death” (2019) 1 *Nomos* 197; Gianluca Gentili & Tania Groppi, “Italian Constitutional and Cassation Courts: When the Right to Die of an Unconscious Patient Raises Serious Institutional Conflict Between State Powers” (2011) 18:1 *ILSA J Intl & Comp L* 73.

42 Corte Costituzionale, 2018, n 270 (Italy).

43 Antonio Ruggeri, *Itinerari di una ricerca sul sistema delle fonti: XXI Studi dell'anno 2017* [Routes of a Research on the System of Sources: XXI Studies of the Year 2017] (Torino: Giappichelli, 2018).

44 Corte Costituzionale, 2019, n 242 (Italy).

45 Paolo Caretti, “La Corte costituzionale chiude il caso Cappato ma sottolinea ancora una volta l’esigenza di un intervento legislativo in materia di ‘fine-vita’” (2020) 1 *Osservatorio sulle Fonti* 187.

cracy.⁴⁶ Nevertheless, in the early Nineties the Tangentopoli scandal rocked Italian politics⁴⁷ and a majoritarian system was interpreted as the best way of leaving the breakdowns of the old political system behind while introducing an institutional order more similar to the Westminster one. The subsequent — and clearly predictable according to Italian political science⁴⁸ — failure in the reduction of the number of political parties, and in the fulfilment of a more stable party system, led to a lot of reform proposals and, eventually, to the return of mixed-proportional rule in 2005. Attempts to change electoral rules have continued, however, and they may be considered still in flux,⁴⁹ resulting in a very tumultuous process where both the Parliament and the Constitutional Court have a say, with the latter playing a constitutive role that would normally fall to political parties in an elected representative body.

The end of the majoritarian era has been represented by law 270/2005 — commonly called *Porcellum* (pig's law) — which met the need of the center-right government of Berlusconi to minimize electoral losses in 2006 by reintroducing a Proportional Representation cum majority premium system based on blocked party lists.⁵⁰ In the Chamber of Deputies, the majority premium allowed the coalition with the most votes nationally to achieve 55 per cent of the seats. By contrast, in the Senate, the majority premium was obtained by

46 Pietro Scoppola, *La Repubblica dei Partiti: Profilo Storico Della Democrazia in Italia, 1945–1990* [The Republic of Parties: Historical Profile of Democracy in Italy, 1945–1990] (Bologna: Il Mulino, 1991); Maurizio Cotta, “The Rise and Fall of the ‘Centrality’ of the Italian Parliament: Transformations of the Executive-Legislative Subsystem after the Second World War” in Gary W Copeland & Samuel C Patterson, eds, *Parliaments in the Modern World: Changing Institutions* (Ann Arbor: University of Michigan Press, 1994) 59; Marco Valbruzzi, “Il governo tra frammentazione e destrutturazione partitica” in Fortunato Musella, ed, *Il governo in Italia. Profili costituzionali e dinamiche politiche* (Bologna: Il Mulino, 2019) 295.

47 The Tangentopoli scandal uncovered the most extensive networks of political corruption ever to come to light in post-war Italy. The traditional parties collapsed, and it paved the way for Berlusconi's decision “to take the field” in 1994 and for the establishment of the so-called Second Italian Republic.

48 Giovanni Sartori, in his restating of the Duverger's laws on the relationship between change in electoral rule and party system, has anticipated that the single-ballot plurality system would fail to reduce the number of parties, and would actually produce more parties and cause a still higher level of fragmentation, given that “incoercible minorities (which cannot be represented by two major mass parties) are concentrated in above-plurality proportions in particular constituencies or geographical pockets.” See Giovanni Sartori, “The Influence of Electoral Systems: Faulty Laws or Faulty Method?” in Bernard Grofman & Arend Lijphart, eds, *Electoral Laws and Their Political Consequences* (New York: Algora, 2003) 43 at 59.

49 Gianluca Passarelli, “Electoral Systems in Context: Italy” in Erik S Herron, Robert J Pekkanen & Matthew S Shugart, eds, *The Oxford Handbook of Electoral Systems* (Oxford: Oxford University Press, 2018) 851.

