«UNCONSTITUTIONAL» CONSTITUTIONAL AMENDMENTS BEFORE CONSTITUTIONAL COURTS: SOME COMPARATIVE NOTES FROM HUNGARY AND ITALY

La «inconstitucionalidad» de enmiendas constitucionales frente a Tribunales constitucionales: algunas notas comparadas desde Hungría e Italia

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RESUMEN: Cuando la mayoría adopta leyes que afectan principios constitucionales fundamentales, es preciso que los Tribunales Constitucionales actúen en defensa de estos principios; sin embargo, el tema de cómo puedan cumplir con esta tarea es debatido, ya que cualquier acción tendría consecuencias notables para la arquitectura institucional del Estado. En las últimas décadas, conflictos del

ABSTRACT: When elected majorities pass rules affecting basic principles of a State's constitution, it is for constitutional courts to act in defence of such principles. How such action is to be taken, and what consequences it entails for the constitutional architecture of the State concerned, is nevertheless a matter for discussion. In the last decades, Italy and Hungary have been confronted with long-last-

Estado. En las últimas décadas, conflictos entre mayorías y Tribunales constitucionales ocurrieron en Hungría e Italia. Destaca la distinta actitud de los dos Tribunales. La Corte italiana hizo todo lo posible para no enfrentarse directamente al Gobierno, al gozar éste de una fuerte legitimación electoral; el Tribunal húngaro construyó argumentos sofisticados en contra de la mayoría parlamentaria. El resultado, quizás paradójico, ha sido que al largo plazo la Corte italiana ha preservado intactos sus poderes y ha podido desempeñar un papel crucial en la defensa de la legalidad constitucional; el Tribunal húngaro, tras perder la batalla con el Gobierno, ha sido relegado a una posición marginal en el debate interinstitucional.

PALABRAS CLAVE: Enmiendas constitucionales– Tribunal constitucional– Principio de legalidad– Estado de derecho– Legitimación del poder.

lasting struggles between elected majorities and the constitutional court; yet, the latter's attitude in the two countries has been radically different. The Italian Court avoided a direct clash with a Government as it enjoyed high electoral consensus; Hungarian judges crafted sophisticated arguments to oppose the legislature. In the long run the result is paradoxical: the Italian Court has preserved its powers and played a major role in protecting constitutional legality, whereas the Hungarian Court has been confined to a marginal position in the inter-institutional debate.

KEYWORDS: Constitutional amendments– Constitutional courts– Legality principle– Rule of law– Legitimation of power.

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THE SCOPE OF THE ATTEMPTED ANALYSIS

In Hungary, after the 2010 elections, the radical changes thrust by the coalition led by *Fidesz* having Viktor Orbán as a leader have drawn worldwide attention to the Hungarian Republic. Despite denying constitutional reform ambitions during the electoral campaign, after his appointment as Prime Minister Orbáncame up with a draft of a new Fundamental Law (April 2011) igniting fierce opposition, as major concerns were raised about its compliance with separation of powers and protection of human rights. Meanwhile, the Parliament passed a few legislative measures – so-called «Temporary Provisions»– which, too, cast serious doubts about their compliance with basic constitutional standards. The Constitutional Court struck them down to a large extent; as a response, constitutional amendments were adopted which simply replicated the content of the provisions held unconstitutional, so that the object of constitutional scrutiny became the parameter itself.

Years later, it has become a diffuse opinion that Orbán's majority has purposely re-shaped the Hungarian State in a pseudo-authoritarian fashion. The Resolution voted by the European Parliament in the framework of the Art. 7(1) TEU procedure witnesses to the Union's deep concerns as for the alleged serious breach of European fundamental values[1]. However, *per se* a struggle between the judiciary and the legislature raises a controversial issue

1. European Parliament (2017/131/INL) Resolution of 12 September 2018.

of constitutional law, namely where the boundaries between the two branches of government and their respective powers should be placed. As the majority overruled Constitutional Court's judgments by means of lawfully adopted constitutional amendments, the question arises on whether such overruling is part of ordinary inter-institutional dynamics or entails a rupture of constitutional legality. Should the latter be the case, it is questionable whether Courts can make use of constitutional principles as substantive constraints to legislators, and whether to prevent them from doing so would undermine their function as *watchdogs* of constitutional legitimacy in democratic States.

Theoretical standpoints in support of either positions are underpinned by staggering doctrinal work, a thorough examination of which ranges beyond the scope of this article. What is sought here is to give elements for a broader perspective on the facts concerned by comparing cases in which similar circumstances have taken place.

