Is there a political question theory in Italy?

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Abstract: *Esiste una teoria della* political question *in Italia?* – The essay compares the 'political question doctrine' with the theme of the 'legislator's discretion'. After a brief overview of the American doctrine and of the Italian rules on the limits of the constitutional review (Art. 134 Const. and Art. 28 Law 87/1953), the study dwells on what seem to be the points of contact of the political question with the limit of legislative discretion to the activity of the Italian Constitutional Court. The final part of the essay identifies the substantial differences that prevent the conceptual overlap of these two "limits" to the activities of the Courts.

Keywords: Political question; Doctrines of justiciability; Discretion of the legislator; Political discretion; Constitutional review.

1. The political question doctrine

In Europe, since the early years of the 20th Century, there has been discussion about the relationship between constitutional courts and politics, particularly in regard to the control of constitutional legitimacy exercised by the former on legislative acts. In the Constituent Assembly the same discussions were re-proposed in Italy, substantially in the same terms. The question that arose was what could be the "nature" of the control of the constitutionality of laws and what form would be the most suitable to ensure the observance of the norms sanctioned in the Constitution, at the same time not upsetting the structure of a system like the Italian one, long founded on the idea of the legislative act as "free in its ends".

These reflections led to the formulation of Art. 134 of the Constitution, which defined and delimited the jurisdiction of the Court. Art. 134 of the Constitution itself. This makes explicit the nature of the review of constitutionality – when it expressly refers to the term 'legitimacy', which seems to be considered legitimacy in a *legal-processual* sense and not in an *ethical-political* sense –; but the same can be said of Art. 28 of Law n. 87 of 1953, which excludes any evaluation of a *political* nature and any review of the use of the *discretionary* power of Parliament, thus prohibiting, even for the Court, the modification of the rules of the legal system. The nature of the control of legitimacy of the Constitutional Court is thus further specified, expressly excluding «any evaluation of a political nature and any review of the use of the discretionary power of Parliament». It would seem, therefore,

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that an activity of a manipulative nature is inhibited; otherwise modifying the content of the disposition (not only legislative, but also constitutional) would insert in the evaluation a (necessarily) political character. In other words, Art. 28 of Law 87/1953 seems to constitute a barrier to the control of legislative activity carried out by the Court which, in turn, would be constitutionally bound *not to* superimpose *its* evaluations *of political merit* on those previously carried out by the legislator. Also, because only in this way could the principle of the (tendential) tripartition of powers be said to be respected, and which, *pursuant to* articles 70 and 138 of the Constitution, assigns to Parliament the legislative function (both ordinary and constitutional revision) to be exercised discretionally, albeit always in compliance with those limits (negative or positive as they may be considered) set by the Charter. Where, in fact, the constitutional provisions are formulated in generic terms, as happens for many so-called "principled statements", they would seem to express precepts that can be concretized by the legislator in *many* different and constitutionally equivalent ways. Within this scope of (equal) admissibility the legislator would seem to be endowed with full freedom of choice and his *interpositio* activity would not seem, therefore, to be superseded by the decisions of a judicial body (even if very particular, as in the case of the Constitutional Tribunal). In short, the greater generality of the constitutional provision would seem to correspond to a greater *discretion* not so much of the Constitutional Court, as is often opined, but of the legislator.

Nevertheless, today's system of national constitutional justice seems to have taken on, in practice, a significantly different structure from that outlined by the constituents. Through its own jurisprudential activity, the Court has progressively extended its prerogatives (to the detriment of the Legislator and the other "ordinary" judges), particularly in relation to the control of constitutional legitimacy. Such an "extension" of decisional powers has been achieved through an enrichment both of the argumentative modalities to assign a meaning to the Constitution and to the law, and of the techniques of procedural solution to the controversies.

However, even today it would seem that in certain matters there exists a sort of wider "buffer zone" with respect to which the review of constitutionality can be exercised only exceptionally, and moreover only to verify the existence of particular flaws, such as the manifest unreasonableness or arbitrariness of the challenged legislation. The reference is in particular to electoral, criminal, procedural and tax matters[1].

[1] A search for "key words" among all the Court's pronouncements has shown that the 'discretion of the legislator' is recalled with frequency in certain *matters* (understood in a broad sense) and, for the most part, in pronouncements of *inadmissibility* or *rejection*. The first category identified is represented by the set of 'procedural rules' and has proved to be the one in which the Court has most frequently considered the discretion of the legislator to be relevant in some way. The second category is constituted by the 'sanctioning system', including not only the criminal law but also administrative and

In these cases, the Court seems to recognize (more or less explicitly) areas in which its review is (tendentially) excluded[2], resorting to reasons that very often seem to be reduced to mere style clauses or tautological formulas[3] with which it is stated that the legislator has made good use of its political discretion[4].

Moreover, the problem of the relationship between constitutional judge and legislator certainly does not only affect Italy but is common to all the States in which there is a Constitution and constitutional justice. And it is not by chance, then, that in the very country which gave birth to the first modern Constitution, the United States, a doctrine has been elaborated which seems to theorize a limit to the intervention of the courts for certain questions and sectors held to be strictly within the competence of other powers of the State: the so-called *political question*.

Italian scholarship has cyclically questioned itself on the concrete possibility of importing such a model, giving both positive and negative answers. Naturally, in order to take a position on this matter, it would be necessary to go into much more detail which, due to the very nature of this consciously limited intervention, it is not possible to do here in a complete manner. However, what we shall attempt to do here, after a more general overview, is to verify whether at least some of the fundamental elements of the political question doctrine can provide a further key to interpreting "our" constitutional jurisprudence. With the preliminary clarification, however, that although it would seem possible to find several analogies between this theory and the limit constituted by the discretion of the legislator – especially with regard to the impossibility of judging the political choices of Parliament by a body of constitutional justice – it is necessary to contextualize the theme more precisely. In fact, leaving aside for the moment the problem concerning the possibility of establishing parallels between systems that are so different from each other as regards the form of government, even from the US debate itself there is no univocal orientation. Having said this, we shall now turn to the main problems that have emerged overseas.

In the United States, since the nineteenth century, attempts have been

disciplinary sanctions. The last subject identified (also in terms of the number of cases involved) was taxation. Together, they account for about eighty percent of the pronouncements invoking the Legislature's discretion.
A similar approach can also be found in F. Felicetti, *Discrezionalità legislativa e giudizio di costituzionalità*, in *Il Foro it.*, 1986, 22-26.

[2] For example, v. on criminal law Const. Court, decisions nos. 141/2019, 220/2015, 324/2013, 178/2003, 91/2001, 354/1999, 85/1998, 274/1997, 7/1987; v. on procedural law Const. Court decisions nos. 180/2004, 203/2003, 286/2003, 217/2000, 406/1998, 10/1994, 395/1994, 251/1989, 38/1988, 590/1988; v. on tax law Const. Court decisions nos. 325/2008, 156/2001, 320/1995, 494/1991, 113/1989, 28/1988, 319/1987, 97/1968.

[3] E.g.: Const. Court decisions nos. 361/2007, 158/2006, 190/2006, 240/2000.

[4] A. Sperti, *La discrezionalità del legislatore*, in R. Romboli (ed.), *L'accesso alla giustizia costituzionale. Caratteri, limiti, prospettive di un modello*, Napoli, 2006, 636-637.

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made to prevent judges from invading the sphere of competence of the other powers of the State. In other words, they have tried to prevent the courts from pronouncing on "political" controversies insofar as they are not susceptible to a judicial solution, even if what this means is far from clear[5], as the jurisprudence of the Supreme Court itself testifies. The use of the theory in question over the decades seems to have been more instrumental than anything else: on more than one occasion it has been invoked only to avoid dealing with matters considered particularly sensitive or controversial.

In particular, the *political question is* traditionally included among the various *doctrines of justiciability*[6] through which the Supreme Court selects cases *not* to be decided. It would therefore seem that it is limited to dealing with problems, so to speak, of "jurisdiction", i.e. it provides the criteria for assessing whether or not a given dispute can be dealt with by the judiciary, and therefore whether there are prefixed jurisdictional standards applicable for its resolution. However, there is also another order of considerations that is more properly *political*, namely the assessment of the socio-political context of the moment [7]. And it is clear that if this second line of argument were confirmed, the *Supreme Court* would include in its reasoning extra-legal factual elements that, at least in the abstract, would seem to be extraneous to it.

In order to give an account, albeit very briefly, of the general framework, we shall proceed through a schematic representation of the

[5] The *political question doctrine* «has always proven to be an enigma for commentators. Not only have they disagreed about its wisdom and validity ... but they also had differed significantly over the doctrine's scope and rationale» (M.H. Redish, *Judicial Review and the "Political Question"*, in 79 *Northwestern University Law Review*, 1985, 1031).