50 Mauro Calise, *Il Partito Personale: I due corpi del leader* [The Personal Party: The Two Bodies of the Leader] (Rome & Bari: Laterza, 2010) at 133; Alessandro Chiamonte, “The Unfinished Story of Electoral Reforms in Italy” (2015) 7:1 Contemporary Italian Politics 10.

the coalition with the relative majority of votes cast on a regional basis. The law immediately raised criticism as it did not provide a minimum threshold to attain the majority premium. Even more attention was devoted to the long-blocked list of candidates, which seemed to allow party and faction leaders to reacquire and blatantly exercise the power to nominate their candidates, so creating a “Parliament formed by followers.”⁵¹ In response to these criticisms, two referenda were proposed to modify the electoral law, without success; while the first one did not reach the required quorum, the second one was judged inadmissible by the Constitutional Court, which stated that the abrogation of the 2005 electoral law had to be avoided as it would leave the system in a “legislative vacuum.” Then, according to ruling 13/2012,⁵² “only lawmakers could replace an electoral system with a new one: a position that ... would be totally reversed by later Constitutional Court rulings.”⁵³

Nevertheless, nine years after the promulgation of the 270/2005 electoral law, the Constitutional Court intervened in the electoral arena, a field that has been “inextricably linked to the crucial role of political parties in the Italian polity.”⁵⁴ Indeed, in 2013 the *Consulta* declared an electoral law unconstitutional (ruling 1/2014) for the first time in Italian history. The Court claimed that the national majority premium in the Chamber of Deputies and the regionally-based majority premiums in the Senate violated the constitutional principles of representation and equality of the vote (guaranteed by articles 1, 3, 48, and 67 of the Constitution) because it led to the assignment of seats in a disproportional manner with no minimum threshold, and with different results in the two parliamentary chambers. Additionally, the Court’s ruling invalidated the blocked list system on the grounds that it threatened the freedom to vote by depriving citizens of the right to select their representatives. Consequently, the Constitutional Court reintroduced the electoral system in operation between 1991 and 1993, but also modified the law by introducing a preference voting system for the Senate. The result was that the judicial decision largely delegitimized the parliamentary assembly, as it would be formed by MPs elected through an unconstitutional law. Therefore, the Constitutional Court introduced a Proportional Representation (PR) electoral law with ma-

51 Gianfranco Pasquino, “Tricks and Treats: The 2005 Italian Electoral Law and Its Consequences” (2007) 12:1 *South European Society & Politics* 79.

52 Corte Costituzionale, 2012, n 13 (Italy).

53 Emanuele Massetti & Arianna Farinelli, “From the Porcellum to the Rosatellum: ‘Political Elite-Judicial Interaction’ in the Italian Laboratory of Electoral Reforms” (2019) 11:2 *Contemporary Italian Politics* 137 at 143.

54 Gianfranco Baldini, “The Different Trajectories of Italian Electoral Reforms” (2011) 34:3 *West European Politics* 644.

majority bonus and preference voting, commonly called *Consultellum* (*Consulta's* law), which seemed to “bring an end to attempts to introduce majoritarian elements ... in Italian democracy.”⁵⁵ A crucial decision, with a high impact on the Italian political system, was produced by a judicial actor that seemed to be able to dominate law-making by rewriting previous parliamentary regulation.

Yet the electoral laboratory was a long way from shutting down. Matteo Renzi — at his apex as party secretary and chief executive — introduced the third Italian electoral system (law 52/2015), commonly called *Italicum*, which would assign all seats through a PR formula with a ballot system that awarded a strong majority prize to a winning party with at least 40 per cent of the votes. The new electoral law has been defined as a system that is “majority assuring but not minority-unfriendly,” since “the combination of a seat-bonus and a second round ensures that elections will always result in a clear winner.”⁵⁶ Indeed, thanks to a majority bonus, the new electoral law guaranteed an absolute majority of 340 seats to the list which reaches at least 40 per cent of votes, or to the list winning a run-off if no list wins 40 per cent at the first round. The *Italicum* was built to ensure that two candidates or the two most competitive lists may compete for election wins even in the tripolar format of the Italian party system.

