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Dissenting Opinions between Collegiality and Pluralism

The Italian Constitutional Court and the U.S. Supreme Court

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"What is right for one system may not be right for another. In civil-law systems, the nameless, stylized, judgment, and the disallowance of dissent are thought to foster the public perception of the law as dependably stable and secure. The common-law tradition, on the other hand, prizes the independence of the individual judge to speak in her or his own voice and the transparency of the judicial process."

Ruth Bader Ginsburg, "The Role of Dissenting Opinions" *Minn. L. Rev.* (2010), 3.

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Chapter I
The Italian Model of Constitutional Adjudication and the Debate on Dissenting Opinions

1. Introduction.

This work is focused on the delicate theme of judicial dissent within the realm of constitutional adjudication, more specifically, with regard to the particular case of the Italian Constitutional Court (ItCC). It has to be considered that the Constitutional Court does not admit any form of externalised judicial dissent, and this makes of it an extremely useful object to be analysed in the perspective of the debate between the reasons for secrecy and the ones for externalisation of dissenting opinions. However, the ultimate purpose of this analysis is to explore the approach of the Italian Constitutional Court to judicial dissent, utilising both the rich literature originated from Italian debate on the introduction of dissenting opinions and the comparison with a radically different institution such as the US Supreme Court (SCOTUS). Indeed, the comparative elements are extremely useful to highlight the close connection between the absence of externalised dissent in the Italian Constitutional Court and the peculiar nature of the Court itself.

The argumentation is articulated in three chapters. The first chapter is devoted to the reconstruction of the scholarly, judicial and public debate on the introduction of externalised dissent within the Court which has taken place in the decades following the framing of the 1948 Republican Constitution. The purpose of this reconstruction is to review diachronically the most relevant pieces of literature, theories and approaches that have emerged from the various phases of the still ongoing debate.

The second chapter is oriented towards the comparison between the Italian Constitutional Court and the US Supreme Court (SCOTUS), with the latter representing the opposite side of the spectrum concerning the externalisation of dissent. Beyond comparing the different experiences of the

two courts, the second chapter also explores the decisive influence that selected elements, practices and characteristics have on the secrecy or externalisation of internal dissent. Examples of such elements include the role of different nomination mechanisms, the relevance given to the individuality of judges and, most importantly, the powerful implications of concepts such as collegiality on one side, and pluralism on the other.

In the third and final chapter, after a critical reflection exploring the decisive role of historical circumstances and political ideologies on the two courts' divergent approaches towards judicial dissent, the findings and implications of the first two chapters are discussed and evaluated in a future perspective.

2. The Constitution and the Post-War Phase between Consolidation and Reform.

A complete (even if synthetic) historical reconstruction of the Italian debate on dissenting opinions has to consider the framing of the 1948 Republican Constitution as a privileged starting point for research. However, as a second consideration it must be said that the near totality of the existing materials (particularly the ones regarding the embryonic phases of the debate) is written in Italian. This, unfortunately, shows the lack of studies and publications oriented towards an international audience, especially when analysing the connection between the nature of the Italian Constitutional Court and the framing of the Constitution in the perspective of judicial dissent.

The origins of the debate can be traced back to the earliest phases of post-war constitutional framing thanks to the authoritative volume edited by Costantino Mortati in 1964[1]. In the preface of the volume, Mortati himself wrote about a rejected proposal which tended to the introduction of

[1] Costantino Mortati, ed., *Le opinioni dissenzienti dei giudici costituzionali ed internazionali* (Milano: Giuffrè, 1964).

externalised dissent in the (not yet established) Constitutional Court[2]. Two are the phases mentioned by Mortati in the preface: the first regarding the discussion of the *constitutional project*[3] and the second explicitly referring to the debate within the Chamber of Deputies on the constitutional law n. 87 of March the 11th, 1953[4]. Mortati was highly critical of the motivations for rejection expressed within the Chamber of Deputies: firstly, with regard to the *extraneity of the publicity of votes to the Italian legal tradition* and secondly to the risk of political partisanship of judgements.

To the second motivation for rejection, Mortati replied with the relatively minor (one third) proportion of judges elected by parliament with respect to the two thirds nominated by *super partes* organs such as the President of the Republic or the highest echelons of the ordinary judiciary[5]. He also expressed his confidence in the guarantees for judicial independence present in article 135 of the Constitution, such as the ban on the re-election of judges[6]. Mortati was adamantly confident of the moral and scientific exceptional qualities that constitutional judges should have had. His reading was much closer to common law interpretations of judicial legitimacy[7], grounded in the adherence to popular sentiment of judgments and in the social conscience and moral qualities of judges. Particularly meaningful is the passage in which the true foundation of the authoritativeness of the Court is explicitly said to derive from its close adherence to popular sentiment[8].

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[2] Costantino Mortati, preface to *Le opinioni dissenzienti dei giudici costituzionali ed internazionali*, ed. Costantino Mortati (Milano: Giuffrè, 1964), V. "In sede di discussione del progetto sulla costituzione e sul funzionamento della Corte costituzionale venne respinta una proposta tendente all'adozione dell'istituto".

[3] *"Progetto sulla Costituzione"* in the original text.

[4] Relation of the special commission of the Chamber of Deputies on the legislative proposal "Norme sulla costituzione ed il funzionamento della Corte costituzionale", in *Camera dei Deputati. I Legislatura, Documenti, disegni di legge e relazioni*, A.P. n. 469, 34.

[5] The core influence of nomination mechanisms will be treated more in depth during the second chapter.

[6] Vittorio Falzone, Filippo Palermo, and Francesco Cosentino, *La Costituzione della Repubblica italiana illustrata con i lavori preparatori* (Roma: Colombo, 1954), 422-423.

[7] The diverging interpretations of what constitutes judicial legitimacy in the context of legal systems will be also discussed in the second chapter.

[8] *"…da una stretta adesione al sentimento popolare"* in the original text.

The critique to the first motivation came later than the one to the second in the structure of the preface. The alleged extraneity to the Italian legal tradition of externalised judicial dissent is defined by Mortati as historically unfounded. He redirected the reader to Vittorio Denti's essay on the practice of externalised judicial dissent in several courts of pre-unification Italian states[9] contained in the same volume[10], defining the adoption of dissenting opinions within the Constitutional Court a return to the origins rather than an abrupt change[11]. Mortati's analysis and critique to the initial rejection of externalised dissent is extraordinarily important in light of the continuation of the still unfinished debate for two reasons.

The first depends on the crucial role covered by Mortati himself not only in the study and interpretation of the Constitution, but in its framing. Not only member of the Constituent Assembly, he also had been, most importantly, active part of the *Commission of the 75*, instituted with the task of drafting the initial project for a republican constitution, and of the *Committee of the 18*[12], responsible for the coordination of the three subgroups of the former[13]. The exceptionally active role of the Committee of the 18 (or Redaction Committee) cannot be underestimated. For example, according to Leopoldo Elia, it became much more of a political organ than a mere technical commission, probably representing *the most active and decisive element in the process of constitutional framing*. Notwithstanding its decisiveness, the Committee of the 18 worked in a regime of non-publicity and secrecy[14]. For these reasons,

[9] Vittorio Denti, "Per il ritorno al 'voto di scissura' nelle decisioni giudiziarie," in *Le opinioni dissenzienti dei giudici costituzionali ed internazionali*, ed. Costantino Mortati (Milano: Giuffrè, 1964), 1-20.

[10] For more historical details on the same topic see also: Gino Gorla, "Le opinioni non segrete dei giudici nelle tradizioni dell'Italia preunitaria," *Il Foro Italiano* 105 (1982), 97-104 and recently: Maria Gigliola di Renzo Villata, "Collegialità/motivazione/'voto di scissura': quali le ragioni storiche della nostra 'multiforme' tradizione?," in *The Dissenting Opinion* ed. Nicolò Zanon and Giada Ragone (Milano: Giuffrè Francis Lefebvre, 2019), 41-87.

[11] Mortati, Prefazione, cit., IX.

[12] For a detailed account of their structure and composition, see also: Falzone et al., *La Costituzione*, cit.,11-15.

[13] Livio Paladin, *Per una storia costituzionale dell'Italia repubblicana* (Bologna: Il Mulino, 2004), 46-49.

[14] Leopoldo Elia, "La commissione dei 75, il dibattito costituzionale e l'elaborazione dello schema di costituzione," *Il parlamento italiano 1861-1988* XIV (1989), 128.

Mortati's account and critique of what happened during the framing of the constitutional project, in confidentiality and separately from the *plenum* of the Constituent Assembly, is of vital importance. Furthermore, Mortati was also member of the Constitutional Court from 1960 to 1972, and vice-president in the latest period.

The second reason is based on the decisive impact of his early critique and involvement in constitutional framing on the rest of the Italian debate on dissenting opinions. It can be said that, together with other authors that will be mentioned later, several of his arguments in favour of externalised dissent heavily conditioned the debate over the following decades. Examples of this are the coherence and clarity of constitutional judgements, the dynamism given by dissenting opinions to an indivisible constitutional court (with respect to structurally more flexible ordinary courts) and the evolutionary character of constitutions and of their interpretation[15]. Notwithstanding the contradictory nature of his closeness to *living* and *popular* constitutionalism and his advocacy for the strictly jurisdictional nature of the Court highlighted by Di Martino[16], Mortati's critique still represents the first cornerstone of the debate on externalised dissent in Italy.

Together with Mortati, the most relevant voices in the post-war phase of the debate are scholars such as Piero Calamandrei, Mauro Cappelletti, Giuliano Amato, Vittorio Denti[17], Paolo Barile[18] Francesco Carnelutti[19] and Virgilio

[15] Mortati, Prefazione, cit., IV-X. Especially relevant on this point is the connection between Mortati's interpretation and the theories of *living constitution* emerged in the United States from the 1920's onwards.

[16] Alessandra Di Martino, *Le opinioni dissenzienti dei giudici costituzionali: uno studio comparativo* (Napoli: Jovene, 2016), 331.

[17] Vittorio Denti, "La Corte costituzionale e la collegialità della motivazione," *Riv. Dir. Proc.* (1961), 434-436; Vittorio Denti, "Risposta al questionario: Per un miglioramento della comprensione e della funzionalità della giurisprudenza costituzionale", *Dem. Dir.* IV (1963), 514-517; Denti, "Per il ritorno," cit.,12-13. In these essays Denti highlighted the variegated pre-unification Italian experiences with regard to the *voto di scissura*, contrasting it with the imported French-Napoleonic bureaucratised model and the 1865 post-unification Civil Code, and encouraged a return to the *personalisation* of judgments.

[18] Paolo Barile. "Risposta al questionario: Per un miglioramento della comprensione e della funzionalità della giurisprudenza costituzionale," *Dem. Dir.* IV (1963), 515-518. In his essay included in *Democrazia e Diritto* Barile, similarly to others, emphasised the potentially

Andrioli[20]. Noteworthy are also the chronologically earliest academic publications on the theme of dissenting opinions by Vaccaro and Giordano[21], and the concrete attempt of introduction carried out by judge Bracci during the drafting of the Integrative Norms for the Court in 1956[22]. For what concerns Calamandrei, who also had been member of the Constituent Assembly, of the Commission and of the Committee, dissenting opinions were strictly connected with judicial responsibility and democratic accountability, running counter to the emergence of intellectual laziness, conformism and *bureaucratic indifference*[23]. Cappelletti underlined the correlation between publicity of dissent and liberal-democratic ideologies on one side, and between secrecy and illiberal regimes-ideologies on the other[24]. With regard to Amato[25], he emphasised the peculiar nature of constitutional interpretation with respect to the interpretation of codes and statute law. The former subject to teleological ad evolutionary interpretations, strong interpretative contrasts and political influences, while the latter tending towards logical deduction and textualism.

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evolutionary function of externalised and personalised dissent. Also his interpretation seemed very close to a *living constitution* type of theoretical approach.

[19] Francesco Carnelutti, "Risposta al questionario: Per un miglioramento della comprensione e della funzionalità della giurisprudenza costituzionale," *Dem. Dir.* IV (1963), 514-515. Carnelutti's interesting proposal brought to the extreme consequences other more moderate interpretations of externalised dissent: following the Swiss model, he retained any form of secrecy to be useless in the context of constitutional adjudication. This proposal remains particularly interesting, since it has not been put forward in the debate anymore by similarly authoritative voices.

[20] Virgilio Andrioli, "Motivazione collegiale e dissensi dei giudici di minoranza," *Dem. Dir.* IV (1963), 512-513 published again in Virgilio Andrioli, *Studi sulla giustizia costituzionale* (Milano: Giuffrè, 1992), 30-35.

[21] Renato Giordano, "La motivazione della sentenza e l'istituto del dissenso nella pratica della Corte Suprema degli Stati Uniti," *Rass. Dir. Publ.* II (1950), 153; Roberto Vaccaro, "Dissent e concurrences nella prassi della Suprema Corte degli Stati Uniti," *Foro Pad.* IV (1951), 9. It is interesting, in particular, to see Vaccaro's reflection on the origins and evolution of externalised dissent in the American context from the Marshall Court onwards, and Giordano's analysis of the question of partisan appointments in the Supreme Court in relation to the principle of constitutional check and balances. Curiously enough, these two essays are the only comparative effort antecedent to the establishment of the Italian Constitutional Court.

[22] Barile, "Risposta al questionario," cit.,515.

[23] Piero Calamandrei, *Elogio dei giudici scritto da un avvocato*, 5th ed. (Firenze: Ponte alle Grazie, 1989). 267-273.

[24] Mauro Cappelletti, "Ideologie nel diritto processuale," *Riv. Tr. Dir. e Proc. Civ.* (1962), 214-215.

[25] At the time only 26 years old, and currently member of the Constitutional Court since 2013.

