

THE DETERMINANTS OF JUDICIAL INDEPENDENCE:
EVIDENCE FROM THE ITALIAN CONSTITUTIONAL COURT (1956-2002)

NADIA FIORINO, FABIO PADOVANO, GRAZIA SGARRA

Nadia Fiorino, Dipartimento di Sistemi e Istituzioni per l'Economia, Università degli Studi dell'Aquila and Center for Economics of Institutions – Università Roma Tre

Fabio Padovano, Dipartimento di Istituzioni Politiche e Scienze Sociali, Università degli Studi Roma Tre and Center for Economics of Institutions – Università Roma Tre

Grazia Sgarra, Centro Studi Confindustria and Center for Economics of Institutions – Università Roma Tre

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*Abstract*¹

This paper tests the explanatory power of alternative theories on the determinants of judicial independence by annual and sentence-based data about the Italian Constitutional Court. The results show that structural measures of judicial independence, the share of constitutional judges elected by the magistracy and justices' age, are positively correlated with independent behavior of the Court. Contrary to previous studies, we find that the Court matches a greater cohesion of the other government branches with more independent behavior, improving the effectiveness of the system of checks and balances.

¹ Corresponding author, Fabio Padovano, Dipartimento di Istituzioni Politiche e Scienze Sociali, Università Roma Tre, Via C. Segre 4, 00146 Roma, ITALY. Tel: +390655176402; Fax: +390655176248; E-mail: padovano@uniroma3.it. Paper presented at the Seminars of the Center for Economics of Institutions, Università Roma Tre and the European Public Choice Society Meeting. We would like to thank Carlo Colapietro, Domenico da Empoli, Emma Galli, Luis Gonzalez, Roberto Ricciuti, Alessandro Terzulli, George Tridimas, Marco Ventura and Stephan Voigt for comments. The usual *caveat* applies.

1. Introduction

Judicial independence is an important feature of the Italian political and institutional system. The Constitution of 1948 asserts that "...The judiciary constitutes an autonomous and independent branch of government not subject to any other" (art. 104 sec. 1). Yet, as for any other general principle embodied in the Constitution, what is relevant is how political and institutional interactions have been shaped in accordance with such a principle. In other words, one should take into consideration both the "formal" and the "material" Constitution, i.e., the transposition of the Constitution into a real context. This aspect calls for empirical analyses of the decisions of judicial bodies and of their actual interactions with the other two government branches, the legislative and the executive. Furthermore, as the Italian judicial system is organized hierarchically with the higher courts being able to overrule the sentences of the lower courts, it is important to analyze the independence of the highest court, the Constitutional Court. Finally, in order to clear the analysis from problems of semantics, in this paper we deem the Constitutional Court "independent" insofar as it is not the agent of the executive and the legislative branch of government.

The textual analysis of the Italian Constitution seems to support the view that the Italian Constitutional Court enjoys a significant degree of independence from the other two government branches (Zagrebelski, 1997; Paladin, 1998). The main role of the Constitutional Court is to protect citizens from unconstitutional actions and rules by the other bodies (Art 134). To this end, the Constitution provides conditions of structural independence to the justices of the Court, such as: the longest tenure among the Italian public officials (9 years, Art. 135 sec. 3); a constitutional protection for "... conditions, forms, and terms for challenging the constitutionality of a law and [for] the independence of the justice" (art. 137, sec. 1); the unappealability of the Court's decisions (art. 137 sec. 3); and, last but not least, the general conditions that "...justice is administered in the name of the people" (art 101, sec. 1) and that "... judges are only subject to the law" (art 101, sec. 2).

However, the law and economics and public choice literatures have proposed a quite different approach to the study of judicial independence. Judges, even constitutional ones, are utility maximizers just like any individual, be he or she a private or a public official; they seek the greatest possible satisfaction out of their activity, in terms of career, prestige, income, upholding of the law, under a set of constraints posed by the legal, institutional, political environment wherein they act. Starting from political economy models of separation of powers, Padovano, Sgarra and Fiorino (2003) recently provided a theory of how an independent judiciary improves the political accountability of a system with the three “classical” government branches, the executive, the legislative and the judicial branch. On the basis of such a theory, the fundamental question that this paper raises is what kind of factors, if any, contribute to make the Italian Constitutional Court independent in his rulings, so to effectively assure a mechanism of checks and balances within the Italian institutional system. Specifically, this paper attempts to provide an econometric analysis of the most relevant determinants of structural independence indicated in Padovano, Sgarra and Fiorino (2003) and to compare the predictions of that model with others considered in the related literature. The data refer to the decisions of constitutional illegitimacy of the Italian Supreme Court from 1956, when the Court first sat, to 2002.

The rest of the paper is organized as follows. Section 2 reviews the literature. Section 3 illustrates the structure and the decision making procedures of the Italian Constitutional Court. In Section 4.1 we describe the variables pertinent to the empirical restrictions emerged from the theoretical literature. We then present the results of estimates on both sentence-based and annual data. Section 5 offers some concluding remarks.

2. The sources of judiciary independence: review of the literature

Landes and Posner (1975) is the first positive analysis of the determinants of the independence of the supreme or constitutional courts. Starting from an interest-group model of government, they argue that an independent judiciary is an institutional mechanism aimed at increasing the durability

of enacted legislation. Since the present value of legislative “deals” between legislators and interest groups is positively correlated with the durability of such deals, legislators have an *ex ante* interest to grant independence to judges. They may do so by extending the length of judges’ tenure and by insulating their selection and incomes from political interferences. Landes and Posner start their argument from the observed fact that independent judges tend to interpret laws in terms of the intent of the enacting legislature, rather than the current one, and thus rarely nullify or declare laws unconstitutional. The durability and present value of legislative deals increase because, even when the enacting legislators end their tenure, their legislative acts outlive them due to the Court’s consideration of their original intent. The main testable restriction of models such as Landes and Posner (1975) applied to supreme or constitutional courts is that the independence of these courts is positively correlated with the durability of the legislative contracts. When the court is relatively dependent, the durability of the standing legislation will be relatively low; consequently, on average there will be a relatively short time between the enactment of the law about which the court renders a sentence of constitutional illegitimacy and the sentence itself. On the other hand, if the court is relatively independent, the durability of the standing legislation will be higher. Therefore, the longer the time elapsed between the enactment of the law and the ruling of the court, the greater the independence of the Court.

In a wide variety of context and samples Anderson, Shugart and Tollison (1989), Spiller and Gely (1992), Boudreaux and Pritchard (1994), Gorini and Visco Comandini (1998) find evidence in support of Landes and Posner’s model, as well as other theories of the same vein, such as Crain and Tollison (1979) and Salzberger (1993).