Renzi's electoral law was devoted exclusively to the Chamber of Deputies. Indeed, along with the approval of the new electoral system, he prompted a radical program of constitutional reform aiming at bypassing the Italian symmetrical bicameral system. According to this reform, only the Chamber of Deputies would be entitled to express a vote of confidence in the Italian government, while the new “Senate of Autonomies” would become an indirectly elected body by virtue of the fact that lower State entities acted as coordinators between the center and the periphery. As Renzi lacked enough support in the Senate to pass the constitutional reform, he proposed an appeal to civil society through a referendum. At this stage, the Constitutional Court had accepted plaintiffs' motion from five different Italian tribunals asking to rule on the constitutionality of the electoral law. Yet in September 2016, the Court decided to postpone ruling until after the results of the December 2016 referendum, being aware of the high political relevance of its decision. Then, one month after the defeat of Renzi's personal attempt to change the Constitution via referendum, the Constitutional Court declared the *Italicum* unconstitutional.

55 Chiaramonte, *supra* note 51 at 23.

56 Roberto D'Alimonte, “The New Italian Electoral System: Majority-Assuring but Minority-Friendly” (2015) 7:3 Contemporary Italian Politics 286 at 287.

The decision on *Italicum* — ruling 35/2017 — was considered a “political catastrophe.”⁵⁷ For the second time in three years, the Parliament seemed to be stripped of its discretion and prerogatives in the definition of electoral law. First, the Court criticized the possibility that the final winner in the run-off might have obtained a modest (albeit the first or second best) share of votes in the first round; second, “the Court ruled that the freedom of candidates to run in multiple electoral districts and then decide which district to choose to represent in the event of being elected in more than one, violated the right of voters to express genuine preferences.”⁵⁸

These elements, as already underlined by ruling 1/2014, show that according to the Court’s reasoning, the representativeness principle needs more protection than the governability one. At the same time, the Constitutional Court has contorted the procedure of determining constitutionality by introducing a preventive and abstract constitutional review on electoral laws.⁵⁹ Indeed, the Constitutional Court ruled on an approved law that had never been applied — the *Italicum* — so revealing a metamorphosis of Italian constitutional justice in its concrete functioning.⁶⁰

Following ruling 35/2017, the Parliament formulated a new electoral law, called *Rosatellum*, that was a mixed proportional system for both chambers and provided that 37 per cent of the seats were allocated according to the *first past the post* mechanism and 63 per cent through the proportional system. This law regulated the 2018 general elections that gave rise, after ninety days of negotiations, to the government led by Giuseppe Conte and supported by the coalition agreement between Five Star Movement and Lega.⁶¹ The influence on the new electoral law of what the Constitutional Court had stated in judgments 1/2014 and 35/2017 was evident, particularly in the limitation of majoritarian aspects.

57 Massimo Luciani, “Bis in idem: la nuova sentenza della Corte Costituzionale sulla legge elettorale politica” (2017) 1 *Rivista Aic* 1 at 3; Staiano, *supra* note 12.

58 Massetti & Farinelli, *supra* note 54 at 149; Giulio Salerno, “Dopo l’Italicum: la giurisprudenza costituzionale come crocevia tra le istituzioni repubblicane” (2017) 37:2 *Quaderni Costituzionali* 261.

59 Catelani, *supra* note 12 at 9-10.

60 Sara Lieto & Pasquale Pasquino, “Metamorfosi della giustizia costituzionale in Italia” (2015) 35:2 *Quaderni Costituzionali* 351.

61 The Northern League is a political party born in the late 1980s to obtain greater political autonomy for Northern regions in Italy. Since 2013 the party — under the leadership of Matteo Salvini — has abandoned the claim that Italy should become a federal state and has embraced nationalism by focusing its political message on immigration, identity, and “law and order” issues. In the 2018 national election the party, without changing its official name in the party statute, was rebranded as the “League” (*Lega*).

