# Parliamentary Inertia in the Election of Constitutional Judges in Italy

VB verfassungsblog.de/constitutional-democracy-italy-corte-costituzionale/

Corrado Caruso

Pietro Faraguna

11 June 2024

## Delegitimizing by Procrastinating

Constitutional democracy, inherently a delicate fusion of the noun “democracy” and the adjective “constitutional,” faces challenges in both jurisdictions with centralized and specialized constitutional courts and those without such established courts. In the former, recent assaults on constitutional democracy have directly targeted these very courts. In countries where populist movements have garnered significant electoral support, their self-proclaimed role as the sole representatives of the true will of a unified people has led them to assert that their democratic legitimacy surpasses the technocratic authority of constitutional courts.

This concerning comparative scenario (see the debate hosted by VB in 2018) should serve as a warning to citizens, scholars and political actors in jurisdictions where constitutional courts have consistently acted as reliable guardians of democratic and constitutional principles in the post-World War II era.

## An Appropriate Design for a Constitutional Court of a Polarized Polity

Italy, with its Constitutional Court formally established in 1948 and fully operational since 1956, appears to belong to the group of reliable guardians of the Constitution and constitutionalism at large.

The *Corte costituzionale*, perched atop Rome’s highest hill and facing the Presidency of the Republic, has steadily gained authority within the legal system. Its ascent has been gradual (Cappelletti, Judicial review in the Contemporary World, Bobbs-Merrill, 1971), characterized by a relational approach (Barsotti, Carrozza, Cartabia, Simoncini).

One of the keys to its success lies in the intricacies of its composition, meticulously designed by the Constituent Assembly. The Italian Constitution mandates that its 15 judges meet rigorous professional standards – either full professors of law, judges in the highest courts, or senior attorneys. The appointment process follows a unique, mixed method:

- Five judges are elected by the highest courts in the country (three by the Court of Cassation, one by the Council of State, and one by the Court of Accounts).
- Another five judges are appointed by the Head of State (who is themselves elected by Parliament).
- The remaining five judges are directly elected by Parliament in a joint session.

Compared to its European and "Western" counterparts, this institutional design is already quite distinctive. Notably, the five judges elected by a directly elected political body must achieve an exceptionally high majority. The Constitution requires a 2/3 majority in the first three ballots and a 3/5 majority from the fourth ballot onward. Interestingly, amending the Italian Constitution is arguably easier than electing a Constitutional Court judge, given that constitutional amendments pass with an absolute majority.

This combination of supermajorities and stringent professional requirements has significantly contributed to the construction of a distinguished profile for constitutional judges in Italy – a country with a long history of strong political polarization, even before it became fashionable.

## Political Deadlocks and how to face them

In recent times, the political landscape has undergone significant changes, resulting in recurring deadlocks during the parliamentary election of constitutional judges. To address this issue, a strategy has emerged: waiting for multiple judges' terms to expire simultaneously. By doing so, a larger group of constitutional judges becomes available for replacement, facilitating political compromise.

Nine years ago, this approach was crucial when Judge Luigi Mazzella's term ended on June 28, 2014. Despite 31 unsuccessful votes to find his replacement, Parliament struggled to reach a consensus. Eventually, after a second judge (Sergio Mattarella) and a third judge (Paolo Maria Napolitano) completed their terms (in February 2015 and July 2015, respectively), a political agreement was reached in December 2015. Three constitutional judges—Augusto Barbera (current President of the Court), Franco Modugno, and Giulio Prosperetti (current vice-Presidents) – were elected.

Fast forward to today: President Silvana Sciarra's term ended on November 11, 2023. Despite three unsuccessful attempts to elect her replacement over the past six months, the political deadlock persists. It appears that Parliament will now wait until December 2024, when the three judges elected in the 2015 package will also complete their terms.

## Playing with Matches

Judges whose term has expired do not remain in office until the replacement is elected. The inertia generates, therefore, some minor inconveniences and a very significant risk. Let's explore these issues: when a single judge's term ends before the larger package, the Court operates with reduced ranks. This results in longer decision times due (not a big issue considering today small, almost inexistent, backlog) and to a loss of expertise and sensitivity that a new judge would bring. Moreover, an even-numbered panel (which is suboptimal for majority voting) may be formed during this interim period.

The very significant risk is determined by the fact that, according the constitutional provisions regulating the Court's activity, its functioning is impaired if the number of judges falls below eleven. Constitutional non-compliance, under unfortunate conditions, ends up having a snowball effect, with the formation of ever-larger replacement packages: four judges next December. In nine years, it could be five judges to be replaced if the same dynamics are followed.

The Court will probably find itself with eleven judges in office out of fifteen projected in the coming months. For a few weeks, if all goes well (actually, for a few months, because the current judges do not participate in hearings and chambers where cases are discussed if their decisions wouldn't be signed in time). Or for longer, if something goes wrong.

