At Risk of Capture?

Tug-of-War over Appointments to the Italian Constitutional Court

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The term of the Italian constitutional judge Silvana Sciarra ended on November 11, 2023. Since then, the Italian Constitutional Court has consisted of only 14 judges instead of the 15 required by Article 135 of the Constitution. On December 21st, the mandates of three other judges will expire, creating a total of 4 vacancies. The appointment of the missing judges is the responsibility of the Parliament, but political parties are far from reaching an agreement on who should fill the seats. Prime Minister Giorgia Meloni has stated that it is up to her political majority to "deal the cards" for these elections and, so far, she has not been trying to reach any agreement with the opposition.

For a judge to be elected to the Court an agreement between the majority and the opposition is necessary, since the election requires the votes of 2/3 of members during the first three rounds of voting, which is decreased to 3/5 starting from the fourth round.

Following another failed ballot on December 10th, the election of all four new judges will now likely take place in January when the lower quorum of 3/5 will suffice. This would allow Prime Minister Meloni's majority, which has 354 votes out of the required 363, to propose a "distribution" of appointments proportional to the balance of power in the Parliament, claiming the choice of three judges and leaving the designation of the fourth to the opposition.

The majority's strategic obstruction of the appointment process in combination with Meloni's statements raise the specter of a possible politicization of the Italian Constitutional Court at a time where the independence of high courts has been under attack in several countries. This concern may seem excessive since the Italian legal system has several safeguards to preserve the impartiality and effectiveness of its Constitutional Court. However, this does not render the Court immune to practices that could slowly and almost imperceptibly undermine its independence.

A Worrying Trend

The phenomenon of democratic backsliding has gone hand in hand with a weakening of the functions and independence of judicial bodies. The reforms undertaken in Hungary and Poland, and the one attempted, but later stopped, in Israel are the most well-known examples of the practice of "judicial overhauls," with Mexico being the most recent example. Other direct or indirect attacks on the independence and effectiveness of supreme or constitutional courts have been made elsewhere through "court-packing" reforms aimed at altering the composition of these courts or through reforms of their functioning and prerogatives in order to weaken their counter-majoritarian function.

The ongoing debate in Germany about whether it is necessary to constitutionalize rules governing the appointment of the Federal Constitutional Court judges, is also illustrative of this concern. Because the rules are currently codified only at the legislative level, some scholars observed that the Bundestag majority could capture the *Bundesverfassungsgericht* in a few simple steps: first by lowering the threshold for electing its members, then abolishing term limits to create lifetime appointments, and finally establishing new parliament-appointed chambers. To avoid this scenario, there are calls for constitutionalizing the 2/3 majority requirement for electing constitutional judges as well as the requirement of term limits.

Contrary to Germany, the rules governing the appointment of the Italian Constitutional Court's members are already entrenched at the highest level of the hierarchy of norms and, so far, any constitutional

reform allowing court-packing has never been proposed. However, this does not render the Court immune to practices that may nonetheless compromise the correct functioning of its constitutional jurisdiction. In particular, the weakening of independence can result from practices aimed at securing a majority of members ideologically or politically aligned to the government, so that they are more inclined to support the government's policies. Though these may not count as examples of court-packing, they could, in the long run, undermine a court's ability to act as a counter-majoritarian institution and thus weaken the system of checks and balances.

A Resilient Appointment Procedure

The Italian Constitution's provisions on the appointment of constitutional judges limit the risk of political capture due to an appointment mechanism that combines high legal expertise with the involvement of all powers. Thus, the President of the Republic, the Parliament, and the highest ordinary and administrative courts (Art. 135 Const.) each get to appoint one third of the 15 judges on the court. While the Constitution is silent on the majorities required for the parliamentary election, the law on the functioning of the Court (Law no. 87/53) originally set a threshold of 3/5 of members of parliament, later lowered to 3/5 of voters starting from the third ballot. To enhance the Court's impartiality and counter-majoritarian function, Constitutional law no. 2/1967 raised this threshold to 2/3 of members during the first three rounds of voting, lowered to 3/5 of members starting from the fourth round. The high majorities required for this election thus reduce the risk of capture, since they request trans-partisan compromises to nominate constitutional judges.