Hence again, the 2018 Italian general elections were disciplined by an electoral law essentially written by the Constitutional Court⁶²

V. A contested space for policymaking

From the early 1990s the sudden escalation of judicial interventions on the Italian political scene has been analyzed as an effect of the deficit of representative actors, especially after the Tangentopoli scandal.⁶³ Indeed, the crisis of political institutions opened by the collapse of the First Republic (1948-1993) has created decision-making paralysis and, consequently, a fertile ground for the expansive interventions of the courts in the political arena. With these interventions, the judges emerged in the eyes of the public as the “heroes” who restored the order corrupted by politicians, in an evident clash between the magistracy and the political class.⁶⁴ In line with this hypothesis, one may ask whether the Constitutional Court’s recent forays in relevant legislative domains may find a source in both the instability of the Italian political system and the weakness of today’s party politics. Unlike in the past, however, the incapacity of political parties to secure effective legislation in Parliament now appears decisive, especially in the field of constitutive policies.

The first source for the growing influence of judicial review in policymaking is the precariousness of Italian regionalism since the 2001 constitutional reform. Indeed, the reform of Title V of the Italian Constitution, introduced in 2001, changed the distribution of competencies between national and regional governments by allocating more power on the sub-national level. Since then, frequent State-Regions litigation has occurred because of the persistence of large areas of shared competency between centre and periphery and a lack of adequate implementing legislation on the rules governing the regional system. It is no accident that in the aftermath of the reform, there has been the highest number of jurisdictional disputes

62 Pasquale Pasquino, “La Corte decide di decidere ma non coglie la natura del ballottaggio (sentenza n. 35 del 2017)” (2017) 37:2 Quaderni Costituzionali 346; Nicola Lupo, “Populismo legislativo? Continuità e discontinuità nelle tendenze della legislazione italiana” (2019) 1 Ragion Pratica 251.

63 Patrizia Pederzoli & Carlo Guarnieri “Italy: A Case of Judicial Democracy?” (2010) 49:152 Int’l Soc Sci J 253; Giuseppe Di Federico “Italy: a Peculiar Case” in C Neal Tate & Torbjon Vallinder, eds, *The Global Expansion of Judicial Power* (New York: New York University Press, 1995) 233.

64 Alessandro Pizzorno, *Il potere dei giudici: Stato democratico e controllo della virtù* [The Power of the Judges: Democratic State and Control of Virtue] (Rome & Bari: Laterza, 1998); Donatella Della Porta, “A Judges’ Revolution? Political Corruption and the Judiciary in Italy” (2001) 39:1 European J Political Research 1.

between State and Regions in the Republic's history.⁶⁵ Moreover, declarations of unconstitutionality from direct access⁶⁶ have increased (Figure 5).

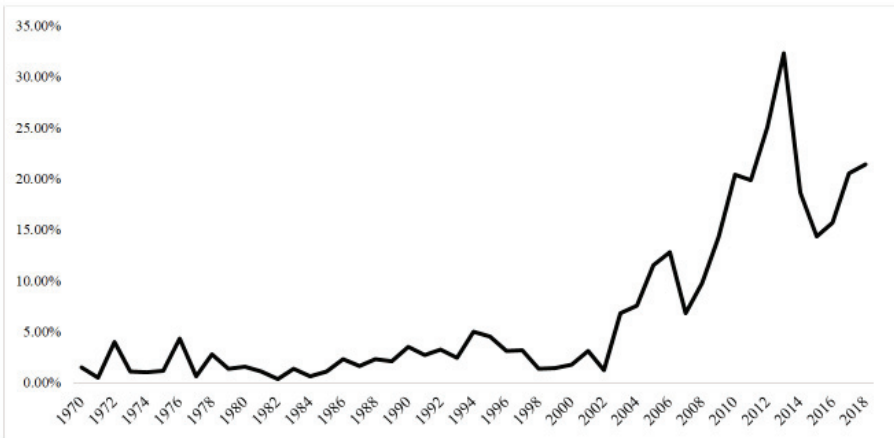


Figure 5. *Percentage of declarations of unconstitutionality by direct access on the total number of declarations of unconstitutionality (1970-2018)*

Source: Pederzoli (2008) for the time period 1970-2007; own elaboration on data provided by the Constitutional Court for the time period 2008-2018.