The most relevant shortcoming of the interest groups models of judicial behavior is their failure to explain how the independence of the judicial power arises from - or is limited by - the *interactions* (“checks and balances” in the jargon of constitutional theories) between the judiciary and the other two government branches, the legislative and the executive. The model of Landes and Posner (1975) features two agents only, the Supreme Court and the legislative; but the very fact that

it is the President of the Court to appoint the justices and that he does so in order to influence future legislation shows that the relationship between the executive and the legislative does affect the functioning of the Court. Analyses of this relationship have recently become possible thanks to the development of the political economics models on the separation of powers and political accountability. Persson, Roland and Tabellini (1997) is the seminal paper in this field; yet they consider only two government branches – the legislative and the executive – and treat the judiciary as a silent partner. Padovano, Sgarra e Fiorino (2003) extend the logic of Persson, Roland and Tabellini (1997) and elaborate a theory of how judicial independence enhances political accountability and assures the functioning of the system of checks and balances. The basic idea is that, in presidential democracies, an independent judicial branch uses its information advantage with respect to voters in order to force the government to keep the extraction of rents (or the preservation of information) below the level ensured by the electoral control; whereas in parliamentary democracies the independent judiciary makes the collusive agreements between the executive and the legislative unstable, again favoring the electorate. An accommodating judiciary, instead, merely participates to the sharing of the rents. The authors relate judicial independence to the possibility for the legislative and executive branches to affect the selection and the career paths of judges. The lower such a possibility, the higher is the independence of the judiciary. When applied to constitutional courts, this model predicts that a relatively more independent court, in the way described above, will be more likely to rule against the constitutional legitimacy of legislative acts approved by the other two government branches.

In their analyses of, respectively, the English Courts of Appeal and the Israeli Supreme Court Salzberger and Fenn (1999) and Salzberger (2003) offer empirical support to predictions akin to those of Padovano, Fiorino and Sgarra (2003). They find that the courts' rulings are affected both by the features that secure the independence of individual judges and the characteristics of the institutional framework in which the courts operate. Among the elements of individual independence rigid arrangements regarding tenure, immunity from wage decreases and judges' age

turn out to be the most significant; whereas the presence of special procedures for the appointment and the promotion of judges, and the mechanism for the allocation of cases to judges are the institutional characteristics that carry the greatest explanatory power. As regards to the Italian case, Breton and Frascini (2003) affirm that the Italian Constitutional Court is as independent as any other corresponding court of democratic countries. They base such assertion by reporting the jobs that the Presidents and the Vice-presidents of the Court took after the end of their tenure and evaluating their “political” nature; yet they do not provide any statistical test for their claim.

In Tsebelis (2000, 2001) the behavior of the judiciary is dependent on the policymaking of the “veto players”. This term refers to the political agents who must jointly agree in order to implement a legislative act. When applied to legislative production (Tsebelis 2001), the veto players model foresees a sequential game in two steps. Given a legislative *status quo* that results from an agreement between the legislative veto players (depending on the institutional setting, they may in turn be the executive and the legislative branches, or the political parties, or the like) the Court decides whether to modify the *status quo* through a sentence of constitutional (il)legitimacy. If the Court acts with a sentence that falls within the Pareto set of the legislative veto players, the game ends. If, instead, the decision of the Court lies outside the Pareto set, the players modify the outcome of the Court’s decision by agreeing about a new proposal that changes the legislative *status quo*. In this model the Court essentially holds a passive role, with a low checks and balance potential, since the probability that the Court’s decision may be the end of the game is conditional to the size of the Pareto set of the legislative veto players. Thus, the higher the number of the legislative veto players or the wider the ideological distance that separates them, the larger is the Pareto set and the higher is the probability of an overthrowing of the legislative *status quo* by the Court. The impossibility for legislative veto players to change the *status quo* may lead justices to be more active and independent from the other political bodies. According to this model, we should observe a higher percentage of sentences of constitutional illegitimacy when the fragmentation and/or the ideological polarization of the legislative veto players increase.

Santoni and Zucchini (2001) test the theory of Tsebelis (2001) on data drawn from the Italian institutional and political framework and focus especially on the relationship between the Parliament and the Constitutional Court. Their main findings are twofold: first of all, they provide evidence that the introduction of the Court in 1956 is correlated with lower legislative output and lower likelihood of policy changes – a fact, however, which can also be explained by the nearly absolute majority of parliamentary seats held by the Christian Democrats during the first two legislatures, which end more or less at the same time. Second, Santoni and Zucchini (2001) show that the level of intervention by the Court, used as a proxy of judicial independence, is an increasing function both of the number of veto players (political parties) in the Italian Parliament and of their ideological differences. The most evident theoretical shortcoming of their analysis is that they define judiciary independence as a function only of the effective number of parties in the Parliament and of the power game played among them. This is at best an *indirect* way to catch such independence, as it is not based on structural characteristics of the Court independence, such as tenure length, methods of appointment of the justices, justices' age and the like. As we shall see, these characteristics are not constant through time. At the empirical level, Santoni and Zucchini (2001) test the veto players model in isolation, without comparing its predictions with those of alternative, competing models of judicial independence. This makes it impossible to evaluate the relative explanatory power of the veto players model and exposes their findings to the risk of observational equivalence with the predictions of other theories. Furthermore, the jurisprudence of the Italian Constitutional Court has not been stable, having been affected by exogenous phenomena such as the need to focus on pre-Republican legislation, cases of impeachment of ministers and the need to absorb the backload of cases in different periods of its activity. A more correct empirical analysis should consider a greater set of theoretical contributions and pay attention to the stability of the relationships through time.

While not testing it directly, still the empirical analyses of Ramseyer and Rasmusen (1997) and Hanssen (2002) are related to the logics underlying the veto players model. In particular, Ramseyer

and Rasmusen (1997) stress the importance of the *stability* of the veto players as determined by the degree of competitiveness in the electoral market. By comparing the Japanese and the American political systems, they argue that judicial independence arises from high political turnover. If a party expects to stay in power for several consecutive legislative terms, it will eventually obtain close control over judicial agents. Conversely, where politicians face competitive electoral markets and a high likelihood of government turnover, judges will be relatively more insulated from political pressures. In the same vein, Hanssen (2002) examines the judicial selection and retention procedures in all the American states. He shows that the most independent judicial institutions are associated with higher levels of political competition and greater differences between political platforms.

