6. How the Court Works

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6.1 A Year of Cases

Taking the year 2008 as an example, the Court dealt with 446 questions of constitutionality of laws, brought, by way of indirect appeals, by criminal, civil and administrative judges (in particular: 15 from the Supreme Court of Cassation, 199 from Courts of Appeals and criminal and civil tribunals, 10 from the Council of State, 95 from administrative regional tribunals, 3 from the Court of Auditors, 46 from tax judges, 2 from military judges, 63 from justices of the peace, 1 from an arbitration panel, 11 from judges of the Magistracy for the Enforcement of Sentences (*giudici di sorveglianza*), 1 from the Juvenile). Moreover, 106 questions of constitutionality were submitted, by way of direct appeals, by the Regions (or Autonomous Provinces) regarding national laws (42) or by the State regarding regional laws (64); 28 petitions regarding allocation of powers were brought by a Region or an Autonomous Province against the State (24) or by the State against a Region or an Autonomous Province (4); 35 petitions regarding allocation of powers were brought by one branch of the State against another (21 in the admissibility phase and 14 in the trial phase).

In the same year, the Court published 449 decisions, of which 183 were judgments (*sentenze*) and 266 were orders (*ordinanze*). Of these rulings, the Court decided 333 questions of constitutionality raised by way of indirect appeals, 64 questions of constitutionality were submitted by way of direct appeals, 13 questions regarding relations between the State and Regions and 13 allocation of powers conflicts among branches of the state. Among the number of decisions, 22 orders (*ordinanze*) regard the admissibility phase of the conflicts, 3 judgments (*sentenze*) regard the admissibility of requests for abrogative referenda and 1 regards a decision to correct material errors.

The number of questions decided is normally greater than the number of decisions issued, usually because a single decision may resolve a number of similar questions or appeals that have been consolidated. The Court's work pace is thus that of maintaining the pace of incoming petitions so as to avoid the buildup of a significant backlog.

6.2 How Is a Constitutional Decision Made?

How does the Court reach a constitutional decision, and what course does a case follow from the time it is referred to the Court to the publication of the Court's decision?

Let us take one of the many questions of constitutionality raised by a judge. The judge raising the question must notify the parties involved in the proceedings and the President of the Council of Ministers (or the President of the Region with respect to regional laws), as well as

the Presidents of the Houses of Parliament or the President of the Regional Council involved. The question is then submitted to the clerk's office (the *cancelleria*) of the Constitutional Court. This legal notice (the *ordinanza*) is published in the *Gazzetta Ufficiale*. A special office of the Court then examines the question in detail and researches legal precedents.

6.3 Who Can Participate?

The publication of the *ordinanza* in the *Gazzetta Uficiale* marks the beginning of the period in which the parties involved in the legal proceedings which gave rise to the issue, as well as the President of the Council of Ministers (or the President of the Region, in the case of a regional law), can present their arguments to the Court. The parties may file written briefs until shortly before the Court officially starts to consider the case. These briefs become part of the case file that it is distributed to all of the constitutional judges, together with the written opinion in which the ordinary judge certified the question to the Court.

The law provides that the President of the Council of Ministers can take part in the proceedings before the Court. This is not because the Government necessarily has a stake in the outcome of the underlying cases, but rather because at issue is the validity of a law which will be automatically voided if declared unconstitutional, and the Government is considered the representative of the unity of the State's body of law (as the President of the Region represents the unity of the Region's body of law).

The President of the Council is represented in the Court by the Advocate General of the State. The Advocate General typically alerts the Court to any grounds on which the constitutional challenge should be considered inadmissible, or ultimately meritless. As a rule, he generally argues in defence of the law, but on rare occasion he agrees that the law is unconstitutional, or refrains from intervening in order to avoid taking a position.

One should note that when a judge certifies a question, the Court always decides the issue, even if no party makes an appearance. The only requisite for the Court to proceed is that the certifying judge file the legal notice. The same is not true in cases where the Court's jurisdiction is invoked directly by petitions from the State or Regions, or branches of the central State. In such cases, it is essential that there be a petitioner who pursues the case.

6.4 The Constitutional Court in Session

At this point the Court can proceed with its work. On the basis of a yearlong court calendar, the President selects which cases will be discussed at each sitting, selects the constitutional judge who will report on each case (the *giudice relatore*), and stipulates the docket or case list for each sitting.