Amato also recognised the function of catalyst for public opinion that externalised dissent covered in the experience of the US Supreme Court, identifying the practice with an exercise of democratic maturity and with a deeply rooted social conscience, while rejecting or minimising the frequent accusations to the Court of excessive partisanship[26].

Eventually, it can be said that the general orientation in this historical phase had been the one of critique to the collegial *status quo*, with a diffused positive attitude towards the introduction of dissenting opinions prevailing in the context of academia. The most interesting theories and proposals with regard to introduction have probably been represented by the theses of completely public deliberation[27], anonymous dissenting opinions or with a quorum of judges to be allowed[28], and the adoption of dissenting opinions only after a necessary period of consolidation for the newly established Court[29].

3. The Phase of Renewed Interest.

The decades that followed the consolidation of the Constitutional Court saw the emergence of a more variegated spectrum of positions in the scholarly and political debate. Gustavo Zagrebelsky[30], Stefano Rodotà[31] and Alessandro

[26] Giuliano Amato, "Risposta al questionario: Per un miglioramento della comprensione e della funzionalità della giurisprudenza costituzionale," *Dem. Dir*. IV (1963), 108-109; Giuliano Amato, "Osservazioni sulla "dissenting opinion," in *Le opinioni dissenzienti dei giudici costituzionali ed internazionali*, ed. Costantino Mortati (Milano: Giuffrè, 1964), 24-26.

[27] Carnelutti, "Risposta al questionario," cit.,514-515.

[28] Mortati, Prefazione, cit., VI-X. As Chief Justice Marshall, who favoured majority over *seriatim* opinions in the early phases in the history of the US Supreme Court, Mortati understood that more fragmentation (the presence of externalised dissent) could have made the consolidation of the Court more difficult. On the contrary, he proposed of introducing dissenting opinions after the Constitutional Court had enough gained social prestige and institutional solidity.

[29] Costantino Mortati, "Considerazioni sul problema dell'introduzione della nelle pronunce delle Corte costituzionale italiana," in *La giustizia costituzionale* (Firenze: Vallecchi, 1966), 170-172.

[30] Gustavo Zagrebelsky, "Corte costituzionale e principio d'uguaglianza," in *La Corte costituzionale tra norma giuridica e realtà sociale*, ed. Nicola Occhiocupo (Bologna: Il Mulino, 1978), 119-120.

[31] Stefano Rodotà, "La Corte, la politica, l'organizzazione sociale," in *Corte costituzionale e sviluppo della forma di governo in Italia*, ed. Paolo Barile, Enzo Cheli and Stefano Grassi (Bologna: Il Mulino, 1982), 508-509.

Pizzorusso[32] assessed positively the introduction of dissenting opinions, while more critical voices (even if almost never entirely contrary to forms of externalised dissent) came from Aldo Sandulli[33], Leopoldo Elia[34] and Giuseppe Branca[35].

Zagrebelsky's arguments seemed to echoe the ones of Calamandrei on judicial and institutional responsibility, and the ones of Mortati on the connection between the dynamism of constitutional justice and the *political culture* of the country[36], while Rodotà critiqued several of the Court's judgments as excessively opaque in style and scarcely rational in motivations. Furthermore, in his interpretation, externalised dissenting opinions could have strengthened, instead of weakening, the independence of the Court as an institution and of individual judges[37], emphasising the correlation between secrecy and the temptations of partisanship. He also critiqued the role of pre-eminence that the President of the Court had assumed, at least with regard to public opinion, in the interpretation of judgments[38]. Rodotà's case is particularly interesting, since his reflections on the theme ultimately gave way to a concrete legislative proposal in favour of the introduction of externalised dissent. As a member of the Chamber of Deputies, Rodotà presented a legislative proposal for the introduction of public and motivated dissenting or

[32]Alessandro Pizzorusso, "Intervento," in *La Corte costituzionale tra norma giuridica e realtà sociale*, ed. Nicola Occhiocupo (Bologna: Il Mulino, 1978), 138.

[33] Aldo Sandulli, "Intervento," in *La giustizia costituzionale* (Firenze: Vallecchi, 1966), 365-366; Aldo Sandulli, "Voto segreto o palese dei giudici costituzionali," *Corriere Della Sera*, May 8, 1973.

[34] Leopoldo Elia, "La Corte nel quadro dei poteri costituzionali," in *corte costituzionale e sviluppo della forma di governo in Italia*, ed. Paolo Barile, Enzo Cheli and Stefano Grassi (Bologna: Il Mulino, 1982), 522-523.

[35] Giuseppe Branca, *Collegialità nei giudizi della Corte costituzionale* (Padova: Cedam, 1970), 7-11.

[36] Expression which seems to recall Mortati's appeal to the adherence of constitutionalism to *popular sentiment*.

[37] The overtones of the concept of independence will be treated more in depth in the second chapter in light of the comparison with the US Supreme Court.

[38] Stefano Rodotà, "L'opinione dissenziente dei giudici costituzionali," *Pol. Dir.* (1979), 637-638. Rodotà, "La Corte," cit.,540. More on the function of the President of the Court will be said in the second chapter in light of the comparison with the Chief Justice of the US Supreme Court.

concurring opinions[39]. The proposal was not successful, but the remained one of the most relevant concrete attempts to challenge the status quo of collegial secrecy.

Another relevant legislative proposal had been registered nearly ten years before, in 1973, presented by Francesco De Martino to the Chamber of Deputies, but suddenly retired without clear motivations[40]. Rodotà had also been a protagonist in the debate preceding the retired proposal, together with Aldo Sandulli and Enzo Cheli. It is interesting to notice how the debate between them occurred in a relatively short period of time (between March and May of 1973) and via newspaper articles[41], instead through the more formal channels of academic publications and seminars. The positions expressed by Sandulli, as already mentioned, were, also in this context, significantly more critical, underlining the potentially negative implications and repercussions of externalised dissent on the political and institutional equilibria of the Republic[42]. Other arguments against introduction were represented by the potential fragmentation and weakening of the Court's authoritativeness, by the necessity of differentiating the Court from the political arena[43] and even by the fact that, up to that moment, the model followed by the Court had proved to be adequately efficient[44].

As already mentioned, another scholar who did not reject entirely the possibility of adopting dissenting opinions, even if extremely sceptical towards the success of adoption, was Giuseppe Branca. His main contribution to the debate on dissenting opinions was represented by a lecture delivered in 1970 on the theme of collegiality, then published. According to Branca's

[39] Legislative proposal presented by deputy Rodotà on February 6, 1981: A.C. 2329 "Menzione delle opinioni difformi dei giudici nelle pronunce della Corte costituzionale".

[40] Legislative proposal presented by deputy De Martino [et al.] on July 9, 1973: "Modificazioni dell'articolo 135 della Costituzione e disposizioni sulla Corte costituzionale".

[41] Stefano Rodotà, "Abolire il segreto sul voto dei giudici," *Il Giorno*, March 31, 1973; Enzo Cheli, "Render noti i motivi del dissenso in giudizio," *Corriere Della Sera*, April 8, 1973; Sandulli, "Voto segreto," cit.

[42] Sandulli, "Intervento," cit.,365-366. Furthermore, several parts of the second chapter will be devoted to theme of abstractness or adherence to specific, practical contexts with respect to "pros and cons" of externalised dissent.

[43] Elia, "La Corte," cit.,522.

[44] Sandulli, "Voto segreto," cit.

interpretation, the collegial foundations of the Court were necessary to the survival of a lively debate in the council chamber. The concrete participative effort of all judges of the Court to the same process of decision making made judgments more sensible to interpretative nuances, incentivised compromise and stimulated the incorporation of minority positions in final decisions and motivations[45]. Notwithstanding his appreciation for the principle of collegiality, Branca also recognised that the introduction of dissenting opinions could also have pushed judges not to "hide" behind collegial decisions. It can be said that the reflection recently made by Di Martino on this period highlights very clearly how the contributions given by these authors served as a bridge between the decades, connecting the latest repercussions of the early phases of the debate with the passage to the travailed 1990's[46].

In fact, the life of the Constitutional Court traversed a period of challenges between the end of the 1980's and the course of 1990's. It can be said that the intensity and the influence of the debate on externalised dissent ran parallel to it. The 1990's saw a higher level of organisation and institutionalisation with regard to the scholarly debate of the previous decades, with the two most relevant sources being the seminar of 1993 organised by the Court itself[47] and the volume by Saulle Panizza published in 1998[48]. One factor among others distinguished the type of scholarship of those years from its previous developments: the increasing relevance and usefulness of comparative studies, both with regard to common and civil law systems[49]. For clear historical reasons, this is particularly evident in comparison with the initial phases of debate around constitutional framing, when the limited comparative resources available were examined conservatively, prioritising research on the

[45] Branca, *Collegialità*, cit.,7-18.

[46] Di Martino, *Le opinioni dissenzienti*, cit.,338-339.

[47]. Adele Anzon, ed., *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993*. (Milano: Giuffrè, 1995).

[48] Saulle Panizza, *L'introduzione dell'opinione dissenziente nel sistema italiano di giustizia Costituzionale* (Torino: Giappichelli, 1998).

[49] Two particularly useful experiences were represented by two European courts, the German *Bundesverfassungsgericht* with the *Sondervotum* and by the Spanish *Tribunal constitucional* with the *voto particular*.

characteristics of other systems that had *not* to be emulated.[50] On the contrary, between the end of the 1980's and the early 1990's, the comparative approach shifted remarkably in the direction of looking for positive models and adaptable elements in other legal systems[51].

The choice of combining the reflection on the normative problem of introduction at the national level[52] with a substantial amount of international contributions was a clear evidence of this trend. Particularly significant was also the direct involvement of the Court in the organisation of the seminar, with President Casavola's brief, but compelling preface to the volume, emphasising

[50] Paladin, *Per una storia costituzionale*, cit.,47-48.

[51] Vincenzo Varano, "A proposito dell'eventuale introduzione delle opinioni dissenzienti nelle pronunce della Corte costituzionale: considerazioni sull'esperienza americana," in *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993*, ed. Adele Anzon (Milano: Giuffrè, 1995), 129-144; Vincenzo Vigoriti, "Corte costituzionale e 'dissenting opinions'," in *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993*, ed. Adele Anzon (Milano: Giuffrè, 1995), 145-153; Jeffrey P. Greenbaum, "Osservazioni sul ruolo delle opinioni dissenzienti nella giurisprudenza della Corte Suprema statunitense,". in *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* ed. Adele Anzon (Milano: Giuffrè, 1995), 183-199; Jorg Luther, "L'esperienza del voto dissenziente nel *Bundesverfassungsgericht*," in *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993*, ed. Adele Anzon (Milano: Giuffrè, 1995), 259-278; Massimo Siclari, "L'istituto dell'opinione dissenziente in Spagna," in *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993*, ed. Adele Anzon (Milano: Giuffrè, 1995), 323-336; Francesco Novarese, "Dissenting opinion" e Corte Europea dei diritti dell'Uomo" in *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993*, ed. Adele Anzon (Milano: Giuffrè, 1995), 361-378. Remarkable was also the variegated anthology of case law and dissenting opinions from foreign and international experiences reported and commented in the same volume, encompassing the US Supreme Court, the German *BVerfG*, the Spanish *Tribunal Constitucional* and the European Court of Human Rights.

[52] On this point see in particular: Sergio Bartole, "Opinioni dissenzienti: problemi istituzionali e cautele procedurali," in *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993*, ed. Adele Anzon (Milano: Giuffrè, 1995), 3-15; Sergio Fois, "Le opinioni dissenzienti: problemi e prospettive di soluzione," in *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993*, ed. Adele Anzon (Milano: Giuffrè, 1995), 21-51; Roberto Romboli, "L'introduzione dell'opinione dissenziente nei giudici costituzionali: strumento normativo, aspetti procedurali e ragioni di opportunità," in *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993*, ed. Adele Anzon (Milano: Giuffrè, 1995), 67-89; Antonio Ruggeri. "Per la introduzione del dissent nei giudizi di costituzionalità: problemi di tecnica della normazione," in *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993*, ed. Adele Anzon (Milano: Giuffrè, 1995), 89-111.

the continuity of the initiative with Mortati's thought and reflections in the 1960's[53].

However, the debate on externalised dissent in the 1990's was characterised by the prevalence of contributions favourable to introduction, and the seminar of 1993 seemed to be a prelude to its adoption within the Court, also in relation to the bipolar-majoritarian twist that the political system took at the time. With regard to this point, dissenting opinions seemed to represent an additional protection for the expression of pluralism even though, eventually, the concern for partisan manipulation of judges, protagonism and self-promotion proved to be stronger, instead. This was evidenced by both the failure of the constitutional reform of 1997[54] and the decline of reformist enthusiasm towards the end of the decade[55]. Such a decline has been evidenced by the critical dimension of Panizza's monography, in which the negative repercussions of reform in the direction of externalised dissent seemed to prevail. His scepticism depended on the increased caseload, the dilution of collegiality, the modified nomination mechanism and composition that the Court would have experienced with the 1997 reform, characteristics which would have altered its sources of legitimacy and made the political soul of the Court prevail on its jurisdictional one, thereby undermining its authority and cohesion[56].

[53] Francesco Paolo Casavola, preface to *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993*, ed. Adele Anzon (Milano: Giuffrè, 1995), VII.

[54] The reform project elaborated by a bicameral joint commission envisaged the introduction of dissenting opinions in the Constitutional Court by modifying article 136 of the Constitution. It also contained other relevant amendments, such as direct appeal (on the model of the German *Verfassungbeschwerde* or of the Spanish and *derecho de amparo*), an increase in the number of judges from fifteen to twenty (with the unprecedented participation of regions in the nomination mechanism), appeal for parliamentarian minorities and the verification of credentials.

[55] On these problematic points see: Di Martino, *Le opinioni dissenzienti*, cit.,362-364.