Hayo and Voigt (2003) and Feld and Voigt (2003a, 2003b) take into account the implications of different strands of the theoretical literature on the determinants of judicial independence in order to construct two indicators of judicial independence, named the *de jure* and the *de facto* indices. The former takes into account formal guarantees of judiciary autonomy, such as the judicial budget, the selection process, the duration of tenure and the like. The latter, instead, focuses on the factually ascertainable degree of judicial independence, namely, the effective term lengths, the degree to which their decisions have an impact on government behavior and the like. The authors use twelve variables in order to assess the *de jure* independence and eight variables to characterize the *de facto* one and check whether judicial independence is conducive to economic growth for a large sample of countries. The most relevant shortcomings of these models are related to the use of a composite index of the degree of judicial independence for each country, obtained by summing up the value of several dummy variables, each related to a component of such independence. An equal weight is assigned to each component, i.e., judicial independence is assumed to be a linear additive function of these factors. A more appropriate aggregation process should either apply the principal component analysis or be guided by theory.

This review of the literature suggests that a fruitful line of empirical research on judicial independence must satisfy two conditions: first, it must pay attention to the institutional details of the jurisprudence of the court, by focusing on formal and substantial provisions of independence and the effects of changes thereof on the behavior of the court itself; second, it must compare the predictions of alternative theories of judicial independence. In order to satisfy the first condition, a single country sample seems more appropriate than a cross country one. The aim of this paper is to advance on both dimensions, using data about the Italian Constitutional Court.

3. A closer look at the Italian Constitutional Court

3.1. Composition of the Court. The Italian Constitutional Court is composed of fifteen justices: one third are elected by the magistrates of the three highest Courts (the Supreme Court of Cassation, the Council of State and the Court of Audit); another third by the two Houses of Parliament (Chamber of Deputies and Senate) in joint session; the remaining third is appointed by the President of the Republic (art. 134 of the Constitution). All of them are selected among active or retired magistrates, professors of law and lawyers exercising their profession since at least twenty years. They hold the office for a 9 years term and cannot be reappointed. With regard to the judges elected by the magistracy, the Supreme Court of Cassation elects three, while the Council of State and the Court of Audit one each. All are elected by a simple majority².

A qualified majority of two-thirds of the total membership of the two Houses is instead required for the judges elected by the Parliament. After three ballots this qualified majority is reduced to three-fifths of the total. During the so-called first Republic (1948-1993) the presence of such a high *quorum* induced the main parties to reach an informal agreement for the election of the judges. On the basis of such an agreement two candidates were usually chosen by the Christian Democratic Party (DC), one by the Communist party (PCI), one by the Socialist party (PSI) and another one by

² If no candidate obtains a majority of the votes after the first ballot, those who received the largest number of votes in the first ballot are admitted to the second. The number of participants to the second ballot equals twice the

the smaller parties (Rodotà, 1999). The introduction of the majority system in the election of the Parliament in 1993 modified the Italian political framework. The result was the creation of two coalitions and, as regards to the election of constitutional judges, meant the disappearance of the informal agreement. Yet, an agreement between the governing and the opposing coalition is still needed, as the majority usually finds it difficult to elect five judges without the support of the opposition.

As for the five judges appointed by the President of the Republic, constitutional theorists (Zagrebelsky, 1997) maintain that the procedure that the Constituent Assembly established in 1946 ensures the autonomy of the decision of the President. Differently from the usual decrees of the President of the Republic (the so-called D.P.R.), which are proposed by the government or single members thereof and then signed by the President, the decree of the President of the Republic that appoints the constitutional judges is of Presidential initiative and signature; it only needs to be countersigned by the Prime Minister. However, the autonomy of the President of the Republic to select the justices may in fact be more limited than what constitutional theorists assert. One must bear in mind that the Italian President of the Republic is elected by both Chambers (as well as by representatives of the Regional councils) by absolute majority after three ballots. He may thus be seen as the agent of the parliamentary majority, even as regards to the appointment of the Constitutional judges. It is no accident that informal consultations with the political parties and the government usually precede the appointment of the five “Presidential” justices.

In order to guarantee the independence of the Court, the Italian law establishes a number of requirements, in addition to the procedures that regulate their election and appointment. For instance, Constitutional judges cannot be members either of the Parliament, or of the Regional Councils; they cannot exercise professional, commercial or industrial activities or be managers or

number of the judges that have to be elected in every court; hence it is equal to six in the Court of Cassation and to two in the Court of Audit and the Council of State.

auditors of profit corporations. Finally, they cannot work as magistrates or university professors or participate to the activities of political parties.

3.2. Decision making process of the Court. It is the details of the procedures through which the Court in fact reaches its decisions where we must look into in order to understand the changing degrees and the actual sources of structural independence of the Constitutional Court. First, the 15 justices elect a President among themselves who holds office for a 3-year term and can be reappointed. The President holds a significant agenda setting power: he sets the agenda of the cases to be reviewed, selects the “judge reporter” whose task is to prepare the first draft of each sentence and holds a double voting weight in case of ties.

Another important driving feature of the Court’s decision making process is the so-called “College of Judges”. Although the Court formally decides as one acting body – dissenting opinions are not published – each decision of the Court is in fact taken by a College of Judges. This College is appointed anew by the President of the Court for every sentence, is composed by at least 11 out of 15 justices, and decides by a single majority on the draft sentence submitted by the judge reporter. The minimum size of 11 ensures that a coalition of 5 judges of the same source of appointment (presidential, parliamentary or judicial) may never hold the absolute majority. This is a first evidence that the appointment process is considered relevant for the type of decisions that the Court makes; in other words, it is expected to influence the sort of jurisprudence and the degree of independence of the Court. One may thus say that the structural independence of the Court varies for every sentence according to the composition of the College of judges; it may not then be *a priori* considered as a constant characteristic. Absences are another factor that may affect the independence of the Court: they may cause the effective composition of the College of judges at the moment of the sentence to be different from that originally selected by the President of the Court; hence they may affect the relative weights of each type of justice within the College of judges and, by that, the relative independence of the Court. Vacancies play a similar role to absences, but on a somewhat greater scale. Justices who end their tenure are not always promptly substituted. This is

more often the case for parliamentary or presidential justices than for “judicial” ones. During its history, the Court has gone through times, often much longer than a year, when it was composed by less than 15 members. Of course, this thwarted the equality among the type of justices within the Court and affected the expected degree of independence of the Court.