Appointees must be selected "among judges, even retired, of the highest ordinary and administrative courts, university professors holding law chairs, and lawyers with twenty years of professional experience". In practice, the highest courts tend to appoint judges, while the President and Parliament generally prefer to nominate university professors or lawyers. Unsurprisingly, Parliament tends to appoint judges who are ideologically close to the proposing political parties, rendering them more politically oriented. Nonetheless, the risk of the court's politicization or subordination to the ruling majority is significantly reduced by several factors: they are elected with a high reinforced majority requiring the participation of the opposition; they are only one third of the court's members; and they must possess the required legal expertise.

While the appointment process goes some way in shielding the Italian Constitutional Court from the risk of political capture, there are nonetheless practices that could compromise its impartiality, including through reforms targeting other institutions that could indirectly allow a political majority to exert greater influence over its appointment.

The Risks of Strategic Delay

This is not the first time Parliament has delayed appointing the Court's members despite being constitutionally required to do so. The history of the Italian Republic is marked by difficulties in electing parliament-appointed members. Parliament often waits for the expiration of various mandates to proceed with two or three appointments at once, making it easier to reach compromise agreements on more than one name, depending on the balance of power between political parties. This is the current scenario, as the majority refrained from putting forward a candidate likely to gather the necessary votes until the end of three other mandates in December (those of Judges Augusto Barbera, Franco Modugno, and Giulio Prosperetti, all appointed by Parliament in 2015).

This practice forces constitutional judges to work with a reduced bench for extended periods, as the Constitution imposes no deadline for elections nor provides any substitute procedure in the event of parliamentary inaction. As the law requires a quorum of eleven members for deliberations, the delay risks paralyzing the Court's activity. In particular, once the terms of the three other judges end on December 21st, any absence of one of the remaining members due to health or personal reasons could temporarily stop the functioning of the institution. To avoid this consequence, some proposals have been put forward by

scholars, such as lowering the court quorum or giving to the other appointing institutions the right to appoint the missing judge after a certain delay. However, it seems unlikely that the parliamentarians, who are supposed to pass any reform of the appointment mechanism, would decide to lower their influence on the composition or to divest themselves of such crucial competence.

Delaying the election of vacant seats thus poses serious risks to the effectiveness of the constitutional justice system, in addition to potentially reinforcing the ruling majority's influence over the Court. During a press conference on July 25, the President of the Republic, Sergio Mattarella, urged Parliament to not further delay this election, putting an end to what he called "a violation of the Constitution". In June, the Court's president, Barbera, similarly urged both the majority and oppositions to reach a compromise on the appointment, "resisting the temptation of an inappropriate delay aimed at carrying out an inadmissible spoils system in such a vital institution". After further months of stalemate due to the inability of parliamentarians to reach a compromise – and with the approaching expiration of three other judges, including himself – President Barbera partially softened his warning. Maintaining his appeal to proceed as soon as possible, he asked parliamentarians to not overly worry about the appointment of government-aligned judges, as the Court's collegiality and the high level of legal debate during deliberations ensure that individual political orientations do not determine the outcome of its decisions.

These guarantees may guard the Court against the sort of polarization that characterizes others such as the Supreme Court of the United States. Nonetheless, any political struggle over Court appointments goes against the spirit of the Constitution which, through the high thresholds envisaged for these elections by constitutional provisions, sought to avoid excessively politicized nominations.

The Indirect Effects of Constitutional Reforms

Another threat to the Court's independence could arise from the constitutional reform currently under parliamentary review. While this reform does not concern the organization of the Constitutional Court or the appointment of its members, it aims to ensure an absolute majority in Parliament in support of the directly elected Prime Minister. If the ruling party were to possess an absolute majority, its representatives could elect the President of the Republic alone (even though regional delegates also participate in this election). If so, this would allow a single political majority to potentially select up to two thirds of the constitutional judges. This is another argument for caution when it comes to constitutional reform, reminding us that any institutional change, even a limited one, can affect the delicate system of checks and balances of a democratic system.

Conclusion

Compared to other jurisdictions, the Italian Constitutional court appears relatively insulated from the risk of capture and, so far, no constitutional reform allowing court-packing has been proposed. However, the increasing attacks on the judiciary by political figures, including in Italy, requires us to remain alert. A judicial overhaul often begins with steady drops that can over time hollow the stone.

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