



Judicial review and political partisanship: Moving from consensual to majoritarian democracy



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ABSTRACT

Due to the collapse of the party system during the mid-nineties, Italy represents an interesting case study to test the effects of a transition from a consensual to a majoritarian model of democracy on judicial behavior at the level of the Constitutional Court. Using a dataset of 972 cases of substantive judicial review (*ricorsi in via principale*) from 1985 to 2005, and proposing new measures of political alignment within constitutional review, we analyze the effect of a change in the political party system on judicial behavior. Our results show that political alignment is a stronger predictor of judicial decision making under majoritarian than consensual model of democracy.

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1. Introduction

Several theories compete to explain judicial decision-making: formalist theory, attitudinal model, and various versions of agency theories.¹ Legalists take the stance that judges simply interpret and apply the law in a conformist view of precedents, that is, compliance with formal interpretation dominates judicial behavior. Judges are largely guided by what the law says and abide by a strict legal authoritative interpretation. Quite differently, the attitudinal model sees judicial preferences, with special emphasis on ideology, as the main explanatory model (judges have a particular disposition and decide accordingly). Finally, agency theorists recognize the importance of judicial preferences but argue that they are implemented taking into account political and institutional realities (judges are willing to sacrifice their disposition in order to achieve other relevant goals).

This large literature has made significant contributions to the understanding of judicial behavior, both theoretically and empirically. Notwithstanding, this literature is principally U.S.-based and tends to ignore relevant aspects of a more civil law-oriented

environment.² There is a growing empirical contribution investigating judicial behavior at the Supreme Court outside the U.S., with notable applications in Europe³ and North America⁴, in Asia⁵, and in Latin America.⁶ The politicization of the Italian Constitutional Court, in particular, has been studied by several political scientists as well as legal economists.⁷ Although the empirical evidence tends to show some complex patterns of politicization, they are different from the American-based standard theories. Neither the attitudinal model nor the strategic model as conceived by American scholars applies directly to the Italian Constitutional Court. In particular, the civil law tradition, local determinants and procedural rules explain why politicization has a different configuration than the standard American literature. In fact, as legal scholars have pointed out [Groppi, 2009], the design of how the Italian Constitutional Court operates aims at eliminating any possible politicization: separate

² For works on other than the Supreme Court case study see Bonneau and Rice (2009), Choi et al. (2010).

³ Vanberg (2005), Amaral Garcia et al. (2009), Franck (2009) and Franck (2010), Garoupa et al. (2013), Hanretty (2012) and Hanretty (2013).

⁴ Tate and Sittiwong (1989), Alarie and Green (2008), Green and Alarie (2009).

⁵ Ramseyer and Rasmusen (2003), Ramseyer and Rasmusen (2006), Ginsburg (2003), Garoupa et al. (2011), Escresa and Garoupa (2012).

⁶ Chavez (2004), Helmke (2004), Iaryczower et al. (2002) and Iaryczower et al. (2006), Hilbink (2007), Kapiszewski and Taylor (2008), Carroll and Tiede (2011).

⁷ See Guarneri (1997, 2001, 2003, 2006), Breton and Fraschini (2003), Santoni and Zucchini (2003, 2004), Fiorino et al. (2007), Pederzoli (2008), Padovano (2009), Padovano and Fiorino (2012), Dalla Pellegrina and Garoupa (2013).

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¹ See, among others, Brenner and Spaeth (1988), Segal and Cover (1989), George and Epstein (1992), Epstein and Knight (1998), Segal and Spaeth (2002), Hansford and Springgs (2006), Lax and Cameron (2007).

opinions are not allowed, deliberations are secret, and collegiality is promoted. Unsurprisingly, the patterns of political alignment can only be explained in such context.

This literature has not tested the relationship between the changes in party system that occurred in the nineties and the behavior of the Court. We propose a further empirical contribution to this literature by exploiting a shock to the referenced underlying political system. Our test allows us to check whether or not a move from a fuzzier catch-all to a deeper clear-cut polarized system of political alliances has any impact on judicial behavior in terms of partisanship or political alignment. In an important piece of scholarship, Lijphart (1999) has proposed two models of democracy: consensual and majoritarian. In the consensual model, there is no clear political polarization; politics is fundamentally based on bargaining, compromise, and inclusiveness. Party coalitions are broad and catch all significant players. In the majoritarian model, political parties are strongly polarized; politics is settled on significant competition, exclusivity, and straight opposition. Coalitions are ideologically more homogeneous.⁸ Our hypothesis is that a majoritarian model polarizes judicial behavior, creating a division within the judiciary that reflects the party system (based on or organized around two coalitions). The consensual model, by contrast, favors compromise and agreement within the judiciary (based on a broader inclusive large coalition).