Figure 1. Percentage of constitutional judges elected by the magistracy per year

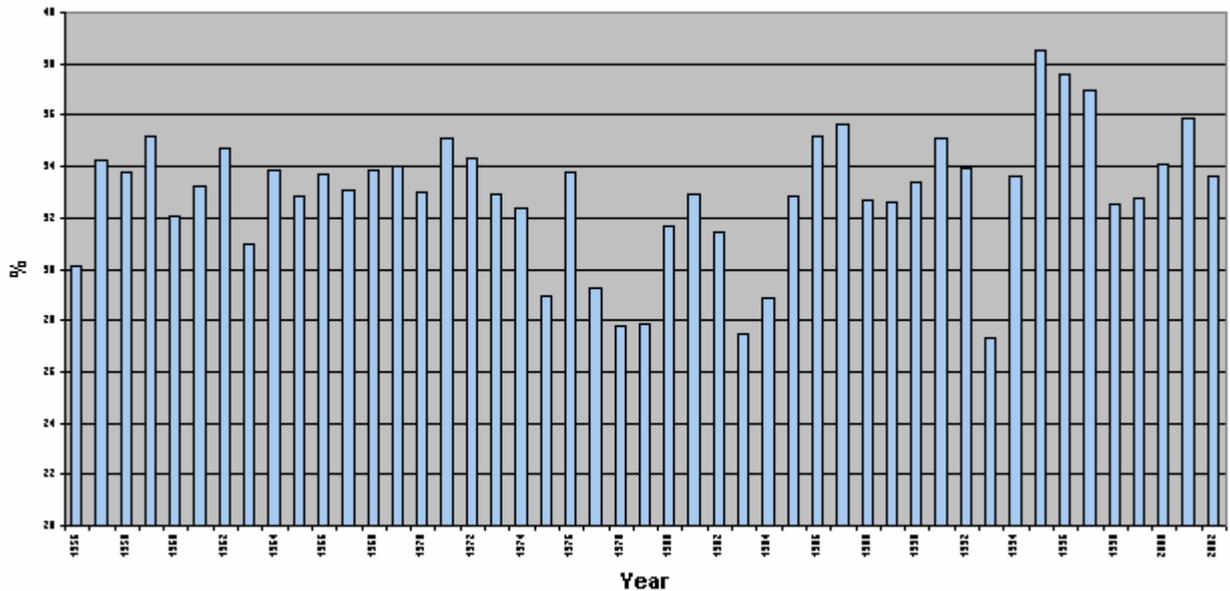


Figure 2. Percentage of constitutional judges elected by the magistracy per sentence

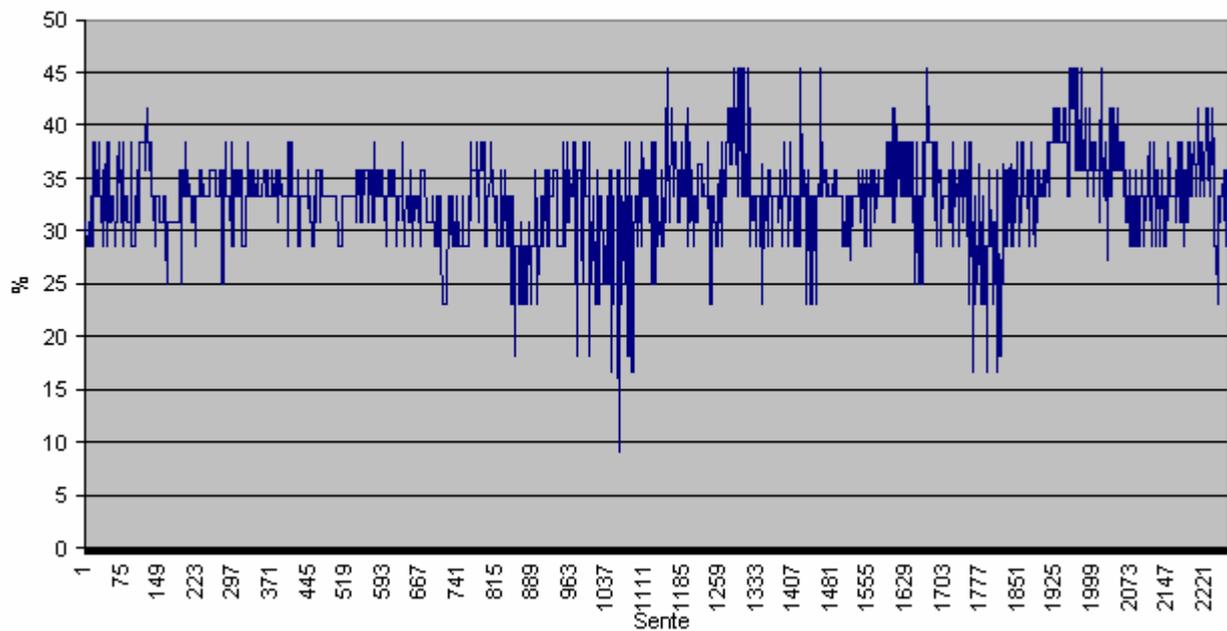


Figure 1 and 2 show the variability of the composition of the College of judges. Figure 1 shows the average share of justices elected by the magistracy who have been reported present in the college of judges of all the sentences of a given year. The percentage varies from 27% in 1983 to almost 39% in 1995. Within these averages, figure 2 displays the share of judges elected by the magistracy reported present in each College of judges of every sentence of the Court (from 1956 to 2002 the Court has promulgated 2267 sentences relevant for our analysis). Here the minimum value is below 10% and the maximum above 45%; but even more revealing is the persistently high volatility of the series. The internal composition of the College of judges thus varies quite significantly from sentence to sentence. The claim that the independence of the Court cannot be assumed to be a constant characteristic is empirically relevant.

4. Empirics

4.1. Selection and description of the raw variables. The review of the literature and the description of the structure and functioning of the Italian Constitutional Court allow to select a limited set of variables that, according to each theory, capture a distinct determinant of judicial independence. All models point out a different source of independence. It is therefore almost always possible to relate each explanatory variable of our empirical model to a single theoretical explanation, so to avoid problems of observational equivalence.

Padovano, Sgarra and Fiorino (2003) stress that an important source of independence for the Court is the impossibility of the executive and legislative branches to affect the selection process and the future career paths of Constitutional judges. We relate these theoretical indications to the real functioning of the Italian Constitutional Court by means of two variables: *SHAREMAG* and *AGE*. *SHAREMAG* is the percentage of Constitutional judges elected by the magistracy who are present in each College of Judges when the College votes on the sentence³. To reinforce the explanatory power of our test, we have estimated the same model using also *SHAREPRES* and

SHAREPARL, respectively, the percentage of justices appointed by the President of the Republic and by the Parliament. According to the theory, we suppose that judges elected by the magistracy are relatively more independent from political interferences than judges elected by the political parties in the Parliament or appointed by the President of the Republic. The variable *AGE* is the age of the President of the Constitutional Court, calculated at the beginning of his mandate as Constitutional judge. It is an indicator of independence for the Italian Constitutional Court much in the same way as life tenure is for the American Supreme Court. When tenure length is limited, justices must seek another position afterwards. As many as these posts, such as ministries and membership of authorities, are controlled by the other two government branches, justices may try to reach them in return of an accommodating jurisprudence. Relatively older Presidents, therefore, are less likely to seek another public office after their service in the Court, and are thereby less prone to influence the jurisprudence of the Court in order to accommodate the pressures from the other government bodies. We focus on the age of the President only because of his agenda setting powers. Since it is the President to allocate the cases to the various members of the Court and to appoint the judge reporter for the different cases, his influence will be substantially greater than that of the other Court members. As Feld and Voigt (2003) put it, "... in such an institutional environment, it could be interesting to try to "buy" just the chief justice" (Feld and Voigt, 2003, p.8)⁴.