[6] Under Article 3 of the United States Constitution, the jurisdiction of the federal courts is limited to current and pending cases and controversies. From this constitutional requirement came the *doctrines of justiciability*. The four doctrines of justiciability are *standing* (assesses whether the plaintiff is the appropriate party to assert an exercise of the action in court), *ripeness* (assesses whether a party brought an action too early for adjudication), *political question*, and *mootness* (the action was brought too late). The *standing relates to* "who" can bring the action while *ripeness* and *mootness* are issues related to "when" the action can be brought, it can be added that the problem of the *political question* is related to "what" can be the subject of judgment by the federal courts» (V. Barsotti, *L'arte di tacere. Strumenti e tecniche di non decisione della Corte Suprema degli Stati Uniti*, Torino, 1999, 201).
If the court is faced with a controversy having the characteristics set forth in the relevant doctrines the matter will not be triable. «The term '*justiciability*' is included with this twofold limitation placed upon the federal courts by the *case and controversy doctrine*. These concepts, both that of keeping the power exercised by the courts within reasonable boundaries, and that of preventing it from overflowing into the prerogatives of other bodies connected to it, are typical of a constitutional jurisprudence, such as that of the United States, hinged on two central points: that of a government with limited powers, and that of the separation of powers» (C. Piperno, *La Corte costituzionale e il limite di* political question, Milano, 1991, 103). In other words, the term *justiciability* indicates the exercisability of jurisdiction with a judgment on the *merits*.

[7] M. Finkelstein, *Judicial Self-Limitation*, in 37 *Harvard Law Review*, 1924, 344.

political question doctrine, substantially following its diachronic evolution[8]. In this way, even if we will not be able to fully grasp all its facets and complexities, we will try to highlight its fundamental principles in order to proceed further. The expositive scheme will be therefore the following: we will start from the *classical political question*, then we will move to the *prudential approach* and to the *functional political question*, and finally conclude with the in-depth study of the well-known Baker *v.* Carr[9] ruling.

1.1. The classical political question

The first devising of the *political question was* affirmed by the case Marbury *v.* Madison as a mere declination of the principle of separation of powers[10]. In that ruling, Justice J. Marshall stated that «questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court» [11]. Thus, affirming that the *Supreme Court* could not deal with any politically sensitive questions. But, at the same time, he claimed the role of preeminence[12] of the judiciary over the other powers of the State, by virtue of the fact that the *concrete identification* of *political questions* removed from the interference of the judiciary would be the exclusive competence of the Court[13].

[8] So also C. Piperno, *La Corte costituzionale e il limite di* political question, cit., 106-108; C. Drigo, *Le Corti costituzionali tra politica e giurisdizione*, Bologna, 2016, 266-279; A. Sperti, *Corti supreme e conflitti tra poteri. Spunti per un confronto Italia-Usa sugli strumenti e le tecniche di giudizio del Giudice costituzionale*, Torino, 2005, 116-125.

[9] Baker *v.* Carr, 369 U.S. 186 (1962).

[10] «The judiciary must refrain from intervening where the Constitution explicitly indicates the jurisdiction of other organs. Therefore, the limit of *political question* is nothing but one of the forms through which the application of the principle of separation of powers is required» C. Piperno, *op. cit.* , 107, but also M.F. Weston, *Political Questions*, in 38 *Harvard Law Review 296*, 1925, 7. However, it is traditionally believed to be the ruling Luther *v.* Borden, the first explicit recognition of the *political question*: «Looking to all these considerations, it appears to me that we cannot rightfully settle those grave political questions which, in this case, have been discussed in connection with the new constitution; and, as judges, our duty is to take for a guide the decision made on them by the proper political powers, and, whether right or wrong according to our private opinions, enforce it till duly altered» [48 U.S. (7 How.) 56 (1849)].

[11] Marbury *v.* Madison [5 U.S. (1 cranch) 137, 170 (1803)]: «The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion. Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court».

[12] «The genesis of the North American system is to be found in the will expressed by the Founding Fathers to establish the supremacy of the judicial power (as we have seen, this is referred to as the government of judges) over other powers, in particular the legislative power. [...] In this way, an institutional design has been implemented that places the judiciary power in the first place, as the body intended to guarantee and implement the Constitution, with respect to the citizens, even "beyond and against the legislator"». (C. Piperno, *op. cit.*, 86).

[13] «It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and

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However, the ample assumption of powers by the "Marshall Court", in time, led to a conflict with Congress and, therefore, the need emerged to reconsider the limits of the Court's discretion[14]. The thinking of M.F. Weston[15] also moves in this direction. In fact, according to him, a question should have been defined as political only if it was the law that *explicitly* attributed it to the executive or legislative branches. In this way, by linking the decision to precise normative parameters of reference, the discretionary power of the judge would be curbed. And H. Wechsler came to even more radical conclusions. Wechsler[16] went so far as to deny the very existence of margins of discretion (in the choice of deciding a case), insofar as the parameter for evaluating the political or non-political nature of a question would have been strictly legal, so that the judge would have had to limit himself to the mere "exegesis" of the norms attributing specific competences to the various organs, applying them slavishly[17]. A further element on the basis of which to ascertain the requisite of "politicity" was identified in the lack of legal standards applicable to the concrete case[18] from which to derive an indication in the sense of non-justiciability, even in cases where there is no express attribution of competence in favor of a political body. The absence of judicial standards would therefore not allow the judge to intervene with a pronouncement and, therefore, the question should

interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each» Marbury *v.* Madison [5 U.S. (1 cranch) 137, 178 (1803)].
It should be noted, however, that although the courts considered themselves competent to identify the margins of discretionary intervention attributed to the various powers, at the same time they refrained from interfering in the choices of merit relative to the concrete exercise of such discretion (C. Drigo, *op. cit.*, 239; R.E. Barkow, *The Rise and the Fall of the Political Question Doctrine*, in N. Mourtada-Sabbah, B.E. Cain (eds.), *The Political Question Doctrine and the Supreme Court of the United States*, Laham, 2007, 26).

[14] Started with *Decatur v. Paulding*, [39 U.S. 497 (1840)].

[15] M.F. Weston, *Political Questions*, in 38 *Harvard Law Review 296*, 1925.

[16] H. Wechsler, *Principles, Politics and Fundamental Law*, Cambridge, Harvard University Press, 1961; Idem, *Toward Neutral Principles of Constitutional Law*, in 73 *Harvard Law Review* 1, 1959.

[17] In other words, where the text of the Constitution has entrusted another power of the State with the independent determination of the question raised, then the Court must refrain from intervening.

[18] «Whatever may be the difficulties in definitively describing the differences between the judicial and the legislative department it seems settled and clear that the court must have some rule to follow before it can operate. Where no rules exist the court is powerless to act. From this it follows that the courts cannot enter into questions of statecraft or policy. Especially is this true when the decisions which they might make would perhaps not be heeded by the other departments of the government because of the strong political considerations involved. [...] It is true that the courts have not formulated any very clear conception of the doctrine of political questions, nor have they always acted upon the same general principles. But a reading of the cases seems to warrant the statement that the most important factor in the formulation of the doctrine is that stated above, namely, a lack of legal principles to apply to the questions presented» (O.P. Field, *The Doctrine of Political Question in the Federal Courts*, in *Minnesota Law Review*, 1924, 511-512).

necessarily be considered as not justiciable[19]. This aspect, as we shall see, will be deepened in later years by a different branch of the so-called *political question*: the *functional approach* (*infra* § 1.3.).

1.2. The prudential approach

Starting from the 1940s[20], there was a real advancement of the classical *political question in* favor of a so-called prudential approach. The most important theoretical contribution to this development was certainly that of A.M. Bickel[21], whose intuitions, though synchronous with the Baker *v.* Carr decision, went decidedly against the tide, if not in open contrast with the decalogue laid down therein (*infra* § 1.4.). In fact, he stated that the Constitutional Court would lack jurisdiction in cases where: «(a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from» [22].

This reasoning necessarily implies the existence of an implicit principle: i.e. that the judge – can not only respond affirmatively or negatively to a question, but – has the faculty not to pronounce, thus exercising his so-called *passive virtues*[23]. And in a perspective of this kind, extra-legal facts (spec. *b)* and *d)*) that seem to contribute to indicating the opportunity of an attitude of *self-restraint of* the Court in favor of the other powers of the State, would also assume a strong relevance. As a consequence, *political questions* are conceived as one of the expressions of *avoidance*, i.e. of the techniques used, precisely, to avoid expressing an opinion on the merits

[19] This approach recognizes a formulation of 'judgement' characterized by a substantially *applicative* activity of the law (: the deciding body applies pre-existing legal norms to a concrete case through a subsumptive procedure).