Indeed, we note that the figure goes from 1.4 per cent in 1998 to 21.46 per cent in 2018, with a peak of 32.3 per cent in 2013. A high-pitched difference may be noted between the years before the 2001 constitutional reform and the recent phase of implementation of the new constitutional framework. Therefore, the limits and ambiguities of the reform have produced a judicial redefinition of the territorial division of powers, and have pushed the Constitutional Court to play a significant role in the new State-regions relationships.⁶⁷

65 Ugo De Siervo, "Il regionalismo italiano fra i limiti della riforma del Titolo V e la sua mancata attuazione" (paper delivered at the Workshop Cooperazione e competizione fra Enti territoriali: modelli comunitari e disegno federale italiano, Rome, 18 June 2007) [unpublished].

66 This occurs when a centre-periphery dispute is raised. Only organs of the State can use direct access to the Constitutional Court. Direct access has an abstract character insofar it requires the Constitutional Court to rule on the constitutionality of legislation that has been adopted but not yet applied. According to Article 123, 127 of the Constitution and Article 9 of Law 131/2003, government may challenge the constitutionality of a Regional Charter before the Constitutional Court within thirty days of its publication. Moreover, government and regions can bring a direct action before the Court to challenge the constitutionality of regional statutes, national legislation, or statutes of other regions within 60 days of their publication.

67 Rullo, *supra* note 26.

Complementary reasons for the growing influence of judicial review in policymaking can be found in the context of the ongoing political transformation of the Italian Republic. Although the expansion of judicial power is the result of several general factors which can be detected in most Western societies, such as “changes in legal systems and cultures, the growth of the welfare state and, above all, the role assigned to the third power in a constitutional democracy,”⁶⁸ the role that the judiciary adopts in policymaking strongly depends on contextual political factors.⁶⁹ One of the main factors that is strongly associated with the phenomenon of the Constitutional Court’s expanding role may be discovered in the political system’s fragmentation, perhaps the most evident and enduring feature of the Italian political system. This point has been widely recognized in comparative analysis of the processes of the judicialization of politics. According to Ferejhon, “courts have more freedom of action when the political branches are too fragmented to make decisions effectively. In such cases, policy making tends to gravitate to institutions that can resolve disputes effectively.”⁷⁰ Similarly, Shapiro confirms that when “parliament is sovereign but internally so fragmented that it cannot exercise its supposedly exclusive lawmaking powers ... reviewing courts exercise those powers.”⁷¹ That appears to have been the case in Italy recently, where, despite the expected reduction in the number of political parties and the simplification of the overall party system that accompanied the advent of the so-called Second Republic, empirical evidence confirms a high level of fragmentation of the party system. As a matter of fact, in the most recent legislature, the multiplication of parliamentary groups has peaked, despite the decision to create larger parties both on the centre-right and on the centre-left at the beginning of the sixteenth legislature (2008–2013). Suffice it to say that during the seventeenth legislature, the number of parliamentary groups in the Chamber of Deputies increased from seven to eleven, and from eight to fifteen in the Senate.⁷²

68 Pederzoli & Guarnieri, *supra* note 63 at 253.

69 Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge, UK: Cambridge University Press, 2003); Julio Rios-Figueroa, “Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002” (2007) 49:1 *Latin American Politics & Society* 31.

70 John Ferejohn, “Judicializing Politics, Politicizing Law” (2002) 65:3 *Law Contemp Probl* 41 at 59.

71 Martin Shapiro, “The Mighty Problem Continues” in Diana Kapiszewski, Gordon Silverstein & Robert A Kagan, eds, *Consequential Courts: Judicial Roles in Global Perspective* (New York: Cambridge University Press, 2013) 380 at 394.