Cases may be dealt with in two ways. There can be a public hearing (*udienza pubblica*), which is a court session open to the public, where the reporting judge (*giudice relatore*) presents the question as proposed, and the lawyers representing the parties involved in the proceedings present their arguments before the united Court. At the end of the public hearing, the Court meets again, in closed session, to decide the case.

Cases can also be dealt with directly in closed session, without prior public discussion and on the basis of the written record. This simplified procedure is used when there are no parties to the proceedings before the Court (apart from a brief filed by the Advocate General of the State or counsel for the Regional President), or even when there are parties to the proceedings, if the President of the Court considers that the question can be rejected as clearly meritless or inadmissible (e.g., on the basis of prior decisions on the same subject). The final decision, however, is always taken collectively by the Court. On average, no more than one third of all cases are discussed in public hearings.

In both public hearings and closed session, the Court convenes in plenary session with fifteen members. It is never subdivided into panels composed of only a subset of the judges.

The relatively small number of judges permits the Court to work in plenary session. As a rule, this enables the Court's case law to develop more coherently than if it were subdivided into panels.

6.5 A Rapporteur for Every Case

The President appoints a judge as rapporteur or *giudice relatore* for each case from among the constitutional judges, normally excluding the President himself. Thus, in every hearing and every closed session, different judges alternate as rapporteurs for the discussion of the various cases being examined.

There are no fixed rules for the criteria used by the President to select the rapporteur apart from the need to distribute the work evenly among all the judges, taking into account the seriousness of each case. In practice, the President generally assigns a case to the judge who has already acted as rapporteur on cases dealing with similar problems, and who has relevant training, previous experience or specialisation (in fields such as criminal law, criminal procedure, civil law, labour law, tax law, or administrative law). These are, of course, only rough criteria, since cases may pose similar issues deriving from the application of constitutional principles even if they arise in different sectors of the law. Furthermore, there are fields of law where constitutional questions are raised quite frequently, and which all judges must deal with at some point. For more complex and delicate cases, the choice of rapporteur may be guided by more specific criteria of the President's own choosing.

The choice of rapporteur is important because it is this judge who will, after having examined all aspects of the case thoroughly, propose how to frame and resolve the question. This choice does not necessarily determine the outcome of the case, since the opinion of the rapporteur is not always adopted as that of the Court.

Moreover, the rapporteur is not the only one to know the question in advance of the hearing and to have studied it in detail. The job of preparing the material for each case to be discussed falls to the assistant of the reporting judge, who assembles a research packet including the legal provisions at issue, relevant precedents of the Court, significant opinions by ordinary judges, and useful academic writings. The packet, which may include several volumes each including hundreds of pages, is distributed to all the judges, allowing each of them to prepare for the case in detail.

In more important and complex cases, the material distributed to the judges may be supplemented by research on the legislation and case law of countries similar to Italy, or of international courts, where similar questions have been dealt with. This is because constitutional principles embedded in different legal systems are often based on common ideas or approaches (a sort of constitutional common law), and thus the problems of constitutionality that arise in different countries may be similar. The Italian Constitutional Court can draw valuable suggestions for its own decisions from the experience of other constitutional tribunals.

6.6 Public Hearings

The Court meets in public session in a special room of the *Consulta*, normally every two weeks, on Tuesday morning at 9:30 a.m. Behind the horseshoe-shaped bench sit the judges with the President at the centre, with the most senior members near the centre and those nominated more recently towards the wings. At a separate bench, to the side, sits the head of the clerk's office (*canceliere*), in a black robe. It is his task to draft the written record of the hearing. This does not contain the content of the individual oral statements, except where this is expressly requested, but simply takes note of who makes statements. Next to the clerk of the court sits the court usher (*messo*) dressed in a red cape, who calls the cases in the order decided by the President.

Facing the judges' bench is the bench of the lawyers (also dressed in black robes) who appear to address the Court. They must be lawyers admitted to appear before the "higher jurisdictions," that is, with at least twelve years' legal experience. They speak in the order specified by the President, after the rapporteur judge presents his report. As a rule, the judges only listen and do not pose questions to the lawyers, who present their arguments without interruption. In cases in which an ordinary judge has certified a constitutional question, the Advocate General of the State representing the President of the Council speaks last. Objections or rebuttal arguments are not normally allowed.