[20] The dating is considered entirely indicative, it should be noted in fact that it is not possible to identify a real perfect chronological succession between these theories both from the point of view of jurisprudence and scholarship.

[21] A.M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, New Heaven-London, 1986; Idem, *The Supreme Court and the Idea of Progress*, New Heaven-London, 1978; Idem, *The Supreme Court, 1960 Term. Foreword the Passive Virtues*, in 75 *Harvard Law Review* 40, 1961. It is possible to maintain that Bickel's theorization has been the most successful not only in the United States, but also in Italian thought (spec. A. Pizzorusso, but also P. Bianchi, C. Drigo cited here).

[22] A.M. Bickel, *The Least Dangerous Branch*, cit., 184.

[23] A.M. Bickel, *Foreword the Passive virtues*, cit., 47 ss. See also C. Piperno, *op. cit.*, spec. 117-118, but also 107-108: «The second theory presupposes a prudent evaluation of the role of the Court, i.e., it is believed that the judge called to rule on the merits of a question has not only the possibility to answer in the affirmative or negative, but also not to answer. We would then be in a case in which the Court would apply its passive virtues, but in this hat not only the *political question* but also all the questions on which the Court, through the technique of *avoidance* avoids to pronounce on the controversy».

of the dispute[24].

To sum up: Bickel would like to see the Supreme Court adopt a deferential and prudential attitude with respect to the choices of the other powers of the State and, therefore, chooses not to decide precisely because of the application of its *passive virtues* and the application of the technique of *avoidance*, as well as a shrewd use of the other *doctrines of justiciability*.

1.3. The functional political question

At the same time as Bickel's doctrinal elaboration, another formulation of the *political question was* affirmed, based on the *effective* capacity of the judges to concretely define the question. According to this view, all those cases in which the Court cannot decide for a real lack of "means", and in particular because *a) it* does not possess the necessary information[25]; *b)* the matter requires uniformity of decisions (taken by the representative bodies); *c) the*

[24] In Ashwander *v.* Tennessee Valley Authority, [297 U.S. 288, spec. 347 (1936)], the *Supreme Court* developed the first devising of the doctrine of "*constitutional avoidance*" («The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter»). But see also Colegrove *v.* Green [328 U.S. 549 (1946)] on constituencies; South *v.* Peters [339 U.S. 276 (1950)] on the weight of votes; McDouglas *v.* Green [335 U.S. 281 (1948)] on restrictions on political action.

[25] Just think of the problems of foreign policy, on which the legislature, but perhaps even more so the executive, can have access to greater and more complete information, as for the questions inherent to the declaration of a state of war (spec. on the possibility of applying the "Trading with the Enemy Act" see Commercial Trust Co. *v.* Miller, 262 U.S. 51 (1923)), to the recognition of foreign governments (United States *v.* Belmont, 301 U.S. 324, 330 (1937); Otjen *v.* Central Leather Co, 246 U.S. 297 (1918); United States *v.* Sandoval, 231 U.S. 28, 45-46 (1913)), or to the ratification and interpretation of international treaties (Terlinden *v.* Ames, 184 U.S. 270 (1902); Goldwater *v.* Carter, 444 U.S. 996 (1979)), but with respect to the latter see contra. Japan Whaling Association *v.* American Cetacean Society, 478 U.S. 221 (1986): «the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that the challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of IWC quotas presents a purely legal question of statutory interpretation. The Court must first determine the nature and scope of the duty imposed upon the Secretary by the Amendments, a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below. We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones. We conclude, therefore, that the present cases present a justiciable controversy, and turn to the merits of petitioners' arguments'» (230).
Cf. this theme F. Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, in 75 *The Yale Law Journal* 517, 1966, 567-573.

intervention of the judge could hinder the activity of the other powers of the State and it would be political.

In this regard, the most important theoretical contribution is certainly due to Scharpf[26]. According to him the *functional political question* would not be so much one of the techniques of *avoidance*, but rather an insurmountable obstacle for the *Supreme Court*, which would be *structurally* inadequate to resolve the case[27]. «[T]he *doctrine* would not, therefore, be a tool that the Supreme Court could manipulate at its discretion by reason of its intended objectives, but a limitation that expresses a *technical inability* to proceed with *constitutional adjudication*» [28].

1.4. Baker v. Carr

The fortune of the *political question doctrine* had a decisive halt at the beginning of the 60's when a period of marked judicial activism of the "Warren Court" began. Indeed, starting from the Baker *v.* Carr case, the Supreme Court reformulated it in rather restricted terms in order to expand its prerogatives. First of all, it established that the *political questions* could only concern the relations between the judicial power and the other federal powers. Moreover, it expressly attributed the faculty to interpret the configuration of relations between the *political branches* established in the Constitution, thus reserving the possibility of reviewing their actions in the case of exceeding the margins of constitutionally provided discretion[29]. More generally, precise criteria were established[30] to recognize the *political questions* which can be summarized in the following points: *(a) the* existence of a textually demonstrable constitutional commitment tying the question to an organ of the State; *(b) the* lack of jurisdictional standards; *(c)* the impossibility of a decision without an initial political determination involving the exercise of non-jurisdictional discretion; *(d)* the impossibility of independent resolution by a court without encroaching on the powers of other organs; *(e)* the requirement of unconditional adherence to a political decision already made; *(f)* embarrassment at the existence of multiple statements by various "departments" on a question [31].

[26] F. Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, in 75 *The Yale Law Journal* 517, 1966, 517-597.

[27] Cf. *supra* § 1.1. regarding the last element which already emerged in the classic *political question* where the lack of the normative standards necessary to reach a judicial pronouncement already begins to be considered symptomatic of the existence of a political question.

[28] C. Drigo, *op. cit.*, 279 (italics ours).

[29] In a manner similar - if not more marked - than that outlined by the so-called Marshall Court (see § 1.1.).

[30] The importance of the six criteria identified is also underlined by the fact that the case law subsequent to the Baker case, while clarifying their content, has never changed their number.

[31] [369 U.S. 186, 217 (1962)]: «It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political

At least formally, with the adoption of such criteria, the *Supreme Court* showed that it embraced both the *classical* and the *prudential political question*. However, in practice, despite the fact that the case Baker *v.* Carr had provided a new *test* with quite flexible characteristics, from that moment on there was a progressive decline of the *political question* in general[32] and of the *prudential approach* in particular[33].

1.5. The political question: a synthesis

From the brief reconnaissance of the evolution of the *political question doctrine*, the difficulty emerges of tracing certain boundaries between the prerogatives of the courts with respect to those of the other powers of the State. Also, the semantic data does not help; '*political question*' does not seem to mean that there is something *really political* (in a strict sense).

As we have seen, there has certainly been no lack of attempts at definition or the identification of possible symptomatic elements. However, practice has shown how, notwithstanding appearances, such theorizations have been changed, reinterpreted and reshaped to meet the needs of the moment. In other words, it seems that wide margins of vagueness have been

question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question».

[32] Notwithstanding this, there are cases in which the political question doctrine has been recalled by the Supreme Court, updating the debate on the subject. A particularly relevant example is certainly represented by the recent request of the Court to deepen the profiles inherent in the political question doctrine in the case Trump v. Deutsche Bank (April 27, 2020; available at: https://www.supremecourt.gov/orders/courtorders/042720zor_6k47.pdf).
In general, for some critical viewpoints of the existence of the *political question* see: L. Henkin, *Is There a "Political Question" Doctrine?* in *Yale Law Journal*, 1976, 597 ss.; M.H. Redish, *The Federal Courts in the Political Order. Judicial Jurisdiction and American Political Theory*, Durham, Carolina Academic Press, 1991, 111-136.

[33] Nevertheless, there seems to be no lack of hypotheses in countertendency. For example, the case O'Brien *v.* Brown would seem to make implicit reference to the *prudential approach* («these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties» [409 U.S. 4, (1972)]). While Gilligan *v.* Morgan («No justiciable controversy is presented in this case, as the relief sought by respondents, requiring initial judicial review and continuing judicial surveillance over the training, weaponry, and standing orders of the National Guard, embraces critical areas of responsibility vested by the Constitution, *see* Art. I, § 8, cl. 16, in the Legislative and Executive Branches of the Government» (413 U.S. 5-12 (1973)) and Nixon *v.* United States (506 U.S. 224 (1993) 228-238) to the *classical political question doctrine*.

deliberately left, above all, by the jurisprudence, which has thus created a ductile instrument to be modulated according to necessity. To give an example: the ratification and interpretation of international treaties has traditionally been considered a *political question* as evidenced, among many others, by the cases Terlinden *v.* Ames, 184 U.S. 270 (1902) and Goldwater *v.* Carter, 444 U.S. 996 (1979). Nevertheless, in Japan Whaling Association *v.* American Cetacean Society, 478 U.S. 221 (1986), the Court did not hesitate to hold that it had the authority to interpret treaties and executive agreements because it considered this task required by the Constitution itself: «under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones»[34]. Another significant case is represented by Davis *v.* Bandemer, 478 U.S. 109 (1986), in which the judges abandoned the traditional deference to the "electoral" legislator, proclaiming the unconstitutionality of the amendments "motivated by invidious partisan intent" and thus sanctioning that the phenomenon of *gerrymandering* [35] should be considered a justiciable matter.