[56] Saulle Panizza, *L'introduzione*, cit.,291. For an exhaustive discussion on the oscillations between the political and the jurisdictional souls of the Court see: Rosa Basile, *Anima giurisdizionale e anima politica del giudice delle leggi nell'evoluzione del processo costituzionale* (Milano: Giuffrè, 2017); Roberto Romboli, ed., *Ricordando Alessandro Pizzorusso. Il pendolo della Corte. Le oscillazioni della Corte costituzionale tra l'anima 'politica' e quella 'giurisdizionale'* (Torino: Giappichelli, 2016).

4. More recent developments.

In 2002, four years after the failure of the 1997 proposal, the Court deliberated against the introduction of dissenting opinions via modification of the Integrative Norms. Even in the cases of broader procedural revisions, such as in 2004 and 2008, the Court preferred to uphold the current form of collegiality[57]. Furthermore, a legislative proposal presented by former President of the Republic Francesco Cossiga in 2004 also failed[58]. On the top of these failed attempts of reform, the period seemed to witness a general shift the in the approach towards externalised dissent, pursuing and emphasising the trend already observable at the end of the previous decade. Both the Court and the academia adopted a range of more circumspect and critical attitudes, especially if compared with the ones characterising earlier phases of the debate. As already mentioned, the crisis of traditional, mass political parties in the 1990's, the emergence of bipolar tendencies on the Italian political scene and the frequent accusations of partisanship to the Court, especially by the centre-right majorities during the XIV and the XVI legislatures, had all contributed to reinforce the idea of a strong, defensive collegiality to fend off political attacks and instrumentalisations[59].

The most striking case related to this shift in the general attitude was Gustavo Zagrebelsky's "conversion" to the side of pure collegiality[60]. Already in his press conference as President of the Court, in 2004, he vigorously supported the difference of vote from deliberation and the absolute detachment

[57] Di Martino, *Le opinioni dissenzienti*, cit.,365.

[58] A.S. 2690, Legislative proposal presented by senator Cossiga, notified to the Presidency on January 29, 2004. The proposal envisaged the introduction of dissenting opinions in both the Constitutional Court and at the highest levels of the judiciary. The initiative was probably sparked by a controversial decision of the Court (n. 24 of 2004) which declared the unconstitutionality of the suspension of trials against the highest offices of the State during their mandates (the so-called *Lodo Schifani*). For further details see: Di Martino, *Le opinioni dissenzienti*, cit.,370.

[59] Francesco Bonini, "La Corte nel maggioritario," *Percorsi Cost.*, 2010, 109; Di Martino, *Le opinioni dissenzienti*, cit.,364.

[60] Notably after his mandate as constitutional judge (1995-2004) and President of the Court (2004).

of decision-making dynamics in Court from the nature of political cleavages[61]. The same concepts permeated his post-2004 publications, in which he underlined the crucial need for cooperation between judges, collegial deliberation and the research of the broadest consensus possible within the council chamber. This implied the minimisation of all forms of protagonism and fragmentation, insulating of the Court from the rewards and penalties of the political game and accentuating its strongly jurisdictional nature[62].

Zagrebelsky's latest positions were close to the ones of the political philosopher Pasquale Pasquino[63] who, together with Barbara Randazzo, edited the volume *Come decidono le corti costituzionali* (2009), containing the contributions to the international conference held in 2007 in Milan[64], which remembered, in its structure and purposes[65], the aforementioned seminar of 1993, even if with a more comparative and social science focus on the nature

[61] Gustavo Zagrebelsky, "La giustizia costituzionale nel 2003. Relazione del Presidente Gustavo Zagrebelsky," *www.cortecostituzionale.it*, April 2, 2004.

[62] Gustavo Zagrebelsky, "La Corte costituzionale italiana," in *Come decidono le corti costituzionali*, ed. Pasquale Pasquino and Barbara Randazzo (Milano: Giuffrè, 2009), 59-63; Gustavo Zagrebelsky and Valeria Marcenò, *Giustizia costituzionale. Oggetti, procedimenti, decisioni*, vol. II (Bologna: Il Mulino, 2012), 150-152. For a targeted critique of Zagrebelsky's post-2004 interpretation, especially in light of the successful experience of the German *BVerfG*, see also: Di Martino, *Le opinioni dissenzienti*, cit.,366-368.

[63] See, on these themes in particular: Pasquale Pasquino, "Il giudice e il voto," *Il Mulino*, no. 5 (2003): 803-813; Pasquale Pasquino, "Votare e deliberare," *Fil. Pol.*, no. 1 (2006): 103-116; Pasquale Pasquino, "Introduzione," in *Come decidono le corti costituzionali*, ed. Pasquale Pasquino and Barbara Randazzo (Milano: Giuffrè, 2009), 9-21; Pasquale Pasquino and Sara Lieto, "Metamorfosi della giustizia costituzionale in Italia," *Quaderni Cost.* 2 (June 2, 2015): 351-381; Pasquale Pasquino and Sara Lieto, "La Corte costituzionale ed il principio di collegialità," *Federalismi.it*, no. 12 (June 15, 2016): 1-23; Pasquale Pasquino, "How Constitutional Courts Make Decisions," *"Mélanges en honneur du Professeur Philippe Lauvaux* (forthcoming in 2020).

[64] Encompassed within the broader context of the national research project "Dalla Corte dei diritti alla Corte dei conflitti: recenti sviluppi nella giurisprudenza e nel ruolo della Corte costituzionale" coordinated by the former President of the Court (2004-2005) Valerio Onida.

[65] The structure of the conference (and of the volume) envisaged a substantial number of comparative contributions from the Supreme Court of Israel, the German *BVerfG*, the Spanish *Tribunal Constitucional*, and the French *Conseil constitutionnel*, several interventions by (then) current and former members of the Constitutional Court such as Sabino Cassese, Leopoldo Elia, Ugo de Siervo and Valerio Onida, with an introduction by Pasquino himself. Furthermore, in the volume of 2009, there had been the addition of an appendix with contributions from another conference held in Rome, in May 2008. The contributions (in French) regarded the decisional processes in other types of courts such as the French *Cour de cassation* and *Conseil d'Etat*, and the Appellate Body of World Trade Organisation.

of collegial decision-making itself[66]. These initiatives were followed by another seminar organised by the Court in June 2009[67] and a failed legislative proposal by senator Linda Lanzillotta in 2010[68]. The renewed attention on collegiality and the generally sceptical climate towards dissenting opinions were further reinforced by the declarations released by the presidents of the Court in their annual press conferences[69].

Another distinctive characteristic of this phase of the debate was the growing importance given to the study of the episodic manifestations of internal dissent within the Court[70] and, in general, of the possible procedural or informal "cracks" in the walls of collegiality[71]. However, it has to be observed that the most recent waves of academic publications have been generally supporting the introduction of dissenting opinions in the Italian system of constitutional adjudication and have been characterised by great confidence in

[66] On this particular aspect, see: Sabino Cassese, "Les organes collégiaux et leur processus de decision. Introduction," in *Come decidono le corti costituzionali*, ed. Pasquale Pasquino and Barbara Randazzo (Milano: Giuffrè, 2009), 159-163; Pasquale Pasquino, "Légitimité et processus décisionnel des cours de justice," in *Come decidono le corti costituzionali*, ed. Pasquale Pasquino and Barbara Randazzo (Milano: Giuffrè, 2009), 163-175.

[67] Seminar introduced and preceded by Sabino Cassese's lecture on dissenting opinions, see: Sabino Cassese, "Lezione sulla cosiddetta 'opinione dissenziente,'" *Quaderni di Dir. Cost.*, no. 4 (2009): 1-17. The constitutionalist, after a comparative analysis, concluded by expressing his scepticism towards the need for the Court to adopt forms of externalised dissent. Among the interventions in the seminar of June 22, 2009, particularly interesting had been the one of the member of the Court Maria Rita Saulle, see: Maria Rita Saulle, "Intervento del giudice costituzionale Prof.ssa Maria Rita Saulle," in *www.cortecostituzionale.it* (Roma, 2009).

[68] A.S. 1952, "Modifiche alla legge 11 marzo 1987, e alla legge 31 dicembre 2009, n.196, in materia di istruttoria e trasparenza dei giudizi di legittimità costituzionale". The proposal envisaged the modification of the constitutional law n.87 of 1953. On both the proposal and the seminar see: Carlo Favaretto, "Le conseguenze finanziarie delle decisioni della Corte costituzionale e l'opinione dissenziente nell'A.S. 1952: una reazione alla sentenza 70/2015?," *Osservatoriosullefonti.it* 2 (2015), 1-7; Di Martino, *Le opinioni dissenzienti*, cit.,369-371.

[69] Most notably: Zagrebelsky, "La giustizia costituzionale nel 2003," cit.; Valerio Onida, "La giustizia costituzionale nel 2004. Introduzione del Presidente Valerio Onida, Relazione sulla giurisprudenza del 2004," *www.cortecostituzionale.it*, January, 2005. For more examples see: Di Martino, *Le opinioni dissenzienti*, cit.,369.

[70] For an in-depth discussion of the practices and episodes of internal dissent within the Constitutional Court see: Di Martino, *Le opinioni dissenzienti*. cit.,371-382.

[71] A remarkable impact on the public opinion has been achieved by the controversial Cassese's *Dentro la Corte*. See: Sabino Cassese, *Dentro la Corte. Diario di un giudice costituzionale* (Bologna: Il Mulino, 2012).

the positive role of externalised dissent[72]. Furthermore, these studies have been based on a strongly comparative methodology, usually geared towards a progressive-reformist interpretation of comparison between legal systems. These approaches have been putting themselves in continuity with traditional pro-dissent arguments of the past decades, even if often running the risk of minimising both the influence of historical contexts on those arguments and the role of practical considerations on the political and institutional present[73].

[72] Most notably on constitutional adjudication: Di Martino, *Le opinioni dissenzienti*, cit.; Elena Ferioli, "Le Dissenting Opinion nella giustizia costituzionale europea di matrice kelseniana," *Il Mulino* 3 (July-September, 2017): 687-715; Elena Ferioli, *Dissenso e dialogo nella giustizia costituzionale* (Padova: Cedam, 2018); Marilisa D'Amico, "The Italian Constitutional Court and the Absence of Dissent: Criticisms and Perspectives," in *The Dissenting Opinion* ed. Nicolò Zanon and Giada Ragone (Milano: Giuffrè Francis Lefebvre, 2019):88-101; on the most studied "crack" in the secrecy of the council chamber, the episodic non-coincidence between the chosen rapporteur-judge and the opinion-writer judge, see also: Saulle Panizza, "Could there be an Italian way for Introducing Dissenting Opinions? The Decision-Making Process in the Italian Constitutional Court through Discrepancies between the Rapporteur Judge and the Opinion-Writer Judge," in *The Dissenting Opinion* ed. Nicolò Zanon and Giada Ragone (Milano: Giuffrè Francis Lefebvre, 2019): 102-113. For a markedly European perspective see: Katalin Kelemen, *Judicial Dissent in European Constitutional Courts* (London-New York: Routledge, 2018) and from a sociological perspective see: Lucia Corso, "Opinione dissenziente, interpretazione costituzionale e costituzionalismo popolare," *Soc. Dir*., no. 1 (2011): 27-56. For a discussion on the introduction of dissenting opinions beyond constitutional adjudication and in the ordinary judiciary within the Italian legal system see also: Cristina Asprella, *L'opinione dissenziente del giudice* (Roma: Aracne, 2012); Fabiana Falato, *Segreto della camera di consiglio ed opinione dissenziente* (Pisa: Pisa University Press, 2016).

[73] A critical reflection on the structure and methodology of these studies will be provided at the outset of the second chapter.

Chapter II
The Principle of Collegiality and the Disclosure of Dissent: Between Italy and the United States

1. Critical Remarks on Methodological Approaches.

The possibility for judges in constitutional or supreme courts to manifest and articulate the physiological presence of dissent outside the court has been object of multiple interpretations and controversies, especially from the comparative perspective. Comparing systems that allow dissenting opinions with systems that do not is commonly adopted as the most useful comparative technique, generally finalised at identifying beneficial and detrimental effects caused by the presence of dissenting opinions or of their absence within the national systems considered. The vastly accepted scheme followed to carry out this type of comparative analysis is usually structured in a series of separate historical evolutions and concluded with comparative reflections on the present. If there is any kind of shortcoming in this approach, the most relevant one might consist in the fact that each one of the single parts of the analysis could be taken in isolation from all the other ones and stand alone.

This is an indicator of the lack of interdependence, within the same work, between historical research and the strictly comparative (more or less explicitly prescriptive), reflections on the present. The two are almost unconsciously considered as separate and autonomous. This way of thinking is most likely to be the cause of the next shortcoming of this approach to comparison. The conclusions to similar comparative studies typically imply elements of evaluation and prescription structured on a *cost-benefit* model, weighing *pros and cons*. They commonly treat the presence-absence of dissenting opinions as an *independent* variable influencing *dependent* variables such as legitimacy, transparency, independence or freedom of expression applied to courts. The problematic aspect is that the nature of such dependent variables has to be put into question, as the different meanings they assume in different cultures and

legal systems rarely influence the final outcomes of the comparative studies in which they are treated.

However, this is both simplistic and simplified with respect to several works that have treated, although in a relatively marginal way, these differences of meaning and interpretation. Taking Kelemen[74] as one of the most recent examples, it is clear that the author considers and compares these differences, but also that in multiple occasions still reasons as if uniformity had existed. This is not an argument against the possibility of general evaluations, but against the effectiveness of evaluation without an extensive consideration of those dependent variables and therefore, against prescriptions which are not tailored to specific systems. The reason for this might be that the existing semantic differences in the characteristics treated as dependent variables *are* often the causes behind the presence or the absence of dissenting opinions (usually treated as the independent variable) across different systems.