Particularly, in 1999 Italy underwent a reportedly minor constitutional amendment –the introduction of the «fair trial» principle (Art. 111 Const.)– whose political significance was in fact outstanding, as it consolidated a political *elite* whose leadership was undermined by corruption scandals. In the same vein as Hungary –despite the obvious historical diversities– that reform, too, turned into constitutional law what the Court had struck down as primary legislation and was instrumental to a constitutional narrative purporting the need for limiting the judiciary's «activism» allegedly to preserve the balance among constitutional powers. The Court chose not to call for the existence of substantive constraints to the legislator; rather it bent, like a reed in the wind, before the will of elected majorities. By avoiding resistance at any cost, it seemingly accepted the reform's legal and political implications; yet, in the long run such a «moderate» approach was crucial to enhance the Court's legitimation and to foster a counter-narrative providing more inclusive reasons to the process of constitutional reform. In fact, repeated attempts to grant personal immunity to high officials and to permanently restrict the boundaries of the judiciary have been rejected by the Court in the following years; however, they were not annulled for infringement of the core values of the Constitution, but rather dismissed for mere procedural matters.

I. HUNGARY: THE AMENDMENTS TO THE FUNDAMENTAL LAW OF 1989 AND THE CONSTITUTIONAL COURT'S APPROACH TO «UNCONSTITUTIONAL» CONSTITUTIONAL AMENDMENTS

The 2010 *Fidesz* victory finds its roots in the *post-1*989 Hungarian society being confronted with repeated economic crisis and major scandals weakening

the governing *élite*[2]; accession to the EU, too, had been contested in itself to a large extent[3]. The coalition *Fidesz-KKDNP* (Christian-Democratic People's Party) obtained 68% of the seats (263 MPs of 386) with 53% of the votes cast; that is, more than the 2\3 majority required for the 1989 Fundamental Law to be amended. Although no reference to constitutional reform was made during the campaign, in the immediate aftermaths ten constitutional amendments to delicate parts of the 1989 Fundamental Law were adopted by the Parliament, while the Government announced a new constitutional text within the just launched «Programme of National Co-operation»[4].

Moreover, the *media* reform of Art. 61 Const. replaced the constitution-based commitment for the Parliament to issue anti-monopolies legislative provisions in the media sector with vague references to protecting the diversity of press and the right to «proper» or «adequate» information about public life; this apparently ran against provisions laid down by the Council of Europe in its Recommendation (2007/2) on the *Media Pluralism and Diversity of Media Content*[5]. Yet, on the basis of this new provision, a *Media* Authority was created by merging the previously established authorities on telecommunications and broadcasting, and a *Media* Council was entrusted with the supervision of all media[6]. The law provides, in particular, that the Head of the Authority, appointed by the Prime Minister, was Chair of the Council, which was appointed by the Government[7]. As a response to the threat to media freedom, independence and pluralism, international institutions such as the Commissioner for Human Rights[8], the Parliamentary Assembly of the

2. On the evolution of *Fidesz* ideological background, Kiss, C. (2002: 739); worth to mention the Socialist Party's Prime Minister Ferenc Gyurcsány's declarations in the so called Őszöd speech, when he admittedly misled the electorate during the 2006 campaign. The speech was delivered at the *Magyar Rádió* on Sunday, September 17, 2006, and ignited a wave of protests throughout the country: see Kósa (2016).
3. The 2003 referendum on the accession was approved by a large majority of votes cast, but only 46 per cent of voters entered the polls.
4. Only two of the ten constitutional amendment bills were submitted by the government, whereas the others derived from bills submitted by individual MPs. Particularly, a constitutional amendment repealed the procedural difference established in 1994 between amending the constitution in force and adopting a new constitution, the latter requiring a 4/5 majority of members. In doing so, the two-thirds Orbán's government majority allowed itself to adopt the new constitution they had announced with no need to reach an agreement with the oppositions.
5. In that Recommendation, diversity of media and sources of information is addressed to protect the differences in content through ensuring pluralism. Therefore, a mere reference to the protection of diversity of the press would not correspond to the «diversity» concept.
6. Art. 125 of Act No. 185/2010 on Media Services and *Mass Media* (so-called «*Mass Media* Act»).
7. Art. 124 of the *Mass Media* Act; cfr. Dempsey (2010).
8. Commissioner for Human Rights (2011) raised concerns on Hungary's media legislation with regard to Articles 6, 10 and 13 ECHR, as «the wide range of problematic provisions in Hungary's media legislation [...] is sufficient to warrant a wholesale review of the

Council of Europe[9], the European Commission and the OSCE[10]have accused the Hungarian government of building up a non-democratic regime.