In other words, the federal courts have increasingly used the *political question* doctrine not as a device to avoid conflicts with Congress or the President over the separation of powers, but as a tool to manage (or not manage) particularly sensitive issues. In this sense, the *political question doctrine* acts as a "safety valve" of the system which, together with the other techniques of selection of cases, allows «the establishment of a dialogical relationship with Congress and the executive, especially when new needs for protection and new rights come to the fore, the emergence of which does not find an express legal basis in the letter of the Constitution»[36]. More specifically, the *political question* has been used as a mobile boundary between the judicial power and the other powers of the State (in particular with respect to the Parliament and the Government) and has been frequently

[34] Japan Whaling Association *v.* American Cetacean Society, 478 U.S. 221, 230 (1986).
[35] *Gerrymandering* is the instrumental modification of the boundaries of an electoral college in the majority electoral system in order to obtain a majority of seats in the absence of a majority of votes. The inventor of this system of redrawing constituencies was the governor of Massachusetts Elbridge Gerry, who, knowing that within a certain region (department or state) there may be parts of the population that are favorable to a party or a politician (for example: following the dichotomy centre-periphery; young-older people, lower-middle class), designed a new constituency with particularly tortuous boundaries, including those parts of the population that were favorable to him and excluding those that were unfavorable to him.
On the topic see at least N.R. Seabrook, *Drawing the lines: constraints on partisan gerrymandering in U.S. politics*, Ithaca-London, 2017; B. Grofman (ed.), *Political gerrymandering and the courts*, New York, 1990; A.J. McGann, C.A. Smith, M. Latner, A. Keena, *Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty*, Cambridge, 2016; J. Winburn, *The realities of redistricting: following the rules and limiting gerrymandering in state legislative redistricting* , Lanham, 2008; R. Chari (ed.), *Hard questions for democracy*, London-New York, 2013; J.E. Leighley (ed.), *The Oxford handbook of American elections and political behavior*, Oxford, 2010.
[36] C. Drigo, *op. cit.*, 291.

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referred to in a rhetorical and uneven way, even in those areas in which it has more frequently been invoked [37].

Further investigating the issue from the point of view of motivations, the practice has shown a greater use of some arguments than others (although always in compliance with the decalogue established in Baker *v.* Carr). In particular, the main ones would seem to be the following four[38]: *i) the* explicit attribution of the issue to another power of the State; *ii)* the lack of legal standards applicable to the concrete case; *iii)* the impossibility to decide without a political determination involving the exercise of a non-judicial discretion; *iv)* the *technical inability* to proceed with the decision of the case for lack of the necessary legal instruments. This schematization also lists the criteria that seem to present the most analogies with the limit of the legislator's discretion as it has emerged from the pronouncements of the Italian Constitutional Court. This leads us to compare the two figures in order to verify whether there may be overlaps from a conceptual point of view or even just from a functional point of view.

2. The "Italian way" to the political question

As mentioned above, it would seem possible to establish a certain parallelism between the US *political question doctrine* as a *doctrine of justiciability* and the way in which the Constitutional Court deals with questions of political merit. We shall then try to understand whether the constitutional jurisprudence has conceived the prohibition of reviewing the discretion of the legislator as a technique of case selection structurally analogous to that of the *political question*[39].

What has emerged is that the Constitutional Court has shown that he recognizes the discretionary power of Parliament, but without providing a precise definition. We have also seen that there are material areas in which it is more frequent to find an attitude of *self-restraint* by the Court which is lacking only in the hypotheses in which it finds a macroscopic unreasonableness of the norms under scrutiny. From this point of view, the comparison with the American system would seem useful to verify whether, and if so to what extent, the prohibition of reviewing the discretion of the legislator has been used by the Constitutional Court to subdivide the division of competences between himself and the legislator. And possibly

[37] The example of foreign policy has already been given.

[38] A. Sperti is essentially of the same opinion: «The *political question doctrine* has been invoked not only in cases where the matter is left to political power, but also in cases where the question of constitutionality, if accepted, would imply the choice between several possible solutions or, again, in cases where there is no constitutional parameter of reference» (*La discrezionalità del legislatore*, cit., 639).

[39] In this sense see P. Zicchittu, *The Italian Way to the "Political Question"*, in *Italian Journal of Public* Law, no. 1/2015, 222-262.

also as a tool for the *selection of cases* and therefore to dispose of his "agenda"[40].

First of all, it is worth reiterating how the first – but not only – objective of the *political questions* would seem to be the safeguarding of the principle of the separation of powers. More specifically, to prevent judges from pronouncing on matters that could involve them in affairs belonging to the sphere of competence of other organs of the State[41]. Therefore «if we reflect on the circumstance that in the Italian constitutional framework the principle of the separation of powers is certainly not applied as rigidly as in the United States system and that, in any case, the Italian Constitutional Court is explicitly placed outside the judicial power, and is indeed in a position of equidistance from the other powers (of which it is empowered to resolve legal conflicts), the extension of the *political questions* – which is also the subject of discussion in the United States – could appear to be hardly sustainable. If, however, we compare the applications that the doctrine has received in the United States with the pronouncements in which our Court has invoked the legislator's discretion, we observe instead that the relationship is quite the opposite of what we might have expected and that the Italian Court has adopted, at least in recent times, a policy of self-limitation that is much more accentuated than that of the American judges»[42]. In fact, in the Italian system (although the same can be said for all those systems in which the control of constitutionality is not widespread but is entrusted to a "specialized" judge) it is less intuitive to consider the involvement of the Constitutional Court as an interference of the judicial power. In the Italian legal system, the principle of the separation of powers is not expressed in the same terms in which it is applied in the American legal system: It is the Constitution and the other norms of the constitutional process, which on one hand delimits the power and intervention of the Court, and on the other, delimits the power of intervention of the Court, as well as the operative instruments which it can concretely dispose of. However, despite the structural differences, there are many points of contact between American and Italian case law: there are many rulings of the Constitutional Court in which arguments similar to those used by the *Supreme Court* in

[40] «On the basis of these considerations, the comparison of the jurisprudence of the Constitutional Court on the discretion of the legislature with that of the American Supreme Court on *political questions* is worthwhile, first of all, to provide some justification for the aspiration of the Italian Court to have a flexible and manageable instrument which it can use to better measure the interventions that are necessary to ensure the respect and implementation of the Constitution» (A. Pizzorusso, *Il controllo della Corte costituzionale sull'uso della discrezionalità legislativa*, cit., 816).

[41] As A. Sperti correctly points out: «This means that, while in our experience the limitation under article 28 of Law no. 87/1953 - or even other techniques to which the constitutional judge has recourse in order to avoid making an assessment of the merits - are essentially directed towards the legislature, in the United States recourse is made to the *political question doctrine* even when acts falling within the jurisdiction of other powers are considered» (*Corti supreme e conflitti tra poteri*, cit., 129).

[42] A. Pizzorusso, *Il controllo della Corte costituzionale sull'uso della discrezionalità legislativa*, cit., 815-816.

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evoking the limit of the *political question can be* found. Therefore, it is useful to go back to the systematization of such motivations carried out above, in order to verify how they find correspondence in Italy.

2.1. The lack of the necessary legal instruments

The first of the symptomatic elements of the *political question* (identified in the synthesis in § 1.5.) concerns the incapacity to decide due to the lack of the necessary legal instruments. This incapacity would concern a purely *technical*[43] problem which would not derive from reasons of expediency and therefore the limit would be insurmountable, in the sense that the Court could do nothing else but decline jurisdiction.