One thing is to evaluate the impact of single elements such as dissenting opinions *as such*, and another one is to theorise the potential impact of single elements on the equilibrium of a specific system *as it is* in a given historical moment. Any proposal for reform should be seriously considering not only the peculiarities of a given system, but also the potential repercussions of change on the remaining elements of the existing political, institutional and cultural equilibrium. If there are any cost-benefit analyses to be made, they should be made in response to specific needs and tailored to the contexts in which those needs arise. The question to be asked is not what impact does the presence-absence of dissenting opinions has *on legal systems*, but what impact does the presence-absence of dissenting opinions has *on a specific legal system*.

The rest of this paper will be devoted to a tentative case study on how a comparative analysis could be carried out inverting those that are commonly utilised as dependent variables with the usually independent one. The independent variables will be the overtones of concepts such as individuality, legitimacy and independence, while the dependent variable will be the

[74] See: Kelemen, *Judicial Dissent,* cit.

presence-absence of dissenting opinions. The two objects of the comparison will be the Italian Constitutional Court and the Supreme Court of the United States, positioned at the opposite sides of the spectrum in terms of disclosure of judicial dissent.

2. Composition and the Disclosure of Dissent.

The bulk of the comparative analysis will be carried out, as already mentioned, inverting the usually *dependent* variables with the usually *independent* one. However, this cannot be done without comparing the *identities* of the two courts, the Italian Constitutional Court (ItCC) and the Supreme Court of the United States (SCOTUS). The rather ambiguous expression *identity of the court* which is used here refers to all the factors that influence its material composition. Given that courts are composed of individual judges, the first element to analyse is how these individuals are appointed to become members of courts. To frame the comparison in this way means not only to examine the institutional mechanisms through which individuals become members of the court, but seeking to understand which kind of legitimacy are those institutional mechanisms bound to entrust upon future judges. To examine the way in which individuals become part of the court is, in reality, a tentative to comprehend the role of the court as an institution in a given political system or in a given society.

Article 135 of the Italian Constitution[75] envisages a Constitutional Court composed by fifteen judges, and their nomination mechanism reveals the

[75] For a detailed account of the proceedings of the Constituent Assembly regarding the drafting of article 135, see again: Falzone et al., *La Costituzione*, cit.,422-429 (in particular 425-429, on the debate around the composition of the Court in the Assembly). Especially interesting is to observe how the original project on the Constitution envisaged a Court composed by a half of ordinary judges, a quarter of law professors and attorneys, and a quarter of citizens over the age of forty. In a second phase, beyond the current tripartite solution, two divergent blueprints of composition emerged. One entirely dependent from the two chambers of Parliament, and another (proposed by Codacci Pisanelli) formed by the administrative Court of Accounts in joint chambers, together with twelve additional members elected by Parliament. The *jurisdictional* solution (notoriously supported by Mortati) prevailed on the *political*

ideological choices of the post-WWII Constituent Assembly[76] as well as the historical-cultural trajectory followed by Republican Italy. Five judges appointed by the President of the Republic, five by Parliament in joint sitting, and five by the highest ordinary and administrative ranks of the judiciary[77]. Not only does the tripartite structure of appointments reflect the double nature of the court (partly jurisdictional, partly political), but also Montesquieu's traditional division of powers[78]. It can be said that also the American system is profoundly inspired by Montesquieu's division of powers, and that the US

alternative (all members elected by Parliament). More historical profiles on the debate will be provided in the final chapter.

[76] For an exhaustive description of the constitutional provisions regulating the composition of the Court, see: Enzo Balocchi, "Corte costituzionale," in *Novissimo Digesto Italiano* IV (Torino: Utet, 1959), 972-993 (in particular 983-993); Franco Pierandrei, "Corte costituzionale," in *Enciclopedia del diritto* X (Milano: Giuffrè, 1962) 874-1036 (in particular 890-892); Giuseppe La Greca, "Corte costituzionale," in *Digesto, Discipline Pubblicistiche* IV (Torino: Utet, 1989), 205-215 (in particular 211-215); Mario Rosario Morelli, "Artt. 134-137," in *Commentario breve alla Costituzione*, ed. Vezio Crisafulli and Livio Paladin (Padova: Cedam, 1990), 771-808 (794-797 on art. 135); Gian Marco Sbrana, "La composizione, l'organizzazione e il funzionamento della Corte costituzionale," *Diritto & questioni pubbliche* (2001), 375-390; In English and directed towards an international audience see also: Mauro Cappelletti, John Henry Merryman and Joseph M. Perillo, *The Italian Legal System: an Introduction*," (Stanford, Calif: Stanford University Press, 1967); Daniel S. Dengler, "The Italian Constitutional Court: Safeguard of the Constitution," in *Dickinson Journal of International Law* 19 (2001), 363-385; Michael A. Livingston, Pier Giuseppe Monateri, and Francesco Parisi, *The Italian Legal System: an Introduction* (Stanford, CA: Stanford Law Books, 2016); Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia and Paolo Simoncini, *Italian Constitutional Justice in Global Context* (Oxford: Oxford University Press, 2017); Giuseppe Franco Ferrari, ed., *Introduction to Italian Public Law* 2nd ed. (Milano: Giuffrè Francis Lefebvre, 2018); 183-211. For a review and summary of Barsotti et al. see also: Nicola Lupo, "The Italian Constitutional Court in Global Constitutional Adjudication," *American Journal of Comparative Law* 66 (2018), 713-717.

[77] See Kelemen, *Judicial Dissent*, cit.,101. On the last point Kelemen's critique provides an insight on how the rationale of nomination mechanisms can directly influence the presence-absence of dissenting opinions. Given that one third of the members of the Court come from the ordinary judiciary, they are "in particular not prepared to write separate opinions, and do not support their introduction". It is interesting to notice how in this case the author of the comparative analysis uses the absence of dissenting opinions as a dependent variable, but then limits the line of reasoning to the singling out of the systemic resistances to the introduction of dissenting opinions in the ItCC. In fact, the author does not regulate prescriptions accordingly, eventually returning to consider (in this case the introduction) the presence of dissenting opinions as the independent variable, able to heighten the levels of "legitimacy" or "independence" of the court, to improve its performances.

[78] Sbrana, "La composizione," cit.,376; Barsotti et al., *Italian Constitutional Justice*, cit.,41. The tripartite, mixed nomination mechanism, however, descends not so much from the Montesquieuian division of powers, but from the necessity to create a coexistence between *jurisdictional* and *political* elements within the Court, representing a complex (and tentative) act of balancing, or integration, between technical-juridical competences and political consciousness.

division of powers might represent a "purer", more clear-cut version of it, since the Italian President is not technically part of the Executive. In the US, the President also appoints SCOTUS Justices with the advice and assent of the Senate[79].

At this point, the most relevant divergence is that while the Italian system tries to achieve a proportional synthesis of the three branches (both elected and non-elected) within the composition of the court, the US system reserves a special role for presidential appointment[80] (by the elected Executive). In fact, the way in which the composition of the SCOTUS mirrors a miniaturised, unelected version of a parliament in a majoritarian, bipartisan political system is extremely interesting[81]. The emphasis on competition and accountability proper of a FPP (first-past-the-post) system is echoed by the nature of the Court even if its members are unelected (but still derive their legitimacy from presidential appointment). Exactly as in a parliament, a known majority "passes" the binding part of the judgment, while pluralism is secured through

[79] Justin Orlando Frosini, "Constitutional Justice," in *Introduction to Italian Public Law* 2nd ed., ed. Giuseppe Franco Ferrari (Milano: Giuffrè Francis Lefebvre, 2018), 167-190 (in particular 168-171). The distinction adopted in the volume is the one between *appointment-based* systems, *election-based* systems and *mixed* systems, in which the SCOTUS is classified in the first category and the ItCC in the third; Ferioli, *Dissenso e dialogo*, cit.,75-80.

[80] For a critical assessment of the restrained discretion of presidential appointments see again: Giordano, "La motivazione," cit.,166.

[81] Even if presidents have usually sought to appoint Justices from their own political party, and those who shared their political and philosophical views, it has always been relatively easy to trace "patterns" in appointments, dependent on historical conjunctures or social-political necessities. As reported by the Supreme Court Historical Society (founded by Chief Justice Burger in 1974): "The presidents' choices for appointment to the Court have all been lawyers, although there is no constitutional or legal requirement to that effect. George Washington established a pattern of geographical distribution, with three southerners and three northerners from six different states … With the passage of years, the make-up of the Court has tended to reflect the dominant threads in the weave of American society. All the Justices were protestants until 1835, when President Andrew Jackson chose Roger B. Taney, a Catholic, as Chief Justice. President Woodrow Wilson appointed the first Jew, Louis D. Brandeis, as an Associate Justice in 1916. The first African-American Justice, and only the second Justice to lie in state in the Great Hall following his death, was Thurgood Marshall, who was appointed by president Lyndon B. Johnson in 1967. The first nomination of an Italian-American was that of Justice Antonin Scalia, who ascended to the high bench in 1986. The invisible wall that had kept women off the Court was shattered in 1981 when President Reagan nominated Sandra Day O'Connor, a 51-year-old judge on the Arizona Court of Appeals." See: "How The Court Works: Selecting Justices," The Supreme Court Historical Society - How the Court Works - Selecting Justices, accessed January 22, 2020, https://supremecourthistory.org/htcw_selectingJustices.html).

externalised dissent and freedom of expression is granted to the opposition. The opinion supported by the majority becomes binding, while dissent (the "opposition" within the parliamentary analogy) is canalised towards future decisions (and potential future majorities), fuelling the public debate.

On the contrary, in the case of the ItCC, the political nature of parliamentary nominations is counterbalanced by both explicit professional qualification requirements (only judges of the highest courts, law professors and attorneys of at least twenty years' experience are eligible), by the *technical* appointments depending on the Court of Cassation, the Court of Accounts and the Council of State and, in addition to that, also by presidential appointments, mainly because of the peculiar role of the President within the institutional framework[82]. What probably strikes the most about this elaborated mechanism is that even in its eminently political part presents what could be defined as a sort of institutionalised, deeply engrained *embedded proportionality*[83]. The instruments to achieve this result are extremely high parliamentary quorums (higher than the ones needed to elect the President) and practices such as the distribution of parliamentary appointments along the proportional influences of parties or the informal consultation with sitting members of the court for presidential appointments. These are all consensus-seeking dynamics, deliberately oriented towards proportionality, compromise and mediation, guided by the overarching need of achieving a reliable *synthesis* of both a set of

[82] See: Sbrana, "La composizione," cit., 375-378 for details on the role of the President of the Republic in light of the composition of the Court. The connection between the peculiar role of Head of State and the Court's nature and composition is deeper than it is usually thought. In fact, the constitutionally *super partes* President (elected indirectly by the two chambers of Parliament in joint sitting) appoints five judges by means of a presidential act (with the Prime Minister's countersignature). These appointments are intended to be (and usually are) an act of balancing with respect to the eminently political five parliamentary nominations, especially because of the *non-political* role of the President as the guarantor of the constitutional order and institutional framework of the Republic.

[83] For a description of the first composition of the Court, see again: La Greca, "Corte costituzionale," 211-212 cit. This sort of *embedded proportionality* was reproduced through the establishment of a convention between political parties which had dominated both the Constituent Assembly and the post-war proportional electoral system, according to which two judges had to be nominated by the Christian-Democrats, one by the Communists, one by the Socialists and one by minority parties. This partition came to be identified by Zagrebelsky as a *patrimonial conception* parliamentary nomination (see: Gustavo Zagrebelsky, *La Giustizia Costituzionale* (Bologna: Il Mulino, 1988), 74.).

constitutional values and a spectrum of political positions. What also strikes in comparison with the US system, although with regard to the outcomes of the nomination process, is that, as observed by Barsotti et. al, "only on a few occasions have certain appointments been criticised"[84].

There are also other relevant characteristics to be considered in order to single out structural differences and their deeper implications. An example is provided by the figures of the Chief Justice and of the President of the Court. Already in this case, terminology serves an as indicator: what is called *Chief Justice* in the SCOTUS is called *President of the Court* in the ItCC. The President of the Court's principal function is to represent the Court and, several times, the President's personal prestige has contributed not only to represent, but to protect the Court's interests and its prerogatives[85]. Also, it is almost impossible to single out the "eras" of the ItCC, as in the case of SCOTUS, by identifying them with the name of a President or Chief Justice.[86] This is a

[84] Barsotti et al., *Italian Constitutional Justice*, cit.,44.

[85] For a detailed discussion on the powers, prerogatives and functions of the President of the Court, see: Temistocle Martines, "I poteri del Presidente," *Giur. Cost.* (1981); Gaetano Azzariti, "Il ruolo del Presidente della Corte costituzionale nella dinamica del sistema costituzionale italiano," in *L'organizzazione e il funzionamento della Corte costituzionale*, ed. Pasquale Costanzo (Torino: Giappichelli, 1996); Sbrana, "La composizione," cit.,382-385; Paolo Passaglia, "Presidenzialismo" e "collegialità" nel procedimento decisorio della Corte costituzionale," in *Studi in onore di Luigi Arcidiacono* V (Torino: Giappichelli, 2011), 2401-2433. Especially in Sbrana's analysis, the role of the President is emphasised with regard to the public "defence" of the Court (and of its collegial nature) from external attacks or interferences. This characteristic is especially relevant with regard to Shetreet's notion of *external* independence, intended as independence from other institutions or powers (see: Shimon Shetreet, "Judicial Independence and Accountability," *Judiciaries in Comparative Perspective* (2011), 3-24.). Passaglia's essay, on the other hand, is particularly useful to understand the Court's "form of government", and the significance of the presidential power to initiate and direct the discussion in the council chamber. His account of the presidential function is important to discern the possible overtones of collegiality, which can be strongly conditioned by the action of a President. However, the elements of *presidentialism* within the decisional process of the Court are mitigated by the extremely short duration of terms and by the internal election of Presidents based on seniority.