In order to capture the implication of the theory of Landes and Posner (1975), we measure the durability of the legislative acts that undergo the review of the Court as the square of the number of days elapsed between the date of the promulgation of the law and the date of appointment as justice of the President of the Court who was sitting for the sentence⁵. We call this variable *TIMELP*.

³ Data sources are described in the Appendix.

⁴ We have also tried *POSTOCC*, a dummy equal to 1 when the President of the Court has taken another public office after the end of his justice tenure. It has performed worse than *AGE*, its continuous variable counterpart.

⁵ In the sentence-based model we square the difference in order to have only positive numbers; some laws declared illegitimate by the Court were approved by the Parliament after the President of the Court became a constitutional judge. In the annual model we consider the yearly average of the above variable.

Higher values of *TIMELP* indicate greater durability and, according to theory, higher degrees of Court independence⁶.

Tsebelis' (2001) veto players model is the third theory considered in our analysis. The empirical restriction is that the independence of the Court is a function of the dimension of the Pareto set of the legislative veto players. We proxy such dimension with the Herfindhal index of fragmentation of the parties in the government coalition, named *HGOV*⁷. According to the war of attrition models (Alesina and Drazen, 1991; Padovano and Venturi, 2001) the "power" of a coalition (governing or opposing) increases with the concentration of its parliamentary seats. The higher the share of seats that a single member of the coalition holds, the lower is the variety of interests that the coalition must represent, and the smaller is the Pareto set of the coalition⁸. Therefore, the more concentrated is the government coalition, the higher is the probability that the government be able to change the legislative *status quo*. This index is distributed in the [0, 1] interval. It equals 1 in one-party majority parliamentary governments, while approaches 0 when the number of parties tends to infinity. Thus, the closer to 1 is *HGOV*, the more concentrated is the government coalition and the closer to its upper limit value is the Pareto set of the legislative veto players; and viceversa. According to theory, a larger Pareto set endows the Constitutional Court with more possibilities to intervene.

⁶ We have also measured the distance between the date of the promulgation of the law and the date of the sentence, *TIMELS*. We prefer *TIMELP* first, because it is the President who chooses the laws to be reviewed and, second, because the time needed for the Court to render a sentence differs greatly from case to case. However, *TIMELP* and *TIMELS* are highly correlated ($r = 0,9$) and the estimates do not vary significantly when either of the two is included in the model.

⁷ To calculate this index, we sum the seats of the party i in the Chamber of Deputies and in the Senate, calculate the percentage s that these represent on the total number of seats held by the government coalition in the Parliament and compute the Herfindhal index: $HGOV = \sum_{i=1}^g s^2$ where the superscript g is the total number of parties in government coalition. We have also considered the concentration of the opposition (*HOP*), as discussed in Padovano and Venturi (2001), but it never turned out statistically significant.

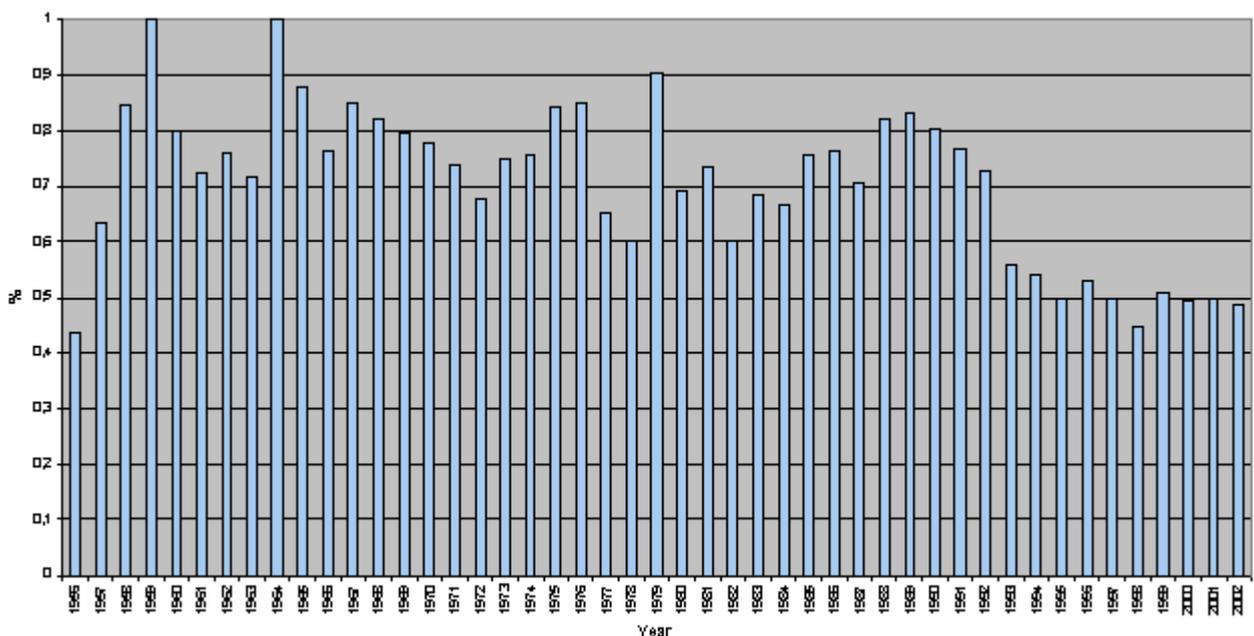
⁸ We have also tried a measure of ideological polarization of the Italian government coalitions, from Woldendorp, Keman and Budge (1993, 1998), but it never showed up statistically significant in the estimates. The likely explanation is that between 1948 and 1993 there has been no alternation in government of the two main parties: the Christian Democrats were always in the government and the Communist Party at the opposition. Parties were thus induced to follow opportunistic, rather than ideological, policies in their strategic interactions.