The problem of the "means" directly evokes the theme of the powers of the Constitutional Court[44]. It has already been seen that, in this regard, the principle of the separation of powers is less rigid than that which characterizes it overseas, where, among other things, the very control of constitutionality is a judicial creation. The problem must, therefore, be faced in the light of the particular constitutional design of our country and on the basis of the specific configuration of the control of constitutionality by our Constitutional Charter[45]. We must also take into account the fact that, in our system, «the classic principle of separation, far from being clearly expressed, is also contradicted on several occasions, both to the advantage of the collaborative principle and for the imperfect correspondence between powers and functions»[46]. To briefly recapitulate what is foreseen by positive law in the case of judgements on merit: when the Court notes the

[43] It therefore relates to the lack of *means* deemed necessary to resolve the issue.
[44] As has been pointed out several times, the field of investigation is limited only to judgments of constitutional legitimacy in an incidental way, therefore, with regard to the problem of the instruments, the only profile that is of interest here is that of the means attributed by the Constitution to the Court to deal with any illegitimacy found.
[45] In fact, the basis of the powers and limits of the Court is regulated by the Constitution (especially by Articles 134; 135; 136 of the Constitution) and by the other legitimated sources ("authorized" by Art. 137 of the Constitution: among these, without a doubt, are Law no. 87/1953 and constitutional Law no. 1/1953).
[46] P. Costanzo, *Legislatore e Corte costituzionale. Uno sguardo d'insieme sulla giurisprudenza costituzionale in materia di discrezionalità legislativa dopo cinquant'anni di attività*, in *ConsultaOnline*, 2005, 9, where he specifies: «This does not mean, let it be clear, that the disarticulation of power (horizontal and vertical) with all the benefits that derive from it does not constitute a principle of structure of the Italian constitutional system, but that, at the end, there are no functions ontologically proper to the various powers and organs, which all end up finding in the rigid Constitution the title of their attributions. [...] This is why the determination of the limits and the significance of the Court's control is not abstractly derivable from the principle of separation, but is still the task of the Constitution or of other legitimate sources. It is perhaps no coincidence that the previous text of Art. 127 of the Italian Constitution explicitly removed the legislative conflicts of merit between the State and the Regions from the Constitutional Court to attribute them to the Chambers, not hesitating on the contrary to marginalize the principle of separation by attributing to the same Court the decision on the possible contrasting configuration of the conflicts themselves».

unconstitutionality of a norm, must declare it unconstitutional, otherwise it pronounces it unfounded. There are therefore only two options[47]. And also, with regard to the consequent effects of the acceptance, there does not seem to be any particular margin of discretion: the legislation declared illegitimate ceases to have effect[48].

From the normative point of view then, it is not foreseen that the Constitutional Court can intervene in a *positive way* because only the legislator could operate in that direction[49]. Nevertheless, since ancient times, it has considered that it can fill the legislative vacuum caused by its pronouncements of acceptance by acting through manipulations or additions. However, the problem of the admissibility of the so-called additive-manipulative sentences is not *directly* connected to that of discretion since it would seem to be excluded already on the basis of the Constitution itself and of the "integrating" norms of the process. However, a contrary orientation of the Court is by now consolidated[50], which admits variously manipulative interventions, albeit subordinating them to the presence of certain requisites. It is precisely the necessity of these requirements, first and foremost that of the so-called "obligatory rhymes", which once again moves the center of gravity of the discourse to the level of discretion: it is not so much the use of an additive ruling in itself that is considered by the Court as problematic, but rather the possible content of that addition.

2.2. The exercise of non-jurisdictional discretion

The fundamental requisite required for the adoption of the so-called additive-manipulative sentences would then be the existence of the so-called

[47] This thesis is reiterated in scholarly works with particular clarity by A. Vignudelli, *La Corte delle leggi. Osservazioni sulla cosiddetta efficacia "normativa" delle sentenze della Corte costituzionale* (1988), now in Idem, *Il vaso di Pandora. Scritti sull'interpretazione*, edited by F. Pedrini and L. Vespignani, I, (Modena, 2018) 36 ss.

[48] «When the Court declares the constitutional illegitimacy of a rule of law or of an act having the force of law, the rule ceases to have effect from the day following the publication of the decision» (Art. 136 Const.). But Art. 27 of Law 87/1953 also has the same tenor: «[w]hen the Constitutional Court accepts a petition or an appeal relating to a question of the constitutional legitimacy of a law or an act having the force of law, it declares, within the limits of the appeal, which legislative provisions are illegitimate. It shall also declare which other statutory provisions are unlawful as a result of the decision taken».

[49] In this sense we recall the model of the judge of the laws as a "negative legislator" theorized by H. Kelsen in *The Justice of the Constitution* (1928).

[50] «it has been affirmed that the formal reasons should not be made to prevail over the substantial ones: so that it is the procedural rules that must be "bent" to the requirements of the substantial constitutional law of "rendering constitutional justice" and not vice versa» (with a critical approach to this orientation, in particular by M. Ruotolo, *Principio di diritto nell'interesse della legge e questioni di legittimità costituzionale: tra le astratte simmetrie formali del diritto processuale e l'esigenza di "rendere giustizia costituzionale"*, in *Rivista AIC*, no. 1/2015, M. Raveraira, *Il giudizio sulle leggi: la Corte costituzionale sempre più in bilico tra giurisdizione e politica*, cit, 141).

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obligatory rhymes, or rather of a single solution imposed by[51] the Constitution. Only in this case the Court would also seem to deem possible its intervention in a positive way, beyond what is expressly allowed by the Constitution. The basic logical assumption of this *modus operandi* would seem to be the following: in the presence of "obligatory rhymes" the additive intervention is not the result of the exercise of any discretion by the Court because there would be no discretion exercisable. The solution prescribed by the decision is the only one that is constitutionally compatible and, therefore, necessary. The same could be applied to the legislator himself, who would not enjoy any margin of discretion, but would have to limit himself to "discovering" (in the sense of "recognizing") the only possible solution[52].

Much has been written on the real difficulty of deriving unequivocal normative consequences from constitutional norms (often formulated through statements of "principle"[53]), however, at least formally, this condition has been considered (almost[54]) constantly indispensable[55]. Vice versa, additive interventions outside of the so-called obligatory rhymes have tended to be considered inadmissible. Therefore, when a discretionary choice is necessary, the examination of the merits is precluded not only in the United States, but also in Italy. The hypothetical decision would, in fact, require an intervention that is not unequivocally determined, thus openly

[51] Thus A. Vignudelli, *Il fantasma della legalità*, cit., 123-124: «such sentences, from the logical-legal point of view, when they directly substitute the legislator in "filling" the "void" - that is, the "lacuna" that they themselves create by declaring the constitutional illegitimacy of a legislative norm - presuppose, at least formally, that it is the Constitution itself that imposes the discipline they indicate in the motivation of their sentence. In order for the Court to intervene as "positive legislator", in short, the principle of *horror vacui* and that of the preservation of acts would not be enough, but the Crisafullian "obligatory rhymes" would also be needed: the solution prescribed by the Court, in other words, would be the only one that is constitutionally compatible. [...] If the legislative discipline contained in a paralegislative sentence is indeed the only one that is constitutionally compatible, this means that it (discipline) is constitutionally necessary, and therefore implied by the Constitution itself. This denotes, on the other hand, that such discipline may be derived in a logical sense from an utterance or combination of utterances of the Constitution, being implied from it (to them)».

[52] Any inability to grasp it would then require the corrective intervention of the Constitutional Court.

[53] «Since the latter are distinguished by generality – that is, by their structural suitability to allow different ways of implementation and yet equally compatible with the precept expressed by the principle» (A. Vignudelli, *Il fantasma della legalità*, cit., 124).

[54] An exceptional episode in which the limit of the so-called obligatory rhymes was explicitly exceeded may be represented by Const. Court judgment no. 222/2018 in which the Court finds a substitute discipline among those that the legislator himself has identified for other (albeit different) cases. Moreover, on this occasion it has intervened only after an explicit warning to the legislator. See also judgment no. 40/2019.

[55] We are therefore not interested here in discussing these issues as explored in depth by the scholarship, but we consider it sufficient to ascertain what the conduct adopted in *practice* by the Court is.

encroaching on the areas of discretion reserved for the legislator[56]. In both cases, the Constitutional Tribunal would have no choice but to declare the inadmissibility of requests which would go beyond its competence, both in terms of instruments (since interventions of an additive nature are not feasible) and, above all, in terms of content (since they are choices of merit which are *not* constitutionally obligatory).