72 Thus, it comes as no surprise that the legislative performance of the Italian Parliament has shown a very low rate, with a tiny percentage of MPs’ proposals actually passed, to the point that it remains below one percent for some legislatures. See Fortunato Musella, ed, *Il governo in Italia: Profili costituzionali e dinamiche politiche* [The Government in Italy: Constitutional Profiles and Political Dynamics] (Bologna: Il Mulino, 2019); Fortunato Musella, *Il premier diviso: Italia tra pre-*

It is also worth noting that fragmentation of the parliamentary assembly goes along with frequent party-switching on the part of MPs — that is, the individual behaviour of parliamentary members who switch party affiliation during their mandate in Parliament — as a consequence of the lack of party discipline in legislative activities. The fluidity of parliamentary groups signals a declining loyalty to party and coalition because a growing number of MPs decide to change parliamentary group during the legislature. The number of MPs that have decided to switch parties, or coalitions, between elections has increased significantly: “the average number of MPs switching party increased from 21 in the decade 1983–1994, to 80 in the period 1994–2006 and then to 116 during 2006–2017, while the average number switching from one parliamentary group to another increased from 93, to 200, to 212.”⁷³ Thus, it was not a big surprise that the Parliament was not able to produce satisfactory legislation for a long time, as the case of electoral regulation has clearly shown. In such a context, the difficulty of legislative activities in a fragmented assembly has acted as a strong incentive for the Constitutional Court to take on a substitute role.

VI. The Constitutional Court between government and opposition

Constitutional Courts were born to limit the prerogative of government in defense of citizens’ rights: as instruments and actors of constitutionalism, they find their genetic origin in determining the conformity of legislation to the Constitution in order to “restrict arbitrary power and ensure a ‘limited government.’”⁷⁴ From a traditional perspective, Constitutional Courts are “the constitutional organ which secures the balance among the various powers of the State, preventing any one of them from trespassing the limits imposed by the Constitution, and “thus ensur[ing] an orderly development of public life and the observance of the constitutional rights of citizens.”⁷⁵ At the same time, they guarantee the balance of power between center and periphery, they resolve conflicts between different orders of government, and they preserve co-

sidenzialismo e parlamentarismo [The Prime Minister Divided: Italy Between Presidentialism and Parliamentarianism] (Milan: Università Bocconi, 2012).

73 Marta Regalia, “Electoral Reform as an Engine of Party System Change in Italy” (2018) 23:1 South European Society and Politics 81 at 93.

74 Giovanni Sartori, “Constitutionalism: A Preliminary Discussion” (1962) 56:4 American Political Science Rev 853 at 855.

75 Giovanni Cassandro, “The Constitutional Court of Italy” (1959) 8:1 Am J Comp L 1 at 12; Giovanni Bognetti, “Political Role of the Italian Constitutional Court” (1974) 49:5 Notre Dame L Rev 981.

hesion in federal and decentralized countries.⁷⁶ Nevertheless, the potential of the Constitutional Court to shift from a role of guardian of freedom to that of an effective policy-making body has been recognized — and warned against — in many countries since their creation, especially by those who support the sovereignty of legislative power.⁷⁷ In the reality of today's democracies, this statement appears even more reasonable. In numerous countries, constitutional courts have become increasingly prone to act as political actors by declaring legislation unconstitutional against the will of a legislative majority, or even by modifying a legislative text by adding or removing some part from it. Under specific circumstances, especially circumstances defined by political instability and/or lack of trust toward traditional politics, courts tend to assume an institutional authority to replace representative actors in relevant policy domains.