Our hypothesis can be understood both by a selection effect as well as incentives which reinforce each other. A majoritarian model induces the coalitions to select individuals who are perceived to be significantly loyal (by mere coincidence of ideological preferences). These coalitions are also the natural audience for the justices who can be potentially compensated at later stages by exhibiting loyalty. Therefore, we expect to have political labels such as *socialist* or *conservative* to describe judges. In a consensual model, appointments are likely to be more likely negotiated within the stable broader coalition and result in individuals who are perceived to be faithful to the model (that is, favor consensus over dissent) rather than strict ideological alignment. The absence of strong factions also shapes the natural audience and possible rewards.

Notice we are not saying that judges are more or less politicized under one particular model by comparison to the alternative model. In both models, consensual and majority, they are likely to be equally responsive to political variables. The point is that the response is revealed in different ways. In particular, we expect more explicit political alignment in a majoritarian model than in a consensual model.

To investigate such hypothesis, we use a dataset on Italian Constitutional Court decisions from 1985 to 2005, focusing on cases with substantive judicial review (*ricorsi in via principale*). The Italian case is quite interesting as the country was a consensual democracy until 1992 (with a proportional electoral system and a multiparty arrangement stabilized around a coalition that ruled since World War II) and emerged as a majoritarian democracy after 1994 (with plurality rule for electing the parliament and two well-defined coalitions). At the same time, the formal appointment mechanisms to judicial positions in the Court did not change in that period. Our results provide some support for our hypothesis, subject to important caveats discussed in the paper. We detect more political alignment between the decisions of the Court and the political majority after 1994, thus confirming a more polarized judicial behavior. Before 1992, we have no evidence of important political divisions in the Court and the evidence seems to indicate a

more consensual judicial behavior. In particular, having an extra Justice aligned to the petitioner decreased the probability to have a declaration of constitutionality by 20%. The effects are more apparent when the central government files for constitutional review or when the Court reviews regional laws which is consistent with our interpretation given the enhanced politicization of these issues.

The paper goes as follows. We detail the institutional framework in Section 2. The relationship between judicial behavior and party system is discussed in Section 3. The econometric model is presented in Section 4. Descriptive statistics and results are addressed in Section 5. Conclusive remarks close the paper.

2. The institutional framework

2.1. Breaking the party system

In Italy, the move from a First (FR) to a Second Republic (SR) took place without a formal constitutional reform; rather it was due to a political scandal burnt out in spring 1992: the Clean Hands (*Mani Pulite*) affair.⁹ This scandal unveiled some particularities with the funding of political parties. Many sources of funding were clearly outside of the law in different forms of corruption. At the same time, the whole affair hit hard the parties with governmental responsibility, both at the national and the regional levels.¹⁰ Before the scandal, the electoral system was based on a proportional electoral system. This system, particularly by the end of the seventies, used to reward a coalition lead by a dominant party, the Christian Democrats (DC), allied with the Socialists (PS), the Republicans (PR), the Liberals (PL), and the Social Democrats (PSD), in the so-called Penta-Party coalition (PP).

The Italian party system of this period has been described as a polarized pluralist system (Sartori, 1966, 1976), a multiparty system with a dominant party (Lijphart, 1999), and even as an imperfect two-party system. Behind these definitions stands a system in which the electoral results were fundamentally irrelevant to determine the ruling government coalition. Indeed, from the very origin of the FR, the Communist Party (PC) represented the major opposition. Yet the communists were never part of the central government, but for a few years between 1976 and 1979, the so-called *Government of National Solidarity*, under the threat of the terrorist Red Brigades.¹¹ The other relevant opposition party assembled the fascists under a new movement (MSI), which was always excluded from central and regional governments.¹²

At the same time, the communists were more actively involved in regional governments, where they used to be in power, sometimes alone, sometimes with the support of the socialists. Due to localized political interests, it could also happen that, without a new electoral call, a regional government shifted from a PP administration to an administration opposed to PP. Usually the switch took place because of an alliance between DC and PS collapsed and was soon replaced by an agreement between PS and PC.¹³ There are remarkable regional fluctuations. For example, Basilicata, Campania or Puglia are quite stable with PP regional governments in the relevant period. In other regions, such as Lazio, Liguria or Sicily, we can denote some switch of governments within the period we

⁹ The change in electoral laws was infra-constitutional.

¹⁰ Italy is divided into twenty regions, five of which are ruled under special statutes and fifteen by ordinary statutes. Additionally there are two autonomous provinces, Trento and Bolzano, which operate within one of the special regions, Trentino Alto Adige. Loosely speaking, regions are comparable to states in a decentralized system.

¹¹ See Table A1 in the Online Appendix. Even during these years, the PC was not formally part of the central government but it rather supported it informally.

¹² MSI under Gianfranco Fini was replaced in 1993 by a more moderate National Alliance (AN) which joined the coalition led by Berlusconi after 1994.

¹³ See Tables A2 and A3 in the Online Appendix for further details.

⁸ The political economy literature has long ago recognized the relationship between electoral rules (party systems) and the behavior of political agents. See, among others Myerson (1993), Persson and Tabellini (1999) and Persson and Tabellini (2000), Lizzeri and Persico (2001), Milesi-Ferretti et al. (2002).

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