2.3. The lack of applicable legal standards

From what we can deduce from the study of the *political question doctrine*, a further indication of the "political" (or, in any case, non-justiciable) nature of a question concerns the lack of legal standards which can be applied in the judgement. If, as far as the American experience is concerned, the application of such a criterion does not necessarily imply that there are areas which are constitutionally irrelevant, the same does not seem to apply to Italy. Here, in fact, where there is no (*constitutional*) parameter norm, the existence of constitutionally irrelevant areas of law in which the discretion of the legislator could be freely explained is necessarily presumed. This - as has been recalled - is what can be inferred from constitutional jurisprudence[57], despite the fact that the possibility of intervening in the face of *manifest unreasonableness* is admitted[58]. And if, on the one hand such an exception could be considered the symptom of an irremediable contradiction, on the other hand it acknowledges the evolution of the concept of reasonableness in the most recent case law. Just as for quantum theory, not even the *ideal vacuum* can be correctly defined as such due to the existence of magnetic fields and virtual particles, the same would seem to apply to the concept of "constitutional vacuum" *actually* adopted by the Court[59]. Setting this metaphor aside, there would not exist matters that are constitutionally irrelevant in an absolute manner because, although with respect to them, the recognized margins of discretion are undoubtedly wider, it would always remain possible to check for *manifest unreasonableness* (and this is what happens with procedural matters, essentially criminal matters and tax

[56] This would be an *inherently* non-judicial discretion that would rather touch on choices of political merit.
[57] It is the Constitutional Court itself which recognises the existence of «an empty space of constitutional law in which the legislator can use its discretionary power» (Constitutional Court, judgment no. 172 of 18 May 1999, "*Considerato in diritto*", § 2.1.).
[58] In addition, Pasquale Costanzo's further observation seems correct when he recalls that «the very existence of the control of constitutionality postulates, in the absence of explicit exceptions, the submissibility of the law (of the whole law) to the control already only by reason of its formal regime, therefore having to evaluate the cases of legislative discretion as inoffensive for any parameter. In other words, in principle there should be no inadmissible questions motivated by the Court's lack of jurisdiction to hear the law for some reason» (P. Costanzo, *Legislatore e Corte costituzionale*, cit., 12).
[59] For a different use of the analogy between quantum physics and (science of) law see R. Bin, *A discrezione del giudice. Ordine e disordine: una prospettiva "quantistica"*, 2nd ed., Milan, 2014.

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matters).

This would seem to confirm the notion of discretion developed by Alessandro Pizzorusso, which refers both to the areas in which the legislature's margin of maneuver is circumscribed by more precise constitutional norms and where the activity of Parliament remains essentially (*more*) free. According to the illustrious author «the noun 'discretion' and the adjective 'discretionary' correspond to a dual concept, since sometimes these terms are used to indicate that a power, an activity or a legal act is not entirely constrained but at least partially free, while at other times they are employed to express exactly the opposite, namely that the power, the activity or the act is not entirely free, but is at least partially constrained»[60]. Therefore, when the legislator's discretion can be expressed freely, except for the limit of manifest unreasonableness, the area of review is considerably restricted. This is despite the fact that the extent of the restriction remains unspecified, since the difference between unreasonableness and *manifest* unreasonableness is merely quantitative and there is no clear, or at least easily identifiable, borderline between the two figures in the case law of the Court.

The only element that is clear enough is that the relative control is particularly bland and that only the most evident illegitimacy should be sanctioned. This, however, introduces a further problem, namely that in these cases «the judge of the laws inevitably suffers the logical aporia of a judgement of constitutionality that could, in theory, allow laws to be saved [...] even if unreasonable, but "not in a manifest manner" [...]. Probably, however, here to a greater extent than on other similar occasions, the risk of an excessive politicization of the Court is even more at stake or, if you like, at risk of venturing into a very slippery terrain for its legitimacy. In other words, the delimitation of the sphere of judgement only to cases of manifest unreasonableness constitutes one of the substantial elements of its judgement [...] that can make the existing diversity between the judicial and legislative functions work in a physiological way»[61].

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[60] A. Pizzorusso, *Il controllo della Corte costituzionale sull'uso della discrezionalità legislativa*, in *Riv. trim. dir. proc. civ.*, 1986, 795-796).

[61] A. Rauti, *La Corte costituzionale e il legislatore. Il caso emblematico del controllo sulle leggi elettorali*, in *Consulta online*, no. 2/2017, 229. A further reflection made by the A. that it is considered appropriate to point out is the parallelism between the control on manifest unreasonableness and the obvious lack of prerequisites of necessity and urgency of the decree law. On this last aspect see also A. Ruggeri, *La Corte alla sofferta ricerca di un accettabile equilibrio tra le ragioni della rappresentanza e quelle della governabilità: un'autentica quadratura del cerchio, riuscita però solo a metà, nella pronunzia sull'Italicum*, in *Lo Stato*, no. 8/2017, 300: «There is, in my opinion, an evident assonance between the doctrine of the "manifest unreasonableness" and that of the "evident lack" of the justifying premises of the decrees-laws: in one case and in the other, in fact, the area of the syndicate narrows to a considerable extent and yet arbitrarily. Take note of the paradox in which the Court unwittingly falls: in order to keep away from the risk of its own political delegitimization, the Court adopts a decisional technique itself... politically colored. As I have pointed out several times, the Court was not, in fact,

instituted for the purpose of ascertaining cases of certain violation of the Constitution but precisely those that are doubtful; that is, it is called – as Art. 134 of the Charter says – to pronounce on "controversies" relative to the constitutional legitimacy of the laws and acts equivalent to them».

It should be noted that both contributions comment on the important sentence 25 January 2017, no. 35 with which the Constitutional Court declared the constitutional illegitimacy of the electoral law 6 May 2015, no. 52 (so-called *Italicum*). Among the various important comments we limit ourselves to pointing out R. Bin, *La Corte ha spiegato, niente è cambiato*, in *laCostituzione.info*, 10 February 2017; S. Ceccanti, *I sistemi elettorali per le elezioni politiche dopo la 35/2017: una sentenza figlia del referendum, ma per il resto deludente per i proporzionalisti*, in *federalismi.it*, no. 4/2017; R. Dickmann, *La Corte costituzionale trasforma l'Italicum in sistema elettorale maggioritario 'eventuale' ma lascia al legislatore l'onere di definire una legislazione elettorale omogenea per le due Camere*, in *federalismi.it*, no. 4/2017; A. Morrone, *Dopo la decisione sull'Italicum: il maggioritario è salvo, e la proporzionale non un obbligo costituzionale*, in *Forum di Quaderni Costituzionali*, 13 February 2017; F. Ferrari, *Perché la Corte non avrebbe dovuto giudicare nel merito l'Italicum*, in *laCostituzione.info*, 18 February 2017; A. Mangia, *L'azione di accertamento come surrogato del ricorso diretto*, in *laCostituzione.info*, 15 February 2017; F. Ferrari, *Sotto la punta dell'iceberg*: fictio litis *e ammissibilità della q.l.c. nella sent. n. 35/2017*, in *Forum di Quaderni Costituzionali*, 14 February 2017; L. Trucco, *"Sentenza Italicum": la Consulta tra detto, non considerato e lasciato intendere*, in *Consulta online*, Studi, no. 1/2017, 149-174; R. Dickmann, *Le questioni all'attenzione del legislatore dopo la sentenza n. 35 del 2017 della Corte costituzionale*, in *Diritti fondamentali*, no. 1/2017; P. Pasquino, *La Corte decide di decidere ma non coglie la natura del ballottaggio*, in *Forum di Quaderni Costituzionali*, 6 April 2017; V. Tondi della Mura, *Ma la discrezionalità legislativa non è uno spazio vuoto. Primi spunti di riflessione sulle sentenze della Consulta n. 1/2014 e n. 35/2017*, in *Diritti Fondamentali*, n. 1/2017; D. Casanova, L. Spadacini, *Il ballottaggio nazionale tra liste: la sentenza Corte cost. n. 35 del 2017 e il de profundis per i sistemi majority assuring*, in *Osservatorio AIC*, *n. 2/2017*; G. Salvadori, *La Corte conferma l'accesso "in via preferenziale" (nota a sent. n. 35 del 2017)*, in *Osservatorio AIC*, no. 2/2017; G. Maestri, *Orizzonti di tecnica elettorale: problemi superati, irrisolti ed emersi alla luce della sentenza n. 35 del 2017*, in *Nomos*, no. 2/2017; R. Bin, *Chi è responsabile delle «zone franche»? Note sulle leggi elettorali davanti alla Corte*, in *Forum di Quaderni Costituzionali*, 9 June 2017; A. Alberti, *Discrezionalità del legislatore v. bilanciamento tra rappresentatività e governabilità. Una critica alla sent. n. 35 del 2017*, in *Forum di Quaderni Costituzionali*, May 11, 2017; R. Martinelli, *La sentenza n. 35/2017 della Corte costituzionale: nota critica*, in *Forum di Quaderni Costituzionali*, May 7, 2017; T.F. Giupponi, *"Ragionezza elettorale" e discrezionalità del legislatore, tra eguaglianza del voto e art. 66 Cost*, in *Forum di Quaderni Costituzionali*, 18 June 2017; S. Troilo, *Le liste (in tutto o in parte) bloccate e le candidature multiple dopo la sentenza costituzionale n. 35/2017: dall'arbitrio (solo) dei politici a quello (anche) della sorte, e poi di nuovo dei politici?* in *Forum di Quaderni Costituzionali*, 27 June 2017; G. Comazzetto, Fictio litis *e azioni di accertamento del diritto costituzionale di voto dopo la sentenza 35/2017*, in *Forum di Quaderni Costituzionali*, 21 June 2017; I. Massa Pinto, *Dalla sentenza n. 1 del 2014 alla sentenza n. 35 del 2017 della Corte costituzionale sulla legge elettorale: una soluzione di continuità c'è e riguarda il ruolo dei partiti politici*, in *Costituzionalismo.it*, no. 1/2017, 43-57; A. Ciancio, *Electoral laws, judicial review and the principle of "communicating vessels"*, in *Diritti fondamentali*, no. 2/2017; G. Sobrino, *Il problema dell'ammissibilità delle questioni di legittimità costituzionale della legge elettorale alla luce delle sentenze n. 1/2014 e n. 35/2017 e le sue possibili ricadute: dalla (non più tollerabile) "zona franca" alla (auspicabile) "zona a statuto speciale" della giustizia costituzionale?*, in *federalismi.it*, no. 15/2017; D. De Lungo, *Il premio di maggioranza alla lista, fra governabilità e legittimità costituzionale. Considerazioni (anche) a valle della sentenza n. 35 del 2017*, in *Rivista AIC*, no. 2/2017; M. Mincincleri, *Il sindacato di legittimità costituzionale sulle leggi elettorali, tra ruolo "legislativo" della Consulta, "moniti" al Parlamento ed ipotesi di introduzione del controllo preventivo*, in *Consulta online*, *Studi*, no. 3/2017, 419-428; V. Tondi Dalla Mura, *La discrezionalità del legislatore in materia elettorale, la «maieutica»*