Behind the lawyers sit journalists and the assistants of the constitutional judges. Behind them there is seating for the public, mainly groups of university or high school students, who get a close-up view of how the Court works. Sometimes groups of those individuals with a stake in one of the cases being discussed attend the public hearing.

6.7 Closed Session

The judges deliberate on how to resolve the cases before them in closed session (*camera di consiglio*), and in total secrecy. The Court normally meets in closed session from 9:30 a.m. to 1:00 p.m. and from 4:00 p.m. to 7:00 p.m., every other week, in conjunction with its public hearings.

It is here that the Court, under the direction of the President, debates the issues to be resolved, frames possible solutions, reaches decisions, and approves opinions. If one considers that in a year there are approximately 18 weeks of closed sessions, from Monday afternoon to Friday, and for every day of sittings the judges meet for up to 6 or 7 hours, one can calculate the amount of time that they spend together in discussion every year!

One can therefore understand the sort of longstanding rapport that grows up among the fifteen constitutional judges, in an environment the rites and rules of which are reminiscent of those of a monastery. After several months, the level of reciprocal understanding (of their respective ideas and of their ways of thinking) tends to become rather intense. Since each judge serves for nine years, one can appreciate that the experience of working in the Constitutional Court leaves a deep impression on the judges, converting the group of fifteen into something more than the sum of its parts: the Court becomes virtually a person in its own right, made up of fifteen people.

During this week of group meetings, the judges normally deal first with the cases discussed in open court, turning next to those dealt with in closed session.

Discussion may last no more than a few minutes in cases where the rapporteur proposes a solution that does not meet with objections, and is therefore immediately adopted by the Court. Or it may last entire days, depending on the complexity or controversial nature of the question at issue.

The judges work with the record and the research material before them, but it must be emphasised that the discussion is not based on a draft opinion already prepared by the rapporteur (as occurs in other Courts). Debate begins with a preliminary statement made by the rapporteur judge, which highlights any possible problems regarding the threshold admissibility of the question at issue. The report may end with a detailed proposal, or with a list of various possible solutions, depending on the choice of the rapporteur.

At this point the other judges may join in the discussion, starting with the question of admissibility and then turning to the merits of the case. If the question is of relatively minor importance, it is likely that only a few judges will speak; otherwise, all will offer their thoughts. In the case of more formal discussion, the judges speak in order of age, starting with the youngest, while the President speaks last. The discussion can continue, if requested, with further observations, objections, and requests for clarification. A judge may request that the discussion be postponed until a later date, or there may be a need to acquire new material in order to examine the matter in more depth. The discussion does not necessarily follow a fixed plan. Much depends on the requests made by the judges, as well as the President's direction of the debate, although he often defers to the desires of his colleagues. The rapporteur can reply to other judges' comments, or wait until the end of the hearing to conclude the debate and offer a final proposal (which does not always coincide with the proposal he presented at the beginning). It is here, above all, that one can measure the efficacy and utility of the group

discussion, which can generate objections to the case as presented by the rapporteur as well as suggestions for different grounds on which to base the decision.

One must consider that the final decision of the Court consists not only of the formal judgement itself (such as a declaration of unconstitutionality, a declaration that the certified question is unfounded, or declarations that the question itself is inadmissible), but also, and sometimes above all, of the grounds for the decision spelled out in the opinion of the Court. There may be agreement on the ultimate result, but dissent with respect to the grounds for that result. The latter are important primarily because they constitute – more than the judgement itself – the nucleus of the precedents referred to in cases that the Court is called to decide in the same or similar matters in the future; and also because a single judgment might be supported by reasoning that produces different effects. For example, a decision that rejects a constitutional challenge on the grounds that the impugned provision is constitutional is very different from one that declares the same question unfounded because the challenged law should be interpreted in a different way from that indicated by the judge. Therefore, settling on the grounds for a decision is sometimes more important than deciding whether or not the law is unconstitutional. This may account for the determined and protracted nature of some discussions in closed session.

6.8 Majority Decisions?

Like any other group of thinking heads, the Constitutional Court can find itself divided. With fifteen judges, some dissent is likely, despite the fact that all the judges rely on the same Constitution and that their long hours of collaboration favor the formation of common views. Accordingly, the Court, like other collegial bodies, must arrive at decisions by majority vote. A formal vote is held only when there is a lack of unanimity (for example, in support of the rapporteur's proposed resolution) or even a clear majority of similar viewpoints, or if a judge requests such a vote. The President calls the vote, thus bringing deliberations to a close.