This article sheds light on the growing influence of judicial review in policymaking through the analysis of the role of the Constitutional Court in Italian politics. It enlarges the comparative research on judicial politics by recognizing the need for insightful empirical evidence and systematic data related to the role of courts in contemporary politics. It deepens the focus on the Italian case by showing how the high level of political jurisprudence in Italy developed and is sustained by a favorable political environment. Therefore, more and more issues are brought to the tables of constitutional judges who are called to resolve political questions that were discussed elsewhere (i.e. by elected officials) until recently. In this regard, the Constitutional Court in Italy has been slowly approaching those political regimes, such as the United States and Germany, that have for some time counted the powerful exercise of constitutional review as one of their most distinctive features. As Lijphart underlines, from the mid-1990s, “the court has abandoned much of its former restraint and has stepped more boldly into the spotlight.”⁷⁸ Data are very clear in showing an increasing number of judicial declarations of unconstitutionality in the last two decades, with the figure going from the 18.2 per cent on the overall number of decisions in 1994 to 38.2 per cent in 2018. Moreover, what is even more surprising is the strong propensity of the Court to intervene in policymaking through the adoption of new decisional techniques. In many of its decisions — manipulative, additive, integrative, or “creative”⁷⁹ decisions — Constitutional Court judges

76 Shapiro & Stone Sweet, *supra* note 2.

77 Maria Elisabetta De Franciscis & Rosella Zannini, “Judicial Policy-Making in Italy: The Constitutional Court” (1992) 15:3 *West European Politics* 68.

78 Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, 2nd ed, (New Haven, CT: Yale University Press, 2012) at 217.

79 Parodi, *supra* note 7.

act as positive legislators, going beyond the traditional model of judicial review operating in Italy.

Furthermore, this article investigates some reasons for the inclination of the Italian Constitutional Court to enter the field of legislation. A clear reason is provided by the political instability introduced by the reform of Title V of Constitution, which has consequently yielded a confused and conflictual relationship between the central State and the Regions. In addition to this, the linkage between political fragmentation and the judicialization of politics has been observed, so that “the more dysfunctional or deadlocked a political system is, the greater the likelihood of an expansion of judicial power.”⁸⁰ Although the role of the Constitutional Court in the political arena may depend on several factors, two elements appear as particularly relevant in Italy: the instability of the Italian polity with specific reference to State-regions relations, and the weakness of traditional representative actors such as parliamentary assemblies. These factors create the conditions for more creative instances of judicial review, and this has very often resulted — as in the case of electoral laws that has been analyzed above — in true lawmaking on the part of the Court. Empirical evidence on the expansion of the role of the Constitutional Court of Italy seems to confirm that courts are more active when parliaments and governments are ineffective or even abdicate their legislative role.⁸¹ Understanding the causal factors that lie behind the expansion of the Constitutional Court’s role will help to outline the trajectories of the entire Italian political system going forward.

Appendix A

Notes on sources and methodology

The analysis of the expansion of the Italian Constitutional Court into the political arena increases our knowledge about the changing institutional dynamics of policymaking. In this paper, we focused on judicial declarations of unconstitutionality, which represent a “canonical” means of understanding the characteristics and dimensions of the judicialization of politics. To this end, the first step has been the creation of the database of 3536 judicial decisions from 2008 to 2018, with special attention paid to declarations of unconstitutionality that provide a portrait of the Court’s invalidation of policies duly enacted by

80 Guarnieri & Pederzoli, *supra* note 2 at 161-180.

81 Lowi, *supra* note 14; Tate & Vallinder, *supra* note 2; Elisa Rebessi & Francesco Zucchini, “The Role of the Italian Constitutional Court in the Policy Agenda: Persistence and Change between the First and Second Republic” (2018) 48:3 *Italian Political Science Rev/Rivista Italiana di Scienza Politica* 289.

governments and Parliament. We collected data from Pederzoli (2008) on declarations of unconstitutionality up until 2007, and from our own elaboration from *Giurisprudenza Costituzionale 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018*, which is the official compendium published by the Research Center of the Constitutional Court. It contains all decisions of the Court — including cases in which a law had been declared unconstitutional — and provides the number and type of judgment (“manipulative” judgments being one such type). These unpublished documents of the Constitutional Court are publicly available on the official website of the Italian Constitutional Court (www.cortecostituzionale.it).