[86] For an overview of the "eras" corresponding to the different phases in the activity of the Court since its establishment see: Barsotti et al., *Italian Constitutional Justice*, 37-38. It is interesting to see how the different periods come to be mainly identified with the Court's type of activity and its relationality towards other institutions and powers in the system rather than with the personalities of Justices or Chief Justices. However, some identifiable trends corresponding to determined presidencies have existed in the history of the Court, particularly with regard to the role of Presidents in press conferences or interviews. For a discussion on this point see also: Stefano Rodotà, "La svolta politica della Corte costituzionale," *Pol. dir.* 1 (1970), 37-47; Maria Cristina Grisolia, "Alcune osservazioni sul potere di esternazione del

consequence of the three-year, renewable term[87] envisaged for the President of the ItCC, even if established practice tends to limit appointments to only forty-five days, and only four Presidents of the ItCC have completed their full term of office as Presidents[88]. These elements, together with the nine-year, non-renewable term of ItCC judges[89], are even more strikingly is contrast with SCOTUS Justices' life tenure[90] and the commonplace identification of "eras" in the history of the Court with the names of Chief Justices[91].

However, Both ItCC presidents and SCOTUS chief Justices have substantial influence, with the tasks of publicly representing their court in external relations, choosing rapporteurs (ItCC), casting decisive votes (ItCC) or assigning cases to individual Justices for the drafting of the *opinion of the Court* (SCOTUS)[92].

Furthermore, Chief Justices are directly appointed by the US President (with the advice of the Senate), while ItCC Presidents are elected by their peers (usually on the basis of seniority). These elements are not so relevant with regard to the function of Presidents and Chief Justices as such, but rather with regard to the broader understanding that the two legal systems and cultures

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Presidente della Corte costituzionale," in *La giustizia costituzionale a una svolta*, ed. Roberto Romboli (Torino: Giappichelli, 1991).

[87] Sbrana, "La composizione," 382. Sbrana reports that only three Presidents have been re-elected: Ambrosini in 1966, Elia in 1984 and Saja in 1990.

[88] Barsotti et al., *Italian Constitutional Justice*, cit.,41.

[89] For historical profiles on the term of ItCC judges, see again: Falzone et al., *La Costituzione*, cit.,427-429. Curiously enough, the duration of the term was originally increased from seven to twelve years during the debate on article 135 in the Constituent Assembly, and then reduced again to the current nine years after 1967. Furthermore, at the outset, judges were envisaged to be *non-immediately* eligible for re-election, with an unspecified *cooling-off* period.

[90] It is important, however, to historically contextualise these choices. Life tenure for SCOTUS Justices was established at the end of the 18th century. Average life expectancy at the age of twenty for white males in 1790-99 United States has been estimated around 41.4 years (see: Kent Kunze, *The Effects of Age Composition and Changes in Vital Rates on Nineteenth Century Population Estimates from New Data* (Salt Lake City: University of Utah, 1979), 214 reported in J. David Hacker, "Decennial Life Tables for the White Population of the United States, 1790-1900," Historical methods (U.S. National Library of Medicine, April 2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2885717/#R55).).

[91] For a discussion on the enormously impactful *social leadership* function that the Chief Justice's figure can have, see also: Bernard Schwartz, *Super Chief, Earl Warren and His Supreme Court: Judicial Biography* (New York University Press, 1983).

[92] Kelemen, *Judicial Dissent*, cit.,35.

have of the role of *individuality*. It has to be added, once again, that the best example is provided by the fundamental difference between the impact that a nine-year non-renewable term and life tenure have on a court[93].

The previous line of reasoning on consensus-seeking dynamics can be extended to the fact that the both the practice of electing ItCC Presidents for terms much shorter than the prescribed three years and the unwritten custom of electing the most senior judge can also be interpreted as intentional constraints to the role of individuality within the Court. The customary election of the most senior member as President is intentionally divorced from the logic of party politics. The peculiar nomination mechanisms of the ItCC appear as deliberately aimed at reducing as much as possible the influence of *majority* (referred to both political majorities and majorities in internal decision making) and *individuality* on the Court. Meanwhile, SCOTUS nomination mechanisms seem to amplify as much as possible their impact. On that note, the proportional or majoritarian nature of political systems seems to retain a substantial influence on the composition and the nature of the respective courts.

Another revealing difference between the two processes is reflected by secrecy in the case of the ItCC and openness in the case of the SCOTUS. The nomination of ItCC judges remains within the "technical-political" sphere, while the nomination of SCOTUS Justices is subject to substantial popular attention and media coverage. On this point, it can be said that the bifurcation between the two courts on the degree of openness to the interaction with the public, and to media coverage in general, is not limited to composition and nomination mechanisms, but extends to almost every other fundamental aspect

[93] In 1969, Chief Justice Hughes suggested to the *New York Times* that "by virtue of the distinctive function of the Court, the Chief Justice of the United States is the most important judicial officer in the world" (see: Henry J. Abraham, *The Judicial Process* (New York London: Oxford U.P, 1968), 215.) Notwithstanding functional similarities, quoting Hughes enhances our understanding of the extremely different roles played by *individuality* in the two courts. See also, on this point, the distinction between *strong* individuality and *moderate* individuality adopted in: Ferioli, *Dissenso e dialogo*, cit.,75-86.

of decision making, to what Pasquino defines as their *mode of production* of constitutional opinions and judgments[94].

3. Pluralism in the Context of the US Supreme Court.

If the previous part of the analysis has been devoted to the *identity* of the two courts, examining who and how becomes a member, this part is devoted to comparing their *essence*. If *identity* stood for composition, *essence* stands for the courts' natures as decision-making bodies. The distinction which has been utilised is the same developed by Pasquino[95], which is particularly accurate if placed in the trajectory of the elements already analysed. The distinction is the one between *pluralist* and *collegial* courts[96].As already mentioned in the precedent chapter, all courts are composed by individual members, but the pluralist-collegial distinction is largely based on the different conceptions of which role should the court in charge of constitutional adjudication occupy in a given legal system and society[97]. The SCOTUS, exemplifying the concept of pluralist court, expresses its nature in the aggregation of the individualities of nine Justices, while the in ItCC, a strictly collegial court, the role of individualities is almost totally absorbed by the constraints of collegiality. As

[94] Pasquino, "How Constitutional Courts Make Decisions," cit.,1-2.

[95] Pasquale Pasquino, "The New Separation of Powers: Horizontal Accountability," *Italian Journal of Public Law* vol. 7, Issue 1 (2015), 157-169.

[96] Pasquino, "How Constitutional Courts Make Decisions," cit.,11. "The United States Supreme Court is the most revealing example of what can be classified as a pluralist court. But since all the high courts are panel courts in contrast to courts characterized by monocratic judges, it is necessary to define what I mean by this conceptual distinction: pluralist vs. collegial court. The easiest way to explain this dichotomy is to claim that it is important to distinguish courts that *speak with one voice*, thanks to the undisclosed votes of its members, from courts where the Justices have a clear *public persona* – and who "teach from the bench", addressing as specific individuals to an external public, thanks to dissenting and concurring opinions. The Austrian, Italian, French and Belgian Constitutional Courts, likewise the Court of Justice of the European Union in Luxembourg, are instantiations of what I call a collegial court, whereas most of the courts of the ex-British Commonwealth are simply pluralist courts."

[97] See: Giovanni Bisogni, "La 'forma' di un 'conflitto'. Brevi osservazione sul dibattito italiano intorno all'opinione dissenziente," *Ars int.*1 (2015): 51-64. It is extremely useful to remind, as remarked in Bisogni's essay, that the debate on dissenting opinions is subordinated to the fundamental question of which place and function should the constitutional judge occupy in society.

Pasquino remarks, within the decisional mechanism of the SCOTUS[98], exchanges of opinions between Justices are essentially written[99], while in the case of the ItCC, face-to-face deliberation is much more developed. The purpose of meetings in the *conference room* tends more towards the registration of convergences and divergences, the formation of defined majorities and minorities, than towards persuasion and compromise[100]. However, changes following from interaction in the conference room are not rare but, especially with regard to concurrences and dissents, they resemble more to the results of *negotiation* than of *deliberation* processes[101].

There are also significant terminological and stylistic differences with regard to the *outcomes* of decision-making processes. The two final "products" are characterised by different names, structures and styles[102], which reflect the

[98] For more detailed descriptions of the decisional process see: Abraham, *The Judicial Process*, cit.,210-223; Kurt H. Nadelmann, "Il dissenso nelle decisoni giudiziarie: pubblicità contro segretezza," in *Le opinioni dissenzienti dei giudici costituzionali ed internazionali*, ed. Costantino Mortati (Milano: Giuffrè, 1964), 30-59; Karl Zo Bell, "L'espressione dei giudizi separati nella Suprema Corte," in *Le opinioni dissenzienti dei giudici costituzionali ed internazionali*, ed. Costantino Mortati (Milano: Giuffrè, 1964), 61-104; Bob Woodward and Scott Armstrong, *The Brethren: inside the Supreme Court* (New York: Simon & Schuster, 2005), 482-496; Cass Sunstein, "Unanimity and Disagreement on the Supreme Court," *Cornell Law Review* vol. 100 (2015), 770-772.

[99] Pasquino, "How Constitutional Courts Make Decisions," cit.,11.

[100] See in particular the words of Justice Rehnquist reported in: Richard A. Posner, *How Judges Think* (Cambridge, MA: Harvard Univ. Press, 2010), 303 and Cassese, "Lezione," cit.,8-9. Cassese's interpretation is particularly interesting if contrasted with Pasquino's pluralist-collegial categorisation. He comments the decisional process of the SCOTUS regarding it as a manifestation of (extremely) *weak collegiality* (especially in contrast with British *seriatim* opinions), therefore placing it, with regard to collegial courts, on different sides of the same spectrum rather than in distinct categories.

[101] See: Adele Anzon, "Forma delle sentenze e voti particolari: le esperienze di giudici costituzionali e internazionali a confronto," in *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993*, ed. Adele Anzon (Milano: Giuffrè, 1995), 175-176; Greenbaum, "Osservazioni," cit.,189-200; Antonin Scalia, "Remarks on Dissenting Opinions," in *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993*, ed. Adele Anzon (Milano: Giuffrè, 1995), 410-413.

[102] On this point see in particular: Varano, "A proposito dell'eventuale introduzione," cit.,129-144; Vigoriti, "Corte costituzionale," cit.,145-153. For an in-depth comparative analysis of styles and structures see also: Anzon, "Forma delle sentenze," cit.,167-182; Di Martino, *Le opinioni dissenzienti*, cit.,433-446; Paolo Passaglia, "La struttura delle decisioni dei giudizi costituzionale: un confronto fra la tradizione di civil law e quella di common law," in *Scritti dedicati a Maurizio Converso*, ed. Domenico Dalfino (Roma: Roma Tre-Press, 2016), 419-429. Particularly relevant here is not only the academic, argumentative, style which permeates the tone of SCOTUS Justices' opinions, but also the typographic homogeneity between the opinion of the Court, concurring and dissenting opinions, the presence of footnotes

profoundly different nature of the two courts in general, and their attitude towards dissent in particular. In the case of both courts, technical language mirrors the respective legal cultures. Every chapter of SCOTUS judgments has a markedly *personal* character, while ItCC judgments a have a visibly unitary and impersonal one[103]. It is not by accident that one talks of *opinion* in the American context and of *decision* (*sentenza*) in the Italian context.

Terminological divergences also disclose the presence of completely different approaches to the judicial profession intended more generally. In common law systems, and therefore in the US, "a judge takes responsibility for what *he* thinks and writes, and this responsibility is openly attributed to him by the judgments and the published Reports"[104]. The structure and the style of judgments are never unitary, and even the opinion of the Court is constituted by a sum of distinct and separate voices, which maintain their strong individualities even in the case of agreement or convergence[105].

In this context, the explicitly partisan nomination mechanism and life tenure of Justices also point towards the direction of an individualistic understanding of independence, within a system that values more the independence of the single member of the Court, than the independence of the Court as an organ. Consequentially, the central difference with the ItCC consists in the fact that *independence* is not understood as insulation from politics, but rather as individual responsibility and individual freedom of expression. The key aspect of *pluralist* independence is the independence of

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and the lack of fixed formulas or expressions identifying specific parts of judgments. The decisional process of the SCOTUS has not to appear to the public as a unitary act, but as the reasoned account of a dispute between scholars, not dissimilar from what happens in a scholarly debate or academic conference.

[103] See again: Anzon, "Forma delle sentenze," cit.,175. It is fundamental to notice how even the opinion of the Court has maintained, since its introduction by John Marshall, a personal nature which is highly dependent on which justice is writing. Even the opinion of the Court is extremely flexible, changing according to clearly recognisable personal styles and argumentations. The research of stylistic and argumentative impersonality, which a necessity in the ItCC, is completely absent from SCOTUS judgments.

[104] Patrick S. Atiyah, "Judgments in England," in *La sentenza in Europa: metodo, tecnica e stile: atti del convegno internazionale per l'inaugurazione della nuova sede della facoltà. Ferrara 10-12 ottobre 1985* (Padova: Cedam, 1988), 140.

[105] Panizza, *L'introduzione*, cit.,106.

Justices from fellow Justices rather than the independence of the Court from politics and public opinion[106]. This distinction has been interpreted as the one between *external* and *internal* independence or between *institutional* and *individual* independence[107]. From the American perspective, to inhibit separate writing or externalised dissent would not only violate judicial independence, but also encroach upon the Court's institutional and social legitimacy.