The practices of the Court may vary depending on the styles and attitudes of the President and the other judges, but the basic goal is to achieve the broadest possible consensus among the judges. For this reason, discussions are sometimes extended to look for compromise solutions, or at least solutions that avoid sharp divisions within the Court. The compromise can often consist of a decision that does not resolve the question definitively, for example by declaring a certified question inadmissible rather than rejecting it on the merits. Less dramatically, the Court might simply narrow the sweep of the reasoning in its opinion. This practice is probably driven in part by the current lack of a vehicle, such as dissenting opinions which are published in Germany and Spain, for judges to register their disagreement with the majority view.

The general practice of the Court is to accept or reject the rapporteur's final proposal. Sometimes, if a preliminary question emerges (e.g., regarding the admissibility of the certified question) the Court first takes a vote on the rapporteur's proposal regarding this issue and then, if necessary, on the rapporteur's proposal on the merits of the case. If the rapporteur proposes a series of options, ranking them in order of preference, the Court considers these proposals in the order suggested by the rapporteur. This agenda-setting power is perhaps the most

significant power in the hands of the rapporteur, whose personality can at times contribute to the formation of a majority in support of his proposal.

All judges present during the deliberations must vote for or against any proposal put to the vote; they may not abstain. Furthermore, all the judges present at the beginning of the discussion on a case, either at the public hearing or in closed session, must take part in deliberations until the end and cannot, as is often the case in political assemblies, "leave the room" to effectively abstain from voting. Finally, the composition of the Court cannot change during the discussion of a case.

If the Court is made up of an even number of judges and the vote is evenly split, then the outcome is determined by the vote of the President (or whoever presides over the sitting). This is the only occasion when the President exercises any power greater than that of the other judges. In all other circumstances, his vote is worth the same as that of the others. His influence naturally derives from his authority vis-à-vis his colleagues, but there are no internal hierarchies within the Court, only varying personalities and opinions.

6.9 Drafting the Judgement of the Court

The proceedings do not come to an end with the decision of the Court or vote of the Court in its closed conference. The judgement only becomes final when it has been drafted, approved, and signed, and the original has been filed with the clerk's office.

The phase following the decision is thus very important and is where the grounds on which the judgement is based take shape. It can last anywhere from two weeks to several months, though the average is two months.

Normally the judge who has served as the rapporteur on a case is responsible for drafting the opinion of the Court, and is known as the giudice redattore, or author of the opinion. Not infrequently, the rapporteur may be in the minority, but the general practice is nevertheless for him to draft the Court's opinion along the lines of the majority view. On the rare occasions when the dissenting rapporteur prefers not to write the Court's opinion, the President entrusts the task to another judge from among the majority, unless he chooses to draft it himself.

6.10 Reading the Judgement

If the Court decides to dismiss a question as "manifestly inadmissible" as a preliminary matter, or to reject it as "manifestly unfounded" on the merits, the author of the opinion drafts a brief order known as an *ordinanza* which is circulated among the members of the Court. If there are no objections, in writing or otherwise, within several days of circulation of the draft, the order is signed by the President and the author of the opinion, and filed with the clerk's office, thus

becoming final and public. Until a final text is reached, however, any judge is entitled to offer comments and propose changes to the opinion.

If the decision of the Court reaches the merits and therefore is memorialized in a detailed opinion, known as a *sentenza*, the author distributes his draft to all the constitutional judges. The judges later review the draft opinion together during a chamber conference. The author reads aloud the portion of the opinion that contains the legal analysis for the Court's decision (not the background section that sets forth the facts and the parties' arguments).

At the end of the reading, the judges (each of whom has a written copy of the text) voice their comments or objections, beginning with the general structure of the opinion, and then systematically work through each page of the draft. They discuss whether to change, add, or delete arguments, sentences, and even single words, until agreement is reached, or at least an opinion is finalized at least to the satisfaction of a majority. In cases where the majority does not agree with the draft, the author may be asked to submit another draft, or to change or add some portion. In such circumstances, the reading is postponed until a new draft is circulated.