Finally, we take into consideration changes in the institutional, political and legislative environment that might have occurred with the transition from the so called First to the Second Republic, approximately around 1993. We do so by means of a dummy variable, *SECREP*, which takes the value of 0 between 1956 and 1992 (First Republic) and 1 from 1993 to 2002 (Second Republic).

Our measure of Court independence, the dependent variable, takes two forms. In the sentence based analyses, it is a matrix of three vectors of dummy variables S_{1i} , S_{2i} and S_{3i} that take the value of 1 if each sentence i is, respectively, of constitutional legitimacy, *in parte qua* (i.e., it declares the illegitimacy only of sections of a law and the legitimacy of other sections) or of constitutional illegitimacy, and 0 otherwise. The objects of the sentences are the laws approved by the legislative and executive branches, namely primary laws, legislative decrees and law-decrees. In the annual estimates, the variable, named $ILLSENT_t$ is the ratio of all sentences of constitutional illegitimacy on the total number of sentences of the Court for every year t . Since each judgment may contain a plurality of decisions, i.e. it can establish the legitimacy of a law and the illegitimacy of another, and the sentence *in parte qua* are in fact two decisions, in the annual analyses we enumerate $ILLSENT_t$ by taking into account all decisions that each sentence renders; thus, if a sentence contains three decisions, it is computed as three different sentences. We follow the literature in using the decisions about the constitutionality of the legislation because they modify the current legislation in a definitive manner and, by that, the equilibria between interest groups/voters and politicians based on such legislation. It must always be kept in mind that the executive and legislative branches must not have the Court declare a given law illegitimate if they want it to be abolished; lower cost courses of action for them are either to abolish the law directly or simply to pass another law that resolves differently. Hence, sentences of constitutional illegitimacy can be viewed as the tool in the hands of the Court to oppose the will of the other government bodies; in other words, to act *independently* from political interferences. The consideration of all types of sentences that the Court may render in reviewing legislation makes our analysis more adherent to

reality; it also distinguishes our dependent variable from that of Santoni and Zucchini (2001), who focus only on the sentences of constitutional illegitimacy. Truly, the Constitutional Court also has other means to innovate the legislative *status quo*, for example by rejecting a particular interpretation of the law through an interpretative sentence. Although they are an increasingly important and often-used instrument of jurisprudence, the interpretative sentences are more difficult (and arbitrary) to model as a variable; for these reasons we exclude them from our analysis. In order to provide a outlook of the dynamics of the dependent variable, Figure 3 reports the yearly averages of the percentages of sentence of constitutional illegitimacy. The minimum value of the series is 44% in 1956, whereas in 1959 and 1963 the Court was particularly strict, as it always ruled in terms of illegitimacy.

Figure 3. Percentage of sentences of constitutional illegitimacy per year



As a higher percentage of sentences of constitutional illegitimacy indicates a greater independence of the Court, the expected signs on the coefficients for the explanatory variables are the following: *SHAREMAG*, *AGE* and *TIMELP* are expected to hold a positive sign. A negative sign

on *HGOV* is consistent with Tsebelis' (2001) view of a passive role for the Court, whereas a positive sign shows that the Court does counteract the acts of the legislative veto players. Finally, as no theory exists about the effects of the institutional and political changes occurred with the Second Republic on the behavior of the Constitutional Court, the sign on the *SECREP* dummy is open to interpretation.

We have tested the theories by means of two different estimating techniques: a multinomial logit model on sentence-based data, to account for the three types of sentences that the Court may promulgate, and maximum likelihood estimation on annual data where the dependent variable (the annual percentage of sentences of constitutional illegitimacy) has been censored between 0 and 100. Several reasons suggest the use of two estimation procedures in this analysis. First, since some of the raw variables are available on a yearly basis (such as *TIMELP* and *HGOV*) while others are originally sentence-based (*AGE*, *SHAREMAG*, *SHAREPRES*, *SHAREPARL* and the dependent variable), we want to check whether the results are sensitive to the normalization adopted. Second, and more generally, the use of two estimating techniques provides a test of the robustness of the results. Third, on the one hand, the multinomial logit model yields estimates of the relationship between the dependent variable and the regressors using the most disaggregated observation level; 2267 observations in the sample are a guarantee of efficient estimates. On the other hand, the estimates on yearly data allow to test whether there is some continuity in the jurisprudence of the Court.

Table I shows some descriptive statistics of the variables normalized on an annual basis.

TABLE I - Descriptive statistics of the annual data (number of observations: 47)

<i>Variables</i>	<i>Mean</i>	<i>Median</i>	<i>Maximum</i>	<i>Minimum</i>	<i>St. Deviation</i>
ILLSENT	0,70	0,73	1,00	0,44	0,14
TIMELP	894958,9	82394,0	207538,0	20533,0	48909,4
HGOV	0,62	0,6	1,0	0,23	0,18
HOP	0,49	0,50	0,87	0,005	0,16
AGE	66,15	68,0	78,0	46,0	9,89
SHAREMAG	32,93	33,21	38,49	27,31	2,54
SHAREPARL	32,87	33,38	38,06	23,62	3,01
SHAREPRES	34,35	34,19	38,38	29,16	2,04

4.2. Multinomial logit estimates. In order to exploit the full information of our sample – 2.267 sentences and related observations – we estimate a multinomial logit model where the dependent variable is a 3×2267 matrix that takes the value of 1 in each column vector if the sentence is, respectively, of constitutional legitimacy, *in parte qua* or of constitutional illegitimacy and 0 otherwise. In this model the estimated coefficients indicate how each explanatory variable affects the probability to obtain each type of sentence, holding the other influences constant. The multinomial specification expands the explanatory power of the analysis with respect to empirical models that focus only on sentences of constitutional illegitimacy. The specification of the model is as follows:

$$\Pr(S_i = j) = \frac{\exp(\mathbf{a}_{0j} + \mathbf{a}_{1j}x_{1i} + \dots + \mathbf{a}_{nj}x_{ni})}{\sum_{k=1}^K \exp(\mathbf{a}_{0k} + \mathbf{a}_{1k}x_{1i} + \dots + \mathbf{a}_{nk}x_{ni})} = P_{ij} \quad (1)$$

where $j=1, 2, 3$ indicate the alternative forms of sentences, i is the number of decisions by the Court and k enumerates the regressors x ($K=5$ in the regressions illustrated below). Note that the parameters a are specific to each type of sentence, so there are $j \times k$ parameters in this specification. However, the parameters are not all identified unless we impose normalization (Greene, 1997,

chapter 19.7); we thus normalize the parameters of the first alternative (constitutional legitimacy) to be all zero: $a_{01}=a_{11}=a_{21}=0$. The estimated coefficients on the second and third alternatives thus indicate incremental probabilities. Finally, x_1 relates to *TIMELP*, x_2 to *SHAREMAG* (or *SHAREPRES* or *SHAREPARL*, according to the model), x_3 to *HGOV*, x_4 to *AGE* and x_5 to *SECREP*.