Therefore, the emphasis on individual independence, responsibility and personality also expose the common law understanding of judicial legitimacy within the context of the SCOTUS. In relation to that, the specific social legitimacy or acceptability of judgments is strictly connected to the backgrounds[108] and personalities of Justices. This is especially evident in the choice of which Justice will write and "give personality" to the opinion of the Court in relation to the specific case[109]. The focus on the style and on the linguistic register of judgments and dissents in the case of the SCOTUS cannot be underestimated[110]. One of the strongest indicators of pluralism in the Court is the presence of visible, recognisable stylistic differences, elements of rhetorical uniqueness which can clearly be attributed to one personality or the other, or to one interpretative approach or the other, such as judicial activism or restraint[111]. In this context, stylistic pluralism is nothing but the other side of the Court's pluralist nature.

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[106] On the question of independence and responsibility, it is extremely interesting to analyse Justice Ginsburg's uniquely comparative approach to the defence of externalised dissent: Ruth Bader Ginsburg, "Remarks on Writing Separately," *Wash. L. Rev*. (1990); Ruth Bader Ginsburg, "Speaking in a Judicial Voice," *NYU L. Rev.* (1992); Ruth Bader Ginsburg, "The Role of Dissenting Opinions," *Minn. L. Rev.* (2010).

[107] For a study on the conceptual distinction between internal and external independence see again: Shetreet, "Judicial Independence," cit.,3-24.

[108] For insights on the connection between SCOTUS Justices' writing styles, theories of constitutional interpretation and personal backgrounds see also: Corso, "Opinione dissenziente," cit.,41-49.

[109] See the example in Anzon, "Forma delle sentenze," cit.,175; originally contained in Abraham, *The Judicial Process*, cit.,218.

[110] See, for a commentary on various theories on constitutional interpretation such as originalism, textualism, judicial restraint or activism: Di Martino, *Le opinioni dissenzienti*, cit.,131-153.

[111] This has led to the formation of a sort of distinctive and recognisable "literary genre" attributable to SCOTUS Justices. See: Robert A. Ferguson, "The Judicial Opinion as Literary Genre," *Yale Journal of Law & the Humanities* 2 (January 1990): 201-219; for a concise

It can also be observed that the SCOTUS and the system in which it is positioned, have a structural tendency to create "celebrities" by revealing the personalities of individual Justices, together with their legal opinions, to the broader public. Individuality is already a fundamental element within the Court, but the surrounding political environment, public opinion and the media tend to bring, in more than one case, the consequences of pluralism to the extremes, especially through the action of the media. Not only legal scholars, but also television programs, newspapers and websites analyse, publicise and make predictions on the most important cases to be decided[112].

However, even well before the era of mass or digital media, Justices such as Marshall, Johnson, Daniel, Holmes, Curtis, Brandeis and others gained the status of "celebrities" in the public narrative of the Court. In the course of the 20th century, the growingly hegemonic role of the United States, combined with the size of the country and its economy, together with the development of ever more sophisticated media have developed this narrative up to levels which are unparalleled in the rest of the world. Some have even come to define this unique narrative surrounding the SCOTUS as a *cult of celebrity*[113]. On this particular aspect, the comparison with the relatively anonymous ItCC (and with similar courts) is almost superfluous, given that the visibility of individual personalities is restrained by all procedural rules, institutional mechanisms and informal practices.

These characteristics derive not only from a certain approach to the judicial legitimacy, but from a certain approach to *political* legitimacy. The emphasis on voting and on the disclosure of votes, the partisan nature of appointments and the focus on explicit and clearly recognisable political-interpretative orientations and writing styles[114] all point in the direction of a

review of the stylistic and jurisprudential relevance of selected *great dissenters* see: Di Martino, *Le opinion dissenzienti*, cit.,90-119, 131-153.

[112] Kelemen *Judicial Dissent*, cit.,63

[113] Craig S. Lerner and Nelson Robert Lund, "Judicial Duty and the Supreme Court's Cult of Celebrity," *George Washington Law Review* Vol. 78, No. 6 (December 3, 2009): 1255-1299.

[114] Pasquino, "How Constitutional Courts Make Decisions," cit.,13.

majoritarian understanding of legitimacy. In light of the previous considerations, this reasoning can also be extended to both the notions of *input* and *output* legitimacy[115] that is, to both composition and decision-making. Legitimacy, in the case of the SCOTUS, derives *from* the preservation and the exaltation of interpretative pluralism, which is widely regarded upon as one of the bulwarks of social, political and territorial pluralism in the country[116]. The SCOTUS is not a collegial, but a pluralist organ, composed of strong individualities: separate writing and public dissent are at the core of its nature. They are to be considered as *dependent* variables in the analysis, with respect to the prevailing legal culture, socio-political context and institutional equilibria, just as their absence within the collegial ItCC.

4. Collegiality in the Context of the Italian Constitutional Court.

The opposite side of the coin is represented by the ItCC, founded on the principle of collegiality. Already from terminology, the word *decision* used to identify the final judgment reflects the collegial nature of the Court, in opposition with the usage of *opinion*. As observed by Kelemen: "In continental Europe, under the traditionally dominant influence of the French and German legal cultures, judgments are delivered in the name of the people, the republic or the monarch. They are seemingly unanimous decisions. In these systems there is no possibility for the judge to dissent publicly for her/his colleagues. The court must show unity"[117]. The absence of dissenting opinions in the latter is not only historically derived from the civil law tradition and from the "one voice" historical trajectory of French *ordonnances royales*[118], but designed to

[115] Wojciech Sadurski, "Constitutional Court in Transition Processes: Legitimacy and Democratization," *Sydney Law School Legal Studies Research Paper* n. 11/53 (2011), 4.

[116] Ferioli, *Dissenso e dialogo*, cit.,81.

[117] Kelemen, *Judicial Dissent*, cit.,78.

[118] For critical accounts of the origins and of the historical developments of collegial courts see: Cassese, "Lezione," cit.,9-13; Cassese, "Les organes," cit.,159-163; Pasquino, "Légitimité," cit.,163-174; Di Martino, *Le opinioni dissenzienti*, cit.,221-397; Kelemen, *Judicial Dissent*, cit.,78-157. On the historical derivation of secret deliberation and "strong" collegiality from the bureaucratisation of the judicial role see: Antonio Bevere, "Dal giudice-

strengthen the collegial nature of the Court, deliberately incentivising the research for consensus and compromise in case of divergences.

This unity is not forced nor fictional unanimity. It has been frequently pointed out that "Even if unanimity would be imposed by procedural rules, it is sometimes hard to achieve that in practice. And there is more: it would clearly violate judicial independence. Judges are expected to make their decisions based on the law and according to their conscience"[119]. This is true to the extent that unanimity is, indeed, hard to achieve in more than some cases. However, in this statement the author marginalises the importance of context, considering the violation of judicial independence from a common law understanding of judicial independence. Notwithstanding the author's recognition that "one should keep in mind that the pros and cons of disclosing judicial dissent have to be evaluated in the context of one concrete jurisdiction"[120], the implicit assumption seems to remain that once the disclosure of dissent is made possible, the rest of the system in question will take care of itself and adapt, "evolve" in the same direction without previously (or contemporarily) reforming also the tenure of judges, the composition, the jurisdiction of the Court, its sources of legitimacy and its position in the institutional framework (in short, its *identity* and *essence*). Even if the author gives extensive recognition to the meaning of collegiality in other parts of the analysis[121], statements like the one above exclude the collegial perspective from the picture.

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funzionario al giudice-organo della comunità: riflessioni in margine alla sentenza sulla responsabilità del giudice," *Giur. Cost.* (1989), 106-110 in a commentary to the controversial sentence n. 18, 1989 of the Constitutional Court; Michele Taruffo, "Il modello burocratico di amministrazione della giustizia," *Dem. Dir.* (1993), 12; Leonardo Pace, "La dissenting opinion. Considerazioni storico-comparatistiche," in *Momenti di storia della giustizia*, ed. Leonardo Pace, Simone Santucci and Giuliano Serges (Roma: Aracne, 2011), 67-84. Di Martino, *Le opinioni dissenzienti*, cit.,31-53; Ferioli, *Dissenso e dialogo*, cit.,31-37.

[119] Kelemen, *Judicial Dissent*, cit.,170.

[120] Kelemen, *Judicial Dissent*, cit.,158.

[121] This is often true in the cases of several of the most recent publications, see: Corso, "Opinione dissenzienti," cit.; Di Martino, *Le opinioni dissenzienti*, cit.; Falato, *Segreto*, cit.; Kelemen, *Judicial Dissent*, cit.; Ferioli, *Dissenso e dialogo*, cit.; in which the history, the meaning or the implications of collegiality are extensively discussed, but in which the concrete risks or potential negative repercussions of externalised dissent are underplayed with respect to potential benefits. On the contrary, other contemporary authors, such as Zagrebelsky, Pasquino

Collegiality implies that it is the court as an organ to speak, not the individual judges, and also that it is the court as a whole to be independent from other powers, not the individual judges to be independent from each other within the court. While the subject within the pluralist discourse is the figure of the individual Justice, the subject in the collegial discourse is the Court itself as an organ. A consequence of the principle of collegiality, as observed by Zagrebelsky[122], is the idea that the position of the individual judge only counts within internal deliberations, and that the objective of the deliberation process should result in the synthesis, the mediation between the positions present in the Court. Such a decision-making process prevents judges from *self-marking* with regard to specific sections of the public opinion and political parties. Following this conception, the absence of externalised dissent would constitute a violation of judicial independence in a pluralist court, but not in a collegial one.

It can be deduced, from the extremely synthetic overview in the first chapter, that almost all the reasons in favour of introduction in the Italian debate on public dissent are strictly related to the quality, the richness and the *purity* of the interpretative reasoning. A plurality of opinions shows the complexity of constitutional interpretation more clearly, contributes to the dynamism of case law, makes the legal reasoning sharper, polishing it from the not unfrequently opaque language of compromise[123]. These favourable reasons are broadly accepted as more than valid. Their only problematic aspect is their *absolute* character. These motivations are valid *as such*, but their impact varies accordingly to the context to which they are applied. Especially in the course of the Italian debate, it is interesting to observe how the reasons for introduction mostly have this absolute character, while most of the

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or Cassese have constantly tended to the overplay the risks, uncertainties, and collateral effects of externalised dissent within the system.

[122] Zagrebelsky, "La Corte costituzionale," cit.,78-79; Zagrebelsky and Marcenò, *Giustizia costituzionale*, cit.,45-47.

[123] Diletta Tega, "La Corte Costituzionale vista da vicino Intervista di Diletta Tega a Gaetano Silvestri," *Quaderni costituzionali* 3 (2014), 757 cited in Kelemen, *Judicial Dissent*, cit.,100.

"conservative" ones depend on and are inseparable from the context's specificities and imperfections, emphasising the risk of downturns or negative repercussions on the rest of the system[124].

Furthermore, it has to be observed how the Italian debate on externalised dissent has always followed the torsions of the political system, with alternations of historical phases in which dissenting opinions would have increased the prestige of the Court, and ones in which it would have weakened or fragmented its authoritativeness. There have been phases in which strong collegiality has been felt as a need to give stability and security to the political-institutional system in phases of turmoil. To contextualise also means to picture the Court as an organ in the totality of the system, giving enough weight in the reasoning to historical conjunctures and practical considerations about the system as a whole[125].

However, even when the importance of contextualisation is being recognised, the evaluation of pros and cons continues to present some problematic aspects. An example of this is provided by the ban on the re-election of judges: "…if judges can publish their dissent, the possibility of re-election becomes even more dangerous to their independence. This has sometimes been used as an argument against dissenting opinions. However, it should rather be used as an argument in favour of a ban on re-election."[126].

[124] See again the synthesis of the Italian debate on externalised dissent in the first chapter.

[125] For an analysis of this type see: Di Martino, *Le opinioni dissenzienti*, cit.,501-512. Di Martino, reporting and commenting the observations by Lanchester (see: Fulco Lanchester, "Intervento" in "Pensare la Corte costituzionale. La prospettiva storica per la comprensione giuridica," *nomos-leattualitaneldiritto.it* 2 (2015), 3.) agreed with the interpretation of Mortati's favour towards dissenting opinions and Zagrebelsky's defensive attitude towards them as an ongoing debate on the *normalisation* of the Italian political system. According to both Lanchester and Di Martino, the defence of secrecy and collegiality in the Constitutional Court coincides with the "special" situation of Italy as a *protected democracy*, in which the peculiarities and imperfections of the political system are precluding its normalisation and producing a particular kind of mistrust (mistrust implicitly expressed by Zagrebelsky and other defenders of the *status quo*, according to Lanchester) in the evolution of the system. In Lanchester's analysis, Mortati had been favourable to the normalisation of the system, while Zagrebelsky (after his experience in the Court) to the "protection" of the system, motivated by a deep mistrust in its *imperfect bipolarism* and conditioned by the presence of anti-system parties.

[126] Kelemen, *Judicial Dissent*, cit.,164.

This argument is certainly valid, but it does not consider the possibility that judges could continue their careers following different paths and ambitions, but it is partially lacking contextualisation, since it does not recognise that a ban on re-election is not as effective as life tenure in preserving independence while retaining public dissent.

In the case of the comparison between the United States and Italy, the clearest example would be provided by the current Italian President of the Republic, Sergio Mattarella, constitutional judge from 2011 and President from 2015 (even before the end of the nine-year term). Life tenure precludes SCOTUS Justices from other career paths, while the impossibility of re-election does not give the same assurance in the case of the ItCC. With similar precedents, the introduction of dissenting opinions in the ItCC would also extend the problem beyond re-nomination or election (which is already prohibited), calling into question the fixed nature of terms, which is deeply grounded in the institutional equilibrium of the Italian Republic, as life tenure is in the United States.

Chapter 3
Final Reflections and Evolutionary Perspectives

1. On the Influence of History and Ideology.

The attitudes of the two systems towards the disclosure of dissent are extremely difficult to modify since they are inseparable from constitutions themselves. Pluralism and collegiality in the two courts primarily depend on the historical, ideological and cultural elements that shaped both the US Constitution of 1787 (and the Bill of Rights of 1791) and the Italian Republican Constitution of 1948, their interpretation and their material application.