It is therefore clear that the judges collaborate closely and engage in wide-ranging discussions in the course of drafting opinions. Even those judges who are in the minority may ask that the published opinion reflect their concerns to a certain extent. Some opinions are true compromises, while others may simply be free of any statements that may engender particular controversy among the judges. This can sometimes lead–as critical observers are quick to note–to opinions that are less than clear or more laconic, with reasoning that is more elusive than if a broader consensus had been reached.

It is important to realize that each published opinion of the Court is the product of a collaborative effort of all the judges, and not simply the opinion of an individual author. Indeed, the author may have dissented from the majority view embodied in the final opinion. In drafting the opinion, the reporting judge tries to reflect the opinions of the other judges and to encapsulate what emerged from the discussions of the Court. Commentators often err in personalizing the opinions of the Court, by crediting (or blaming) the author with their content, as if the opinions and arguments presented in them were his alone, rather than those of the Court as a whole.

Naturally, given that a single judge writes the initial draft, it retains his stylistic imprint, and the structure of its reasoning will tend to reflect the one he proposed (which, in turn, is always based on the collective will of the Court). Yet it is fairly common for the final text to contain less than what the author originally proposed, because points with which other judges disagreed may have been discarded, or because additional passages, reasoning, or nuances of argument that the author had not originally included, but which arose in the course of group deliberations.

This way of proceeding explains why the Court may spend more time debating the content of its opinion than debating how the case should be decided. In constitutional cases, the court's reasoning may be as essential as the result it reaches.

This two-step decision making process, which involves debate on both the ultimate result to be reached and the written opinion to be issued, means that the final decision of the Court exists, juridically, only after the final opinion is adopted, signed and filed with the clerk's office of the Court. Until that time, the Court can revisit its initial decision, altering or even

reversing it if, in later discussions, it becomes clear that the decision was incorrect. In drafting the opinion, the author may realise that there are logical or legal difficulties with the decision of the Court, or objections which were not initially taken into account. In such cases he can propose that the decision be amended. 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. If the Court were less rigid, the decision making process might be never-ending.

6.11 Dissenting Opinions

Constitutional Courts or judicial bodies in other countries allow for their members who dissent from the result reached in a given case, or even only on the grounds for that result, to draft and publish their own written dissenting or concurring opinions together with the decision of the Court. In Anglo-Saxon countries this is a result of a tradition whereby the legal decisions of collegial bodies consisted not of a unitary text, but are the sum of individual opinions drafted by each judge. In countries with other traditions, opinions or votes which differ from those of the majority also find room for expression. The jurisprudence of these courts thus includes not only the view of the majority, but also dissenting or other views. With the passage of time, a majority of the Court may eventually adopt the views expressed in an earlier dissenting opinion, allowing for the gradual evolution of case law.

To date, such a practice has not been permitted in Italy, where the traditional ideal of a unified and impersonal judicial opinion still prevails–even if in practice the Court's opinions are the product of a collaborative decision-making process in which not all judges necessarily agree with the majority view. Moreover, strict secrecy surrounds the Court's deliberations, including differences of opinion that are voiced by judges, proposals made but rejected, and legal arguments not contained in the final opinion. When the newspapers report that the Court was split along certain lines, or that a decision was made by a particular majority, they are doing so solely on the basis of leaks or pure supposition. Officially, one cannot know whether a decision was made unanimously or by majority vote, by how great a majority, or how individual judges voted.

For some time there has been discussion, in both academic and legislative circles, and within the Court itself, about whether or not it would be appropriate to introduce the practice of publishing dissenting opinions, and of ways in which this could be done. There is disagreement about the wisdom of such an innovation.

One argument for allowing dissenting opinions is that they would encourage clearer majority opinions, because they would need to respond directly to the arguments presented by the dissenters. Moreover, criticism of the decisions of the Court might move away from simplistic claims that the judges had simply prejudged the issues, and towards reasoned debates focusing on substantive legal arguments. This would dispel the notion that a group of judges may have prevailed based solely on their force of numbers, or based on preconceived ideas.

On the other hand, some fear that dissenting opinions would lead to an excessive "personalisation" of constitutional judgements, to the exposure of individual judges to external pressures, as well as to undermining the authority of the decisions of the Court and a reduced incentive for judges to seek the broadest possible consensus for the decisions of the Court.