The estimates are displayed in Table II. A first general result is that the probability the Court decides for illegitimacy ($\text{Log}(P_3/P_1)$) is broadly in line with the theory of Padovano, Sgarra and Fiorino (2003). In model 1 both restrictions *AGE* and *SHAREMAG* are positive and statistically significant, as expected. The coefficient on *AGE* demonstrates that relatively older justices - who are less likely to be interested in gaining future positions after the end of their tenure and thereby less prone to accommodate the decisions of the other government branches - make it more likely that the Court will render a sentence of constitutional illegitimacy. Similarly, and importantly, a higher percentage of justices elected by the magistracy in the college that decides the sentence increases the probability of getting sentences of constitutional illegitimacy. In other words, a greater share of “magistracy justices” enhances the probability for the Court to act independently. The results on *SHAREPRES* (Model 2) and *SHAREPARL* (Model 3) reinforce the validity of the predictions of the theory of Padovano, Sgarra and Fiorino (2003). The coefficients on these regressors are not significant; the share of justices appointed by the President of the Republic or elected by the Parliament is not relevant for the probability of an independent behavior of the Court. On the other hand, the coefficients on *AGE* are significant with the expected positive sign in both models. None of these regressors instead exerts a statistically significant influence on sentences *in parte qua* ($\text{Log}(P_2/P_1)$), which implies that the prediction of the theory are in fact specific to the decisions of the Court that signal a greater independence.

TABLE II. Multinomial logit estimates of equation (1)

Dependent variable: S_{ji}

Variable	Model 1				Model 2				Model 3			
	Log(P ₂ /P ₁)		Log(P ₃ /P ₁)		Log(P ₂ /P ₁)		Log(P ₃ /P ₁)		Log(P ₂ /P ₁)		Log(P ₃ /P ₁)	
	Coefficient	<i>p</i> -value	Coefficient	<i>p</i> -value	Coefficient	<i>p</i> -value	Coefficient	<i>p</i> -value	Coefficient	<i>p</i> -value	Coefficient	<i>p</i> -value
TIMELP	-2.18 ⁻⁰⁰⁶	0.00	-7.47 ⁻⁰⁰⁷	0.02	-2.19 ⁻⁰⁰⁶	0.00	-7.50 ⁻⁰⁰⁷	0.02	-2.18 ⁻⁰⁰⁶	0.00	-7.21 ⁻⁰⁰⁷	0.02
SHAREMAG	0.002	0.87	0.02	0.05								
SHAREPRES					-0.02	0.16	0.01	0.28				
SHAREPARL									0.02	0.12	0.008	0.47
HGOV	0.69	0.07	0.36	0.33	0.90	0.02	0.45	0.23	0.80	0.03	0.70	0.04
AGE	0.003	0.67	0.02	0.00	0.01	0.08	0.02	0.00	0.003	0.39	0.03	0.00
SECREP	2.25	0.00	-1.41	0.00	2.28	0.00	-1.39	0.00	2.25	0.00	-1.40	0.00
Log likelihood		-1663.2				-1661.1				-1665.3		
c^2		1654.7 ^{***}				1658.8 ^{***}				1650.5 ^{***}		

Note: ^{***} stands for 1% level of significance, while ^{**} indicate a 5% significance level.

The coefficient on *HGOV* is not statistically significant except when combined with *SHAREPARL*. In this case the sign on the coefficient is positive, which contrasts the prediction of the veto players model. The estimates point out that a larger dimension of the Pareto set, captured by a higher concentration of the government coalition, actually makes more likely that the Court will tend to modify the legislative *status quo*. In other words, when the decision making power of government coalition rises, the Court seems to respond by increasing the frequency of the sentences of constitutional illegitimacy. The positive sign on *HGOV* can then be interpreted as the reaction of the Italian Constitutional Court against the decisions of the government coalition and as an indication of the functioning of the system of checks and balances within the Italian institutional system. Finally, the combination of the estimated coefficients on *AGE* and *SHAREMAG* and on *HGOV* sheds light on why Santoni and Zucchini (2001) get to an opposite result about the behavior of the Court. Their model omits variables that directly capture the structural determinants of the independence of the Italian Constitutional Court and that hold a relevant explanatory power. The veto player model appears not only inconsistent with facts, but also insufficient by itself to explain the behavior of the Court.

The negative sign on *SECREP* suggests that the probability of obtaining sentences of constitutional illegitimacy has recently decreased. A possible rationale for this outcome is that the exceptional turnover in the political forces after 1993 has increased both the new legislative contracts between legislators and interest groups and the tendency of the Court to preserve the durability of these contracts, thus lowering the probability of sentences of illegitimacy.

The estimated coefficient on *TIMELP* is statistically significant but, being negative, contrasts with the Landes and Posner's (1975) predictions. A possible explanation may be that, especially in the early years, the Court had to focus on laws enacted before the promulgation of the 1948 Constitution, in order to ensure the consistency of the existing laws with the spirit of the new fundamental charter (Rodotà, 1999). The Italian sample does not feature the political and institutional stability that the Landes and Posner (1975) model presupposes and may thus not be the

most appropriate to test such a theory. Breaking the sample in different periods is of little help, because it is difficult to determine when (and whether) the Court has ended to deal with legislation that is not consistent with the spirit of the Republican Constitution of 1948. Be that as it may, the size of the coefficient on *TIMELP* is very small.

4.4. Stochastic properties of the annual series. Before estimating the structural equation on annual data, we analyze the stochastic properties of the series in order to a) establish whether *ILLSENT_t* and each explanatory variable used in the regression model share a long or a short run relationship, b) specify the model so to avoid problems of spurious regression. To check whether the series are stationary or not, we use a standard Augmented Dickey-Fuller test (ADF) performed with a constant, a trend and a constant or none of the two, as appropriate. The Schwarz Bayesian Criterion suggests a lag structure of order 1 for all tests. A significant test statistic rejects the null hypothesis of nonstationarity of the series. The results, presented in Table III, allow to conclude that none of the variables presents a unit root. The model must thus be specified with all the series in their levels.

TABLE III. Unit root tests.