The strongly pluralist nature of the SCOTUS can be attributed to two crucial elements. The first one is not textually present in the Constitution, and it is the influence of the English common law judiciary. Notwithstanding the evolution during the Court Marshall and the emergence of the opinion of the Court, the pluralism characterising the SCOTUS descends directly from the model of the House of Lords, of the King's Bench and on their traditionally individual, *seriatim* opinions[127]. The second element is the particular importance assumed by freedom of speech among the constitutional principles contained in the Bill of Rights. In fact, freedom of speech is one of the pillars of the First Amendment to the Constitution. Furthermore, the concepts of freedom of speech and of free *marketplace of ideas* have permeated so much the jurisdiction of the Court that the absence of the active contribution of Justices to the public debate through concurring and dissenting opinions would be nearly unthinkable.

[127] For a more detailed comparative historical account of the connection between common law English courts and the American legal system in the perspective of externalised dissent see also: Giuseppe Franco Ferrari, Alfonso Di Giovine, and Paolo Carrozza, *Diritto Costituzionale Comparato* (Roma: GLF Laterza, 2014); Di Martino, *Le opinioni dissenzienti*, cit.; Sistemi costituzionali comparati; Lucio Pegoraro and Angelo Rinella, *Sistemi Costituzionali Comparati* (Torino: Giappichelli, 2017); Ferioli, *Dissenso e dialogo*, cit.

The notion of *marketplace of ideas* has deep social, economic and cultural roots in the Anglo-American sphere. It is, in fact, conducible to the transposition of the Anglo-American variant of capitalism into the domain of human expression. Historically, the origins of the analogy to the economic marketplace can be traced back to the early phases of capitalism in England, more precisely, to the height of the struggle between absolutism-feudalism and parliamentarianism-capitalism represented by the English Civil War. Philosophically, the free competition of ideas as a means to separate truths from falsehoods can be traced back to John Milton and his *Areopagitica* (1644)[128]. It is clear that the belief that no one alone knows the truth, or that no one idea alone embodies either the truth or its antithesis[129] constitutes the ideological bedrock of the SCOTUS pluralist and individualist nature.

This is also demonstrated by the evident will of both majorities and dissenters in the history of the Court to take part in the dialogue with this philosophical and ideological tradition and to actively shape it. It is not by accident that the first explicit reference to the marketplace of ideas was produced by Justice Wendell Holmes, remembered as one of the *great dissenters*[130]. Holmes' landmark dissenting opinion in *Abrams v. United States* contained a passage, which is central in understanding how the ideology of free

[128] Stanley Ingber, "The Marketplace of Ideas: A Legitimizing Myth," *Duke Law Journal* no. 1 (1984), 3. The link might appear far-fetched, but the SCOTUS has directly referred to Milton's *Areopagitica* in its First Amendment case law four times in the last century: in *New York Times Co. v. Sullivan* (376 U.S. 254, 279 1963), *Times v. City of Chicago* (365 U.S. 43, 67, 82, 84 1960), *Eisenstadt v. Baird* (405 U.S. 438, 458 1971) and *Communist Party of the United States v. Subversive Activities Control Board* (367 U.S. 1, 151 1960).

[129] David Schultz and David L. Hudson, "Marketplace of Ideas," The First Amendment Encyclopedia, accessed January 25, 2020, https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas). The philosopher of 19th century liberalism, John Stuart Mill, further developed the concept, explicitly translating market competition into a theory of free speech for the first time in his essay *On Liberty* (1859), complementing political liberalism and *laissez-faire* capitalism with free market competition of ideas. Mill also considered free competition of ideas as the best way to separate falsehoods from fact.

[130] For a complete analysis of Holmes' impact on the SCOTUS in light of his dissents see again: Di Martino, *Le opinioni dissenzienti*, cit.,90-119.

market competition constitutes a pillar of the American model of constitutional review[131].

It is evident that these principles and beliefs are mirrored by the structure of the Court itself. If *truth emerges from competition*, preventing Justices to compete would create a contradiction at the heart of the system. Furthermore, the *marketplace of ideas* has been invoked hundredths of times by both SCOTUS Justices and federal judges within the US diffused system of constitutional review since Holmes' dissent in *Abrams* and continues to be invoked[132]. Nearly a century after Holmes, Justice Breyer in *Reed v. Town of Gilbert* reinstated the centrality of the same concept not only to the US legal system, but to American *society*[133] For these reasons, a prohibition on externalised dissent or separate writing, with the imposition of a unitary structure and impersonal style of judgments would constitute an almost indefensible contradiction in the context of the United States.

Turning to Italy, the reflection will be focused on some of the historical elements which shaped the post-WWII Republican Constitution of 1948, from which the nature and the structure of the ItCC are inseparable. Zagrebelsky gave an interesting interpretation of how the strongly collegial nature of the Constitutional Court is inextricable from the post-war transition to the Republic and from the values of the new Constitution arguing that: "There are many

[131] See: *Abrams v. United States* (250 U.S. 616 1919). "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.".

[132] Only in the last fifteen years it has been invoked in *McCreary County v. American Civil Liberties Union*, 545 U.S. 844 (2005), *Randall v. Sorrell*, 548 U.S. 230 (2006), *Walker v. Texas Division, Sons of Confederate Veterans*, 115 S.Ct. 2239 (2015), *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015) and *Matal v. Tam*, 582 U.S. ___ (2017).

[133] See: *Reed v. Town of Gilbert* 576 U.S. __ (2015). "Whenever government disfavours one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.".

souls in our Constitution and, in the decision of the concrete case, these many souls must find a common ground."[134]

It might be too easy to dismiss this interpretation with the counterargument that pluralism would be better protected by a plurality of opinions[135]. Such a counterargument flows partially from the abstraction from the historical, ideological and cultural context in which the Constitution was developed, and does not concede much room to the influence of ideologies and historical circumstances. The first elements to emerge are that the Italian Constitution was drafted in the aftermath of a civil war which followed the fall of the fascist regime during WWII, while the American Constitution, almost two centuries before, followed the victory in a war of independence.

One could argue that in the case of the American transition to independence, the dominant elite constituted by big landed property managed to seize entirely the constituent power and draft *its own* constitution, permeated by its own ideology, building its own political system. The Founding Fathers could start a constitutional project in which there was not the intention nor the historical necessity to include *many souls* or to find *common grounds* between them. In addition to their rejection of monarchic absolutism (and therefore of the model of French royal courts, inherited by revolutionary France), the members of the American constituent elite had also very few incentives to build a model oriented towards the *coexistence* of ideas instead of one promoting the *competition* of ideas[136].

It follows that, at least in the pre-Civil War and pre-Reconstruction era, when federal institutions (including the SCOTUS) were established and permanently consolidated, there was no pressing need of finding *common grounds* or striving towards *coexistence* between a plurality of souls in the

[134] Zagrebelsky, "La Corte costituzionale italiana," cit.,79. Author's translation.

[135] See, for example: Kelemen, *Judicial Dissent*, cit.,101.

[136] This interpretation finds support *The Politics of Law* (2005) edited by David Kairys. In his contribution to the volume, Kairys reports how John Jay, co-author of the *The Federalist Papers* with Alexander Hamilton and James Madison, thought that "the people who own this country should govern it". See: David Kairys, *The Politics of Law: a Progressive Critique* (New York, NY: Basic Books, 2005).

same constitution. It is perhaps not entirely by coincidence that the closest American parallel of the *many souls* concept expressed by Zagrebelsky was introduced into the US Constitution with the amendments to the Bill of Rights[137]. However, in the wake of the *fundamental rupture* of the Civil War, the structure of Court did not experience any fundamental rupture or changes, having already been modelled and consolidated upon the original constitutional scheme.

The Italian Civil War which followed the armistice of 1943 had all the characteristics of a fundamental rupture, with the difference that it followed the disintegration of the precedent regime. The pressing historical necessity was not only the one of rebuilding a country, but of rebuilding a country's political system and its institutions along new lines. The same did not happen to federal institutions (including the SCOTUS) after the American Civil War. Indeed, one of the primary elements of difference with the post-independence Constitutional Convention in the United States was the *composition* of the post-WWII (and post-Civil War) Italian Constituent Assembly[138].

In addition to that, the transition to the Republic was achieved by means of a universal suffrage referendum between forms of State (1946) with deeply controversial results[139]. From both the war and the elections no clear winners emerged. The country was profoundly divided, and the monarchic or

[137] See: Kairys, *The Politics of Law*, cit.,9. Those amendments regarding "African-Americans, minorities, white men irrespective of property holdings and anyone who has reached the age of eighteen" were introduced only after "the fundamental rupture of the Civil War-after the failure of the original constitutional scheme … their adoption was not required by the Constitution or by law, nor was it inevitable.".

[138] The democratically elected assembly included the 35% of the Christian Democrats (DC), the 20% of the Socialist Party of Proletarian Unity (PSIUP), the 18% of the Communist Party (PCI) and the rest of the percentage fragmented between smaller parties (including Sardinian and Sicilian autonomist and secessionist regional parties). Source: "Dipartimento per Gli Affari Interni e Territoriali," Aree tematiche, accessed January 25, 2020, https://elezionistorico.interno.gov.it/index.php?tpel=A&dtel=02/06/1946&tpa=I&tpe=A&lev0=0&levsut0=0&es0=S&ms=S).

[139] Precisely, 54.3% of republican votes (12.717.923) and 45.7% of monarchic votes (10.719.284). Source: "Dipartimento per Gli Affari Interni e Territoriali," Aree tematiche, accessed January 25, 2020, https://elezionistorico.interno.gov.it/index.php?tpel=F&dtel=02/06/1946&tpa=I&tpe=A&lev0=0&levsut0=0&es0=S&ms=S).

republican preference in the referendum also geographically overlapped with the North-South division[140].

An example of the compromises which resulted from the debate went from the existence of a constitutional court itself to its jurisdiction and composition[141]. The hybrid nature of the type of constitutional review of Court and of its composition derived from the compromise between divergent positions such as the emphasis on popular sovereignty or on technical-professional qualifications, or between unfettered parliamentary sovereignty and "the maximum multiplication of constitutional organs retaining parts of supreme power"[142].

However, it has to be considered that, notwithstanding the radical ideological divergences existing between the dominant forces in the Assembly, the common element of fear towards the possibility of fragmentation or future authoritarian downturns prevailed. It prevailed on both the sides of the ideological spectrum[143]. In a situation which had no clear winners, the only tolerable solution was represented by compromise at all costs. The Republican Constitution was never a *majoritarian* constitution (originated from clear majorities or winners) in which winning or losing forces could be clearly recognised, but a constitution "of everyone"[144] which even clearly antagonising forces could equally recognise as legitimate[145].

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[140] Between republican Centre-North and monarchic Centre-South-Isles. Also the Constituent Assembly was almost split in two, given that out of 566 seats the major party, the Christian Democrats (DC), retained 207 of them, with the Socialists (PSIUP, 115) and Communists (PCI, 104) retaining 219 seats combined.

[141] Paladin, *Per una storia costituzionale*, cit.,62.

[142] Paladin, *Per una storia costituzionale*, cit.,61 (author's translation). The social-communists, such as Togliatti, Gullo and Laconi, advocated for the democratic or entirely parliamentary election of judges, while others, such as the Catholic-democrat Mortati, stood for a system based on presidential appointment.

[143] On one side, with the constructive involvement of social-communists in a constitutional project which did not reflect the most radical of their claims, on the other side, exemplified by the willingness of Catholic-democrats and liberals not just to "contain" the decisive influence of social-communists, but to incorporate it among the different "souls" of the Constitution and of the Republic (notwithstanding the emergence of Cold War bipolarism and the dependence on the US Marshall Plan for reconstruction).

[144] "*di tutti"* is the expression used by Onida in the original text.

[145] Valerio Onida, "Costituzione Italiana." in *Digesto, Discipline Pubblicistiche* IV (Torino: Utet, 1989), 325-327.

In fact, the Republican Constitution and its institutional framework were both results of this compromise. The Constitution itself became the "common ground"[146] and the synthesis of the antagonist forces that had to find a way to *coexist* within the new republican form of State. The Constitutional Court entered into function only ten years later, in 1956, but its nature and structure could not represent a contradiction with the nature of a Constitution born from compromise and founded on the pressing historical necessity of coexistence. If the Constitution had to represent a common ground, in the words of Zagrebelsky, its interpretation had to represent a common ground as well. The necessity regarding both the Constituent Assembly and the Constitutional Court was not to create the illusion of consensus, but to acknowledge the impossibility of consensus and overcome it without creating further divisions[147].

2. Conclusions.

It could be said that there is no definitive answer to the fundamental question of externalised dissent in the realm of constitutional adjudication. As reaffirmed in the initial quote from Justice Ginsburg, "what is right for one system, may not be right for another"[148]. What Ginsburg intended is no simple relativism. On the contrary, it is attention to the strong points, fallacies, peculiarities and imperfections of systems considered in their entirety. The

[146] Zagrebelsky's "*punto d'incontro"* in Italian.

[147] Another fundamental difference between transitional Italy and both post-independence and post-Civil War United States was the absence of phenomena such as slavery or extensively racialized capitalism. With the influence of these factors, a post-Civil War Reconstruction including the rewriting (not only the amendment) of the Constitution (with consequent institutional reforms at the federal level) through the universal suffrage election of a constituent assembly would have proved almost impossible to achieve. While the mostly ideological and political (non-racial) nature of the internal divisions and the relative ethnic homogeneity of the population facilitated the Italian transition to the Republican Constitution, in the United States, the vital importance of racial capitalism and the clear presence of a winning side prevented similar processes from happening. In fact, it would be an interesting thought experiment to think how the US Constitution would have looked like if it had been entirely rewritten by a democratically elected assembly after the Civil War.