Such a situation jeopardizes the Court's operability, as it becomes vulnerable to individual absences due to illness or other personal reasons. Worse still, under those undesirable circumstances, each judge holds the power to disrupt the Court's functioning solely through their absence.

If a similar scenario arises in nine years, with a package of five judges to replace, the Court could be incapacitated for several months.

## The Dangers of a Partisan Court

The "wait-and-see" tactic employed here has clear political motivations. Rather than actively seeking prompt agreement with the opposition (or a portion of it), the majority supporting Meloni's government prefers to prolong the process. Their goal is probably to appoint a constitutional judge whose cultural background aligns with the political profile of the "Brothers of Italy", Meloni's political party. Furthermore, there is a possibility that by simultaneously electing four constitutional judges in December – as mentioned an unprecedented occurrence in Italian constitutional history –, the parliamentary majority could effectively appoint three judges, leaving only one for the highly fragmented opposition. This process would impact on the Court with a large and sudden change in its composition, possibly jeopardising the continuity of its action and jurisprudence, a previous asset in terms of rule of law.

Italian Prime Minister Meloni justifies this wait-and-see approach by asserting her right to play her cards strategically. She responds to critics, including the former President of the Court and former Prime Minister Giuliano Amato, who have raised concerns about the illiberal implications of this stance. While it is unquestionably within the prerogative of the parliamentary majority to elect judges, two issues remain. First, it is unprecedented for the same majority to elect three out of four constitutional judges simultaneously, potentially resulting in a Court suddenly leaning towards the views of the parliamentary majority in office. Second, even if the majority allows the opposition to elect two judges, doubts persist about the constitutional consistency of the multiparty system applied to appointments. A designation process where each major party appoints his own judge could compromise the Court's impartiality, favouring loyalty to appointing parties over openness to different worldviews. Although Constitutional Courts often decide by majority, aiming for consensus or at least majorities that do not mirror party divisions would be more desirable for effective judicial review in a well-functioning constitutional democracy.

## How to fix this?

In an ideal system, this problem would be resolved through a strategic and deliberative approach by political actors. Parties should relinquish the practice of appointing judges based on partisan profiles and instead opt for candidates with impeccable qualifications. The broader legitimacy (in technical, political and cultural terms) of the judge is, the easier it is for them to sever the links with the nominating institution (Gren). This is basically the optimal outcome of a collaborative constitution, where each institutional actor operates within a heterarchical relationship of reciprocity, recognition, and respect (Kavanagh).

However, real-world politics do not operate this way. In the past, when Parliament failed to elect constitutional judges, the President of the Republic (in Italy, largely considered as an impartial guardian of the political process) issued messages urging parliamentary elections for constitutional judges. In some cases, these messages even went so far as to threaten the early dissolution of the chambers (Cossiga, in 1991).

This could be one possible solution, or – to say better – the starting point of a possible solution. Many other structural interventions are in principle conceivable: the above illustrated parliamentary majority could be modified, so to lower or raise the majority needed to elect one single judge. Both options of raising or lowering majorities could have the impact of avoiding the formation of such a large package of judges to be substituted at the same time, either because the simple majority could elect its "own" judge without seeking any agreement with opposition parties, or because the election would need such a large majority to neutralize any connection of the candidates to the party. However, this effect is questionable. Risks and stakes are very high, either of worsening the deadlock or of making a political capture of the Court an easy task. Moreover, the praxis showed that political deadlocks are rarely fixed by political repentance.

Another solution would be a constitutional amendment re-introducing the extension of the term of outgoing judges, as long as their substitutes are effectively elected. Here, again, the solution requires a political forward-looking intervention that seems impracticable. As a last resort option, the Court itself could strike down constitutional provisions excluding such extension through a self-referral of a constitutional issue. In fact, self-referral power allows the Constitutional Court to call itself to review a legislative act, by making an independent constitutional judgment arise from an ongoing one: the Court uses this power quite rarely – approximately 70 times in in almost 70 years – but recently a little more frequently. However, this nuclear option could only be conceivable in case the political deadlock brings the Court to a complete paralysation: risks of squandering a hard-won reputation – which as has happened in other countries (Steinbeis) – are very high.

The mapping of possible solutions leads to the bitter realisation that each of them has drawbacks. It is, in short, a difficult problem to solve. However, in constitutional law there is no Mr. Wolf knocking on the front door with its magic bullet. Once identified, constitutional law issues need be discussed by a composite community studded with citizens, scholars and political actors. This is a small contribution in that direction.

---


SUGGESTED CITATION  Caruso, Corrado; Faraguna, Pietro: *Delegitimizing by Procrastinating: Parliamentary Inertia in the Election of Constitutional Judges in Italy, VerfBlog,* 2024/6/11, https://verfassungsblog.de/constitutional-democracy-italy-corte-costituzionale/, DOI: 10.59704/b87d90da6b6bcfc2.

---

Explore posts related to this:

---

Other posts about this region:
Italien