<i>Variable</i>	<i>ADF test statistics</i> (lags in parentheses)	<i>Specification</i>	<i>Order of integration</i>
ILLSENT	-4.55 (1) ^{***}	Trend and constant	I(0)
HGOV	-3.57 (1) ^{**}	Constant	I(0)
TIMELP	-4.71 (1) ^{***}	Trend and constant	I(0)
SHAREMAG	-4.02 (1) ^{***}	Constant	I(0)
SHAREPARL	-5.19 (1) ^{***}	Trend and constant	I(0)
SHAREPRES	-3.36 ^{**}	Constant	I(0)
AGE	-3.09 (1) ^{**}	Constant	I(0)

Note: ^{***} stands for 1% level of significance, while ^{**} indicate a 5% significance level.

The theory and the tests performed in the last section lead us to specify the following equation:

$$\begin{aligned} ILLSENT_t = & \alpha_1 ILLSENT_{t-1} + \alpha_2 HGOV_t + \\ & + \alpha_3 SHAREX_t + \alpha_4 TIMELP_t + \alpha_5 AGE_t + \alpha_6 SECREP_t + \varepsilon_t \end{aligned} \quad (2)$$

where ε denotes the error term and X indicates the share of the justices elected by the magistracy (*SHAREMAG*), the Parliament (*SHAREPARL*) or appointed by the President of the Republic (*SHAREPRES*), as appropriate. The lagged dependent variable is introduced in order to capture a possible persistence in the jurisprudence of the Court. There are reasons to expect continuity and others that suggest otherwise. The existence of common values and ideologies among the justices, the influence of the agenda setting power of the President are possible causes of continuity of the jurisprudence of the Court. On the other hand, we may not expect persistence because a) the composition of the Colleges of judges that decides for every case changes from sentence to sentence, and with it the expected independence of the Court; b) the cases risen to the examination of the Court present a great deal of randomness.

Table IV reports the estimates of equation (2) by maximum likelihood with the dependent variable censored between 0 and 100.

TABLE IV. Maximum likelihood estimates of equation (2)

Dependent Variable: $ILLSENT_t$

Variable	Model 4		Model 5		Model 6	
	Coefficient	p value	Coefficient	p value	Coefficient	P value
$ILLSENT_{t-1}$	0.40	0.00	0.41	0.00	0.48	0.00
$TIMELP_t$	-1.16^{06}	0.08	-8.93^{07}	0.24	-1.64^{06}	0.03
$SHAREMAG_t$	0.009	0.00				
$SHAREPRES_t$			0.006	0.11		
$SHAREPARL_t$					0.003	0.38
$HGOV_t$	0.12	0.06	0.16	0.02	0.145	0.08
AGE_t	0.0007	0.50	0.002	0.11	0.022	0.05
$SECREP_t$	-0.218	0.00	-0.19	0.00	-0.185	0.00
Log likelihood	54.41		49.81		49.37	
S.E.R	0.084		0.09		0.09	
N. of censored obs.	0		0		0	
N. obs.	46		45		45	

The estimated coefficients in equation (2) are almost always consistent with the related theory. Specifically, the coefficient on $TIMELP$ is again negatively correlated to the dependent variable and is significant in all regression but Model 5, which features the share of presidential judges. Consistently with Padovano, Sgarra and Fiorino (2003), a higher percentage of justices elected by the magistracy in the college that decides the sentence ($SHAREMAG$, Model 4) is positively correlated with higher percentages of sentences of constitutional illegitimacy. In other words “magistracy justices” enhance the independence of the Court. Conversely, the coefficients on $SHAREPRES$ (model 5) and $SHAREPARL$ (model 6) are not statistically significant. The estimated coefficients on AGE in the various models follow an interesting pattern. In model 4, where $SHAREMAG$ is introduced, the age of the President of the Court does not have an additional effect

on the percentage of sentences of constitutional illegitimacy. In model 5 and 6, instead, where the effects of *SHAREPRES* and *SHAREPARL* are considered, *AGE* becomes positive and statistically significant (although at the 10% level in Model 5); the age of justices and their extraction from the magistracy rather than from the political bodies are substitutes in assuring an independent behavior by the Court.

The coefficient on *HGOV* is statistically significant and positive in all models, thus reinforcing the results and interpretation of the estimates of the multinomial logit model. It must be kept in mind that *HGOV* as a raw variable is an annual series, so there is no chance that it may perform better in regressions estimated on yearly averages. Moreover, a positive coefficient on *HGOV* is consistent with the positive ones on *AGE* and *SHAREMAG* and can thus be considered as a further support to the Padovano, Sgarra and Fiorino (2003) theory. Finally, the positive and significant coefficient on the lagged dependent variable indicates that there is some persistence in the conduct of the Court, while the negative sign on *SECREP* suggests that the number of sentences of constitutional illegitimacy has recently decreased. Two are the possible rationales for this trend: first, the exceptional turnover in the political forces after 1993 has increased the new legislative contracts between legislators and interest groups; the Court tries to keep the durability of these contracts high by reducing the number of sentences of illegitimacy. A second possible explanation is that for most of this period the Court suffered from two to three vacancies, which decreased its output.

5. Concluding remarks

On the basis of the model of Padovano, Sgarra, Fiorino (2003), this paper analyses which factors, if any, contribute to make the Italian Constitutional Court independent in his rulings so to effectively assure the functioning of the system of check and balances. The results of both sentence and annual based estimates point out that elements of structural independence, such as the presence of justices elected by the magistracy rather than other government branches, and the age of justices,

as a proxy of their will to seek other official posts after their tenure, increase the independence of the Court. As a consequence, independence must not be considered as a constant characteristic, but a feature that changes according to the contingent relevance of these determinants. Moreover, the direct consideration of elements of structural independence shows that previous findings on the behavior of the Court, based on a single theory that measures independence in terms of the behavior of other political actors, are unsatisfactory.

Further research should focus on the changes of the behavior of the Court following major political and institutional transformations, such as those occurred in Italy in the early 1990s, should try to include a broader class of instruments of jurisprudence of the Court in the explanatory process and possibly look at the behavior of other institutions within the judicial branch of government.

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Appendix: Data sources

Data on the sentences, on the laws that the Constitutional Court reviews and on the judges who are present in each College of Judges are available on the website of the Constitutional Court, www.cortecostituzionale.it.

Rodotà (1999) is the source for the data which constitute the variables *SHAREMAG*, *SHAREPRES*, *SHAREPARL* and *TIMELP* as it indicates whether the President of the Court is nominated by the Parliament, the President of the Republic or elected by the magistracy and when he has been appointed as justice. The data on parliamentary used to calculate *HGOV* are from Senato della Repubblica Italiana (various years) and Camera del Deputati della Repubblica Italiana (1994). Breton and Fraschini (2003) is the source of *AGE* and of *POSTOCC*.