[148] Ginsburg, "The Role of Dissenting Opinions," cit.,3.

weight of potential negative repercussions and collateral effects must not encroach upon modernisation and improvement, but modernisation and improvement must not be considered in isolation from practical contexts.

What may mean a step forward in one context or in one historical moment may be meaning ten steps back in another one. Taking up again Ginsburg's words, *what may be right in one historical moment, may not be right in another*. The example of the decades-long debate on externalised dissent in the context of the Italian system of constitutional adjudication is a powerful indicator. The historical moment in which Mortati advocated for the introduction of dissenting opinions is not identical to the one the Constitutional Court is currently experiencing. The weight of historical circumstances must be present in the equation, and the conjunctures for modifying delicate equilibria and deeply engrained practices are not always the right ones.

In light of these considerations, the comparative focus with regard to the experience of the US Supreme Court has been particularly useful in emphasising how deeply rooted the absence of externalised dissent is in the current system of Italian constitutional adjudication, and how its introduction, if taken as a serious effort, would require a series of structural changes in the system. The jurisdiction of the Court, its sources of legitimacy and of independence, its composition, nomination mechanisms and decision-making processes, the yearly number of cases decided, the terms of office for judges, the role of the President are all decisive factors that should be figuring in the equation of change.

In addition to that, it must be considered that there are other ways in which to implement gradual changes, without necessarily having to modify structural equilibria. An example of that is currently being offered by the Constitutional Court in relation to the organs of Italian civil society[149]. The

[149] For a detailed account of the Court's decision (passed on January 8, 2020) and of its implications on the proceedings of constitutional adjudication with regard to civil society see: Giuseppe Cotturri, "Quando La Costituzione è in Movimento," Questione Giustizia, accessed January 28, 2020, http://www.questionegiustizia.it/articolo/quando-la-costituzione-e-in-movimento_28-01-2020.php).

Court, by modification of the Integrative Norms[150], moved towards the inclusion of interventions by *amici curiae* (through the production of briefs and opinions) within the proceedings of constitutional adjudication. By means of the same modifications, the Court also opened to the hearing of experts on specific subjects regarding individual cases. This could be considered as an example of gradual change deriving from needs emerging from within the system.

As already mentioned in the premises of the second chapter, the presence of externalised dissent (or its absence) should be considered as a *dependent* variable, rather than as an *independent* one in relation to the system as a whole. If the presence of externalised dissent does not emerge as a structural need from the system itself, the impact of its introduction risks to be materially irrelevant or superfluous, if not counterproductive.

[150] See: Delibera della Corte Costituzionale, January 8, 2020: "Modificazioni alle Norme integrative per i giudizi davanti alla Corte costituzionale" (Gazz. Uff. n. 17 published on January 22, 2020).

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Summary

La manifestazione del dissenso nelle corti che amministrano la giustizia costituzionale costituisce un tema di estremo interesse in quanto consente una approfondita riflessione sui diversi aspetti che attengono alla struttura e alla funzione delle corti medesime.

In maniera più specifica, con riguardo alla Corte costituzionale italiana, si deve rilevare in via preliminare che le norme che ne regolamentano l'istituzione e la procedura non ammettono alcuna forma di esternazione del dissenso interno e ciò la rende un perfetto punto di partenza per un'analisi del dibattito tra le ragioni a favore della segretezza e quelle a favore della pubblicità.

Ciò considerato, l'obiettivo di questa indagine è quello di esplorare l'approccio della Corte costituzionale italiana al dissenso interno e alla sua espressione ed esternazione, adoperando, allo scopo, sia l'ampia letteratura emersa dal pluridecennale dibattito italiano sull'introduzione dell'opinione dissenziente, sia la comparazione con un organo radicalmente diverso come la Corte Suprema degli Stati Uniti. Gli strumenti della comparazione si rivelano, infatti, estremamente adatti nel rintracciare la connessione tra l'assenza di forme di esternazione del dissenso nella Corte costituzionale e la natura profonda della Corte stessa.

Il lavoro è suddiviso in tre capitoli. Il primo è dedicato ad una ricostruzione del dibattito sulla potenziale introduzione dell'opinione dissenziente nel sistema di giustizia costituzionale italiano a partire dai lavori dell'Assemblea Costituente. L'obiettivo della fase ricostruttiva è una ricognizione completa, sia pur sintetica, delle principali teorie, interpretazioni ed approcci emersi dal dibattito accademico sul tema. Sono esaminate anche le principali proposte legislative, di riforma costituzionale e di modifica delle norme integrative occorse durante le varie fasi del dibattito. Non senza rilevare,

inoltre, che ognuna delle proposte di introduzione dell'istituto, a prescindere dagli strumenti normativi utilizzabili, è fallita.

Al contrario delle proposte concrete, invece, il dibattito negli ambienti accademici è stato caratterizzato, sin dall'inizio, da forti variazioni e da fasi alterne chiaramente identificabili con tendenze favorevoli o contrarie. Ad esempio, la fase embrionale che va dai lavori della Costituente agli anni del consolidamento della Corte all'interno del tessuto istituzionale, politico e sociale della Repubblica è stata caratterizzata dall'impronta di Costantino Mortati e della sua *advocacy* a favore della pubblicità del dissenso. L'influenza di Mortati e del volume da lui curato, in cui numerose autorevoli voci analizzano, in chiave comparativa e non, i vantaggi portati dalle opinioni dissenzienti sull'operato di una corte, ha un impatto decisivo sull'intero dibattito nei decenni successivi. Infatti, quasi tutti gli argomenti più rilevanti a favore dell'introduzione del dissenso pubblico, ripresi poi in tutte le fasi successive sino ad oggi, sono già delineati in questa primissima fase che va dai lavori della Costituente alla prima metà degli anni Sessanta.

La fase successiva vede, invece, l'estensione del dibattito al di fuori degli ambienti più strettamente accademici tramite la stampa, l'emergenza di apporti più critici riguardo agli aspetti positivi enfatizzati durante la fase precedente e, in particolar modo, anche i primi tentativi concreti di introduzione, sotto forma di proposte legislative. L'intensificazione e l'estensione del dibattito, insieme all'aumento delle esperienze comparabili a livello europeo hanno contribuito a rendere gli anni Settanta ed Ottanta un'importante fase di transizione verso gli anni Novanta, caratterizzati da stravolgimenti radicali a livello politico e dalla crisi del sistema partitico repubblicano.

Gli anni Novanta sono anche caratterizzati dal diretto interessamento della Corte al dibattito sulla pubblicità del dissenso interno. Difatti, gli atti del seminario organizzato dalla Corte stessa nel 1993 costituiscono una svolta importante nel contesto del dibattito. Conseguentemente alla crisi politica e agli attacchi diretti alla legittimità ed autorevolezza della Corte in un sistema che si allontana sempre più dal proporzionale per volgere al maggioritario ed al

bipolarismo imperfetto, i toni della *querelle* mutano durante il corso del decennio, avvicinandosi a posizioni più difensive delle precedenti.

Gli anni del nuovo bipolarismo imperfetto vedono intensificarsi la difesa della collegialità "forte" che caratterizza la Corte, soprattutto alla luce dei sempre più frequenti attacchi provenienti dal mondo della politica. Questa fase lascia emergere, non solo dal punto di vista dei contributi accademici, ma anche da quello del respingimento di ulteriori proposte, l'enfatizzazione della funzione strettamente giurisdizionale della Corte, della sua coesione interna e della sua indipendenza rispetto agli altri poteri ed alle altre istituzioni presenti nel sistema. Nonostante ciò, durante l'ultimo decennio, la crescita del numero di pubblicazioni e di interventi favorevoli all'introduzione dell'opinione dissenziente lascia pensare all'inizio di una nuova fase nell'evoluzione del dibattito, caratterizzata, ancora una volta, dalla forte propensione della dottrina verso la pubblicità del dissenso, ma con un taglio sempre più comparativo.

Il secondo capitolo poi è improntato alla comparazione tra le esperienze della Corte costituzionale italiana e la Corte Suprema degli Stati Uniti, alla ricerca di elementi, prassi e caratteristiche che influenzano la presenza o l'assenza di forme di esternazione del dissenso nelle due corti. Tali elementi includono la diversa composizione e meccanismo di nomina, il differente ruolo assunto dall'individualità dei singoli giudici nel contesto delle corti e, in particolar modo, le implicazioni di concetti come *collegialità* e *pluralismo*.

La distinzione adoperata è la stessa sviluppata recentemente da Pasquale Pasquino, che separa concettualmente le corti la cui natura deriva dal semplice aggregato delle individualità forti dei singoli giudici, dalle corti la cui natura di organo decisionale assorbe le individualità a favore della coesione e dell'univocità interpretativa. Le corti pluraliste, come la Corte Suprema, parlano con più voci contemporaneamente, voci che rimangono ben distinte durante tutto il processo decisionale, mentre le corti collegiali, come la Corte costituzionale, parlano con un'unica voce. Le implicazioni emergenti da queste caratteristiche strutturali pervadono la natura e l'operato delle due corti, rendendo, ad esempio, anche le *opinions of the Court* della Corte Suprema

estremamente personali e riconoscibili a seconda dell'estensore e, dal lato opposto, le sentenze della Corte costituzionale impersonali e, non di rado, quasi criptiche nello stile. La stessa composizione delle corti sembra seguire gli stessi principi tesi ad amplificare o a minimizzare l'incidenza delle individualità e del pluralismo da una parte, e del compromesso e della collegialità dall'altra.

Difatti, le due diverse conformazioni (come i due diversi ordinamenti) sembrano rendere implicite diverse interpretazioni di concetti come *legittimità* o *indipendenza.* Ancora una volta, il pluralismo della Corte Suprema è ancorato al concetto di legittimità quale legittimazione sociale, mentre la collegialità della Corte costituzionale è indissolubilmente legata alla stabilità data dall'impersonalità ed univocità della sentenza. Sul versante dell'indipendenza, invece, emergono differenze ancora più sostanziali. L'indipendenza del singolo membro della corte è il valore da preservare a tutti i costi nel contesto americano, intesa come indipendenza di ogni membro dall'influenza dei colleghi in quanto libertà espressiva. L'indipendenza collegiale della Consulta, invece, si riferisce quasi esclusivamente all'indipendenza ed autonomia della stessa, intesa come organo, dall'interferenza di altri poteri. Nel contesto italiano, l'influenza dei membri della Corte sui propri colleghi si rivela invece un elemento indispensabile nel processo decisionale alla luce della ricerca del compromesso in caso di divergenze. Il ragionamento si estende, inoltre, ai diversi ruoli del *Chief Justice* e del Presidente della Corte.

Nel terzo ed ultimo capitolo, all'esito di una riflessione critica sull'influenza decisiva delle circostanze storiche e dei rispettivi valori costituzionali sull'approccio delle due corti all'esternazione del dissenso, si valutano, in prospettiva, i risultati dell'analisi condotta nei primi due capitoli. In conclusione, sembra non esistere una risposta definitiva in grado di dirimere il dibattito in astratto, anche se la frase di Ruth Bader Ginsburg riportata all'inizio del lavoro vi si avvicina molto. Il concetto espresso dalla giudice della Corte Suprema è attuale più che mai: "ciò che è adatto per un sistema, può non essere adatto per un altro". Il concetto espresso da Ginsburg non è

frutto di semplice relativismo, ma di attenzione ai punti di forza, alle imperfezioni e alle particolarità dei diversi sistemi, considerati nella loro interezza. Il peso di potenziali ripercussioni negative e di effetti collaterali non deve certo impedire miglioramenti in un sistema, ma i miglioramenti non devono essere considerati in maniera isolata dai contesti.

Ciò che potrebbe rappresentare un passo avanti in un contesto o in un momento storico potrebbe, d'altra parte, rappresentare dieci passi indietro in un altro. Riprendendo e rimodulando le parole di Ginsburg, *ciò che potrebbe essere adatto in un momento storico, potrebbe non rivelarsi adatto in un altro*. Il lungo dibattito sull'esternazione del dissenso nel contesto della giustizia costituzionale italiana rappresenta il perfetto esempio di una situazione alla quale applicare questo concetto. Il momento storico in cui Mortati sosteneva l'introduzione delle opinioni dissenzienti è estremamente diverso dal momento storico vissuto attualmente dalla Corte e dall'intero sistema politico-istituzionale. Il peso delle circostanze storiche deve essere presente nel ragionamento che intende sostenere eventuali riforme, considerata la difficoltà che si incontra nel modificare delicati equilibri istituzionali e contrassegnati da dinamiche profondamente radicate.

Alla luce di queste considerazioni, la prospettiva comparatistica riferita agli Stati Uniti ha consentito di mettere in risalto quanto sia, in realtà, profondamente radicata l'assenza di forme di esternazione del dissenso nell'attuale sistema di giustizia costituzionale italiano e quanto un'eventuale introduzione richiederebbe una lunga serie di modifiche strutturali all'interno del sistema. La giurisdizione della Corte, le sue fonti di legittimazione ed indipendenza, la sua composizione, i meccanismi di nomina, il numero di casi annui, la durata del mandato dei giudici, il ruolo del presidente, sarebbero tutti fattori decisivi, tessere dello stesso domino da tenere in considerazione nella valutazione di ogni tentativo di riforma.

Come già specificato nelle premesse metodologiche al secondo capitolo, la presenza o l'assenza di forme di esternazione del dissenso (in particolar modo di opinioni dissenzienti), dovrebbe essere considerata e trattata come una

variabile *dipendente*, piuttosto che come una *indipendente* in relazione al resto del sistema. Qualora la possibilità di esternare il dissenso mediante lo strumento delle opinioni dissenzienti non emergesse quale bisogno strutturale all'interno del sistema stesso, l'impatto della sua introduzione rischierebbe di rivelarsi materialmente irrilevante, se non addirittura controproducente.