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In extreme synthesis, even accepting operating within particularly narrow margins of intervention, the Constitutional Court does not renounce his powers of control *in toto*. And this would seem to represent an insurmountable obstacle to being able to consider the limit of *political question* superimposable on that of the discretion of the legislator because, as we have seen, «it is not easy to overcome the perplexity aroused by the dubious consistency of "matters" regulated by primary sources, yet *unquestionable by definition by* the judge of constitutionality. The doubts grow if one thinks that the judgement of reasonableness is affirmed as a method susceptible to generalized application, for which the attempt to identify *tests* suitable to predetermine its application has proved extremely difficult»[62].

2.4. The impossible overlapping of the limit of political question with the discretion of the legislator

If we try to sum up, it seems necessary to conclude that the *political question doctrine* and the concept of legislator's discretion are not homogeneous. On the contrary, under the label of the legislator's discretion are hidden distinct notions of discretion, even if the Court does not always highlight it for the purposes of the judgment of legitimacy[63].

It is not uncommon for the reference to discretion to be an integral part of the judgement on the *merits*[64], admitting the review of the concrete exercise of the legislator's faculty of choice, at least when the criterion of

della Consulta e il favor (negletto) verso il compromesso legislativo: continuità e discontinuità fra le sentenze n. 1 del 2014 e n. 35 del 2017, in *Rivista AIC*, no. 1/2018; G. Ferri, *I sistemi elettorali delle Camere dopo le sentenze della Corte costituzionale (n. 1/2014 e n. 35/2017) e la legge n. 165/2017*, in *Osservatorio sulle fonti*, no. 3/2017; A. Mangia, *L'azione di accertamento come surrogato funzionale del ricorso diretto*, in *Forum di Quaderni Costituzionali*, 17 June 2018; L. Pesole, *Il ruolo della Corte nel contesto storico-politico segnato dalla bocciatura della riforma costituzionale*, in *federalismi.it*, no. 17/2018; C. Rossano, *Note su premio di maggioranza ed esigenze di omogeneità delle leggi elettorali della Camera dei Deputati e del Senato della Repubblica nella sentenza della Corte costituzionale n. 35/2017*, in *Rivista AIC*, n. 1/2017; A. Celotto, *La legge elettorale: quali prospettive?*, in *Rivista AIC*, no. 1/2017; M. Luciani, Bis in idem: *la nuova sentenza della Corte costituzionale sulla legge elettorale politica*, in *Rivista AIC*, no. 1/2017.

[62] P. Bianchi, *La creazione giurisprudenziale delle tecniche di selezione dei casi, Le tecniche di giudizio e la selezione dei casi*, in R. Romboli (ed.), *L'accesso alla giustizia costituzionale. Caratteri, limiti, prospettive di un modello*, Napoli, 2006, 261 (*italics ours*).

[63] *Ivi*, 259-262.

[64] «[T]he presence of areas reserved to the 'discretion of the legislature' does not always and in any event preclude the Court's judgment on the merits of the question submitted to it. Rather, the Court seems to stop when it encounters difficulties of a twofold nature, which correspond to different ways of interpreting its role. The first inhibiting element, explicitly stated in the decisions, is that of the presence of several alternative solutions, compared to the one adopted by the legislator, none of which is imposed by the Constitution. The other passage concerns the effects of the decisions: only in particular circumstances, due to the formulation of the text of the contested provision, is it possible to adopt a decision that gives rise to outcomes that are at least partially reconstructive» (*ibid.*, 254).

reasonableness is used[65]. Even in cases where the Court of Laws considers that it can sanction only the most obvious and manifest illegitimacy it always operates through assessments that are not merely procedural: the summary nature of the judgment does not qualitatively change its structure. Discretion as a limit to the exercise of constitutional jurisdiction, in cases where the challenged provisions fall within a matter for which there are no constitutional parameters of reference, becomes not so much a circumstance which is difficult to verify, but perhaps, rather, an entirely theoretical hypothesis which does not correspond to the reality of the facts as shown by constitutional jurisprudence (notwithstanding the scattered declarations to the contrary)[66].

In fact, discretion becomes a real limitation only when the Court considers that it cannot pronounce an upholding judgment because there are several alternative solutions, none of which is constitutionally required. However, the question must be duly clarified. In many decisions illegitimacy is noted but not declared because, in the presence of a plurality of possible solutions, it would be necessary to make choices of political merit that would be precluded to the Constitutional Court. In other words, legislative discretion would not be judicially substitutable since the Constitution does not identify any precise alternative to be preferred to the other, but this does not sanction the validity of the legislation[67]. On the contrary, it is only the

[65] In fact, «the set of references to reasonableness in the exercise of legislative power and the reference to the legislator's discretion take on contours that are not entirely defined. Sometimes they indicate the limit of the Court's control, indicating the area of the non-justiciable, other times they are invoked as indispensable elements for the correct expression of the legislative function; contributing to provide a barrier to the balancing operation» (P. Bianchi, *Le tecniche di giudizio e la selezione dei casi*, cit., 669).

[66] «[T]he prohibition of syndication on the discretion of the legislator - in cases in which the observance of Art. 3 Cost - implies a control, albeit a summary one, on the reasonableness (or rationality) of the legislator's choices since, although "[it is] evident that the Court must not superimpose its choices on those of the legislator, [...] it is also clear that the *minimum* rationality necessary to provide a basis for such choices, without which they appear to be real discriminations, cannot escape control"» (A. Sperti, *La discrezionalità del legislatore*, in R. Romboli (ed.), *L'accesso alla giustizia costituzionale. Caratteri, limiti, prospettive di un modello*, Napoli, 2006, 629, with quotation marks by L. Elia, *Conferenza stampa del Presidente della Cote costituzionale*, in *Foro it.*, 1983, V, c. 80). Among other things, it should be noted that not only are there very few pronouncements in which the existence of constitutionally indifferent areas of law is admitted, but they are almost all concentrated before the 2000s.

[67] In these cases, «when declaring inadmissibility the Court ultimately finds or presupposes or at least does not exclude the existence of a flaw in constitutionality. In fact, it is not uncommon to consider the need for legislative intervention in order to eliminate the inconveniences it considers to exist» (L. Carlassare, *Le decisioni d'inadmissibilità e di manifesta infondatezza della Corte costituzionale*, in Aa.Vv., *Strumenti e tecniche di giudizio della Corte costituzionale*, Milano, 1988, 62). With «the solution of inadmissibility [...] does not "absolve" the legislator, it does not provide an endorsement of constitutionality to laws whose compatibility with the constitutional principles is sometimes very doubtful. When the Court, for whatever reason, perhaps even that (to a certain extent legitimate) of the fear of creating legislative vacuums or normative imbalances with its pronouncement, does not feel like declaring illegitimate

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lack of instruments which inhibits the manipulative intervention of the Constitutional Judge and this *self-restraint* knows many exceptions. In fact, when rights of particular importance are at stake and the inertia of the legislator persists, the Court has often acted in any case (*despite the fact that* the margins of discretion do not exactly indicate a single line of intervention). The scheme of action used is as follows: inadmissibility-monitory-acceptance [68]. With the declaration of unconstitutionality, it recognizes (either implicitly or explicitly) that it is acting beyond the powers explicitly conferred on it by the Constitution, but it decides to do so anyway, opting for the "lesser evil" with respect to the lack of protection of rights considered particularly important[69].

Such a *modus operandi* has no citizenship within the *political question doctrine*. Indeed, the PQd is not compatible with the idea of reviewing the exercise of discretion in terms of rationality, nor with that of excluding those decisions as a result of which the Court goes beyond its nature as a negative legislator.

As far as the first point is concerned, the reason is quite clear: discretion does not assume the role of a limit, but of an object of the control of constitutionality, while *political questions*, theoretically, can never be considered justiciable precisely because of the existence of the impassable limit represented by the principle of the separation of powers.

As regards the second aspect, the reasoning is slightly more nuanced, but also in this case the *political question doctrine* behaves differently. The Court, when it faces the problem of discretion in relation to the instrumentality concretely usable to lead back *to legitimitatem*, the normative situation considered illegitimate, «enters into the merit of the question of constitutional legitimacy, but clashes with the difficulties inherent in its original configuration of "negative legislator"»[70]. Instead, in the case of the *political question* there is no analysis of the merit, but the judge simply "declares" his lack of jurisdiction. In other words, he says nothing about the

the law submitted to its judgement, it is - as a lesser evil - preferable to a declaration of inadmissibility with which, at least, it does not take a position on the merits» (*Ibid.*, 63-64).

[68] «The combination between the warnings and the subsequent, eventual, decisions of acceptance bring [...] a further element in favor of the thesis that the decisions of inadmissibility we are talking about are in fact, not declarations of lack of jurisdiction of the Court, but solutions adopted discretionally for (temporary) lack of instruments of intervention» (P. Bianchi, *La creazione giuurisprudenziale delle tecniche di selezione dei casi*, cit., 257).

[69] The so-called "Antoniani/Cappato" case highlights this last aspect. On the contrary, it seems to want to better control the time factor characterising the inadmissibility-monitory-unconstitutionality scheme). The reason lies in the fact that fundamental rights cannot wait *indefinitely*, but illegitimacy must necessarily be remedied "whatever it takes". In other words, it has been explicitly recognized that in certain conditions in which fundamental rights are at risk, the intervention of the Court is not only possible, but indeed *necessary*, even to the detriment of the discretion of the legislator. See also, more recently, ord. nos. 132/2020; 97/2021.

[70] P. Bianchi, *La creazione giurisprudenziale delle tecniche di selezione dei casi*, cit., 255.

possible legitimacy or illegitimacy of the challenged legislation, he merely indicates the competent body for the resolution of the question.

In essence, it can be concluded that the limit of the *political question*, at least in abstract terms, is characterized by much sharper boundaries than that of the discretion of the legislator. Notwithstanding the different theorizations and its inconsistent use by jurisprudence, it can be said that this doctrine remains an expression of the principle of the separation of powers understood as a mere instrument of distribution of competences among the various organs of the State. Even if it has been used both to widen and to narrow the area of judicial intervention and, therefore, to justify, respectively, approaches of *judicial acrimony* and *self-restraint* of the courts.

The same cannot be said, however, for what happens in our country with regard to the discretion of the legislator: «cross and delight' of the constitutional jurisdiction, constituting, at the same time, the limit but also an object of evaluation»[71]. Therefore, the knot of the type of control carried out by the Court in relation to Art. 28 of Law no. 87 remains unresolved, at least at the level of jurisprudential practice. Whether, in substance, it is a control of a "procedural" type and therefore preliminary, such as to prevent the Court from entering into the merits of the question; or whether it takes the form of a true and proper judgement *on the merits of the question*, at the end of which (but only *at the end of which*) the Court comes to assess that – even admitting the unconstitutionality of the provision – it is precluded, given the necessary respect for the discretion of the legislator, from identifying the solution that overcomes that unconstitutionality»[72].

However, both the limit of the *political question* and the limit of the legislator's discretion are used in ways that are not always clear and consistent, and this highlights an underlying desire of judges to have a flexible and manageable tool to better calibrate their interventions[73]. At

[71] P. Costanzo, *Legislatore e Corte costituzionale*, cit., 2.

[72] E. Rossi, *Corte costituzionale e discrezionalità del legislatore*, in R. Balduzzi, M. Cavino, J. Luther (ed.), *La Corte costituzionale a una svolta, Atti del Seminario svoltosi a Stresa il 12 novembre 2010*, Torino, 2011, 346-347, according to whom, however, both solutions could be compatible: «i.e. there may be cases in which the question is formulated in such a way as to make it clear that an intervention not allowed to the Court or extraneous to its jurisdiction is being requested (e.g. in one of the hypotheses referred to of "constitutional indifference" or of legislation *praeter constitutionem*), and a decision of inadmissibility is therefore correct because, regardless of whether or not the censure is well-founded, it cannot be the subject of an examination on the merits. In other circumstances, however, the decision as to whether or not the Court has the power to intervene in the censured provision can only be made after an analysis of *the merits of the* question, which may lead to the conclusion that – although the provision may be unconstitutional – a purely ablative solution is not possible (on pain of violation of other constitutional rights or principles, for example), nor is it possible to reach an additive ruling (in principle or otherwise). In the latter cases, however, the pronouncement can neither be of a procedural nature (because consequent to an examination of the merits of the question) nor, however, of merit, in the sense at least that we know».

[73] A. Pizzorusso, *Il controllo della Corte costituzionale sull'uso della discrezionalità legislativa*, in *Riv. trim. dir. proc. civ.*, 1986, 816. But see also A. Sperti, *La discrezionalità*

least in this sense it is then possible to admit a strong functional analogy between the two theories. They both provide a justification for the courts to intervene or not to intervene, even when the real reasons for their choices are not directly attributable to those explicitly expressed in the pronouncements but reside in considerations of opportunity referred to particularly controversial issues and/or relating to fundamental human rights[74]. As far as the Court is concerned only sometimes does it attempt to construct tests suitable for formalizing the application of the borderline indicated by Art. 28, Law 87/1953[75] and much more often it is evident that it has little interest in making itself more predictable and intelligible to the audience[76], thus avoiding «establishing in a definitive manner, the meaning of the cases and the limits of its own review»[77]. Hence, it may be said that the limit of the *legislature's discretion* is *also a* tool for the *selection of cases* [78], but it represents something broader, pliant and complex.

Nonetheless, the differences remain fundamental, and in particular the limit of the legislator's discretion has proved to be much more nuanced and

del legislatore, cit., 639 and, more extensively, Idem, *Corti supreme e conflitti tra* poteri, cit., spec. cap. II.

[74] An example of this ambiguity can be found in three recent cases that have to do with particularly delicate issues involving "fundamental rights". The first is constituted by judgment no. 159/2010 on homosexual unions (and their equalization with marriage) in which the Court declared the question inadmissible due to the discretion of the legislator in regulating the various institutions (thus adopting a ritual decision). The second is constituted by judgment no. 242/2019 (so-called Antoniani/Cappato case) in which the Court inaugurated a new decisional technique by ruling, in the end, on the merits of the issue while acknowledging that it would be within the competence of the legislator, as long as it did not deprive of adequate protection certain situations particularly sensitive. The third one consists of judgment nos. 32 and 33 in which the Court decided not to intervene because of the existence of the limit of the legislator's discretion, leaving a – recognized – void of protection for the minor born from pma in other countries (forbidden in Italy) compared to the recognition with both parents (including the intended parent). In these three cases, it seems that the Court has not adopted the same line of intervention but has decided in one direction or another for reasons of opportunity.

[75] E. Rossi, *Corte costituzionale e discrezionalità del legislatore*, cit., 348.

[76] P. Bianchi, *Le tecniche di giudizio e la selezione dei casi*, cit., 667.

[77] A. Sperti, *La discrezionalità del legislatore*, cit., 627.

[78] «In this sense, it can be considered that a sort of principle operates in Italy as well, which inhibits the constitutional judge from interfering in *political* questions through the improper attempt to submit to trial questions which do not lend themselves to it, or through a dilation of the scope of the constitutional parameters. Although a true "doctrine" in this regard has never been formulated, neither in the writings of the commentators, nor even less so in the case law, something of this kind occurs when the Constitutional Court withdraws, for the most varied reasons, but all sharing the same *ratio*, from decisions of unconstitutionality (through pronouncements of rejection or inadmissibility of the questions), in order to leave unprejudiced a "legislative space" which it does not consider to be within its competence. Respect for a sphere of autonomy of the legislative process occurs either through the screen of some procedural device that allows the Court not to decide on the merits, or through a restrictive interpretation of the constitutional law that circumscribes the constitutionally prejudiced terrain and enlarges that which is "free from constitutional law"». G. Zagrebelsky, *La giustizia costituzionale*, Bologna, 1988, 161.

nebulous than that of the *political question*. This is due to its intersection with the difficult theme of the control of reasonableness, but also because it has been recalled to deal with heterogeneous situations in relation to which it has assumed meanings that are not always clear or uniform.

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