Fiscal policies, too, became the battlefield of a harsh conflict. Ordinary legislation imposing a 'special tax» was passed in 2010 on rewards higher than 2,000 *Forints* received b y State employees who left the public service and a 98% tax rate was retroactively applied to all such revenues within one year before[11]. This was conceived as a sort of «punitive tax» against severance payments used by the Socialists as a reward for their political supporters in the public service. However, the special tax hit not only high-level former civil servants, but all wages and pensions received by all civil servants.

By Decision No. 184/2010 the Constitutional Court unanimously struck down the special tax. The Court highlighted the discriminatory effects produced by the fiscal regulation, which –due to the high tax rate– resulted in a confiscation of revenues received not only by high-level public employees, but also by teachers, doctors and other such categories.

As a response to the decision, in November 2010 the Parliament passed a constitutional amendment to Art. 70/I Const., allowing retroactive legislation in certain cases, and asserting that the Court could only review such legislation for breach of specific rights expressly provided for by the Constitution[12]. The annulled law was reintroduced, and the scope of its retroactivity clause was extended to the preceding five years.

As counted by Gábor Halmai (2012: 191-195) the Court was then called again into play and delivered a wide-ranging judgment aiming to clarifying the possibility of a substantive review on constitutional amendments. The Court denied that such a review could not be performed at all[13]. Pursuant to a comparative argument, it maintained that substantive constraints to constitutional review can be found in a constitutional text by means of a systematic, historical and teleological interpretation aiming to identify

media package passed by Parliament in the second half of 2010» and prompting «the reinstatement of precise legislation promoting pluralistic and independent media, and the strengthening of guarantees of immunity from political influence on the part of the media regulatory mechanisms».

9. Parliamentary Assembly of the Council of Europe (2011).
10. See Organization for Security and Co-operation in Europe (9/2010).
11. See Act no. 90/2010 on the creation or amendment of certain economic and financial laws.
12. In the amended version of Art. 70/I of the Constitution, such rights were: the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion, or the right to Hungarian citizenship.
13. On the so-called «unconstitutional constitutional amendment» doctrine, according to which «a constitutional amendment can itself be substantively unconstitutional under certain conditions» Landau (2013: 231).

supreme values which cannot be undermined in their essential content by a constitutional amendment[14].

As reported in Halmai (2012:192-199) critics were as tough as numerous. Some scholars criticised the judgment for being «tendentious, one-sided, and lacking in any type of scientific foundation»; or argued that the Court created a «bad precedent» which signed «the death sentence to judicial review»; or else, noticed that the comparative exam had been used in a biased and narrow-in-scope manner.

II. THE NEW FUNDAMENTAL LAW AND THE COURT'S «CRUSADE» AGAINST THE GOVERNMENT: A LOSING GAME?

In response, as commented in Tilk (2011:1-16) the Fundamental Law passed in 2011 expressly aimed to reform constitutional justice system in its entirety[15]; among other things, Art. 24 largely confirmed the restrictions to the domains subjected to constitutional review, including the abolition of *actio popularis*– replaced by a «full constitutional complaint» against a judicial decision allegedly in breach of constitutional rights[16].

In this framework, soon after the entry into force of the new Fundamental Law, the Parliament approved several constitutional amendments explicitly addressed to overrule previous decisions of the Constitutional Court and to restore legislative provisions that had been struck down[17]. This re-ignited the inter-institutional conflict, whose peak was reached with the Transitional Provisions to the Fundamental Law and the connected draft bill for the electoral reform (Uitz, 2013).

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14. As a celebrated example, Italian Constitutional Court highlighted (Decision No. 1146/1988) that such supreme principles exist in Italian legal order, and that even constitutional law must comply with them. See eg Pace (2014: 3 and fn 13) y Requejo Pagés (1998: 367-370).
15. On the scope of human dignity as a general clause for protection of fundamental rights (Art. 37 (4) of the Fundamental Law) Kelemen (2012: 69-70) argues that the Constitutional Court even before had read in an extensive way the right to dignity, treating it as a «mother right».
16. See Art. 24(2) d) of the Fundamental Law: «The Constitutional Court shall, on the basis of a constitutional complaint, review the conformity with the Fundamental Law of any judicial decision». The new Constitutional Court Act (No. 151/2011) introduced the «direct constitutional complaint» (Art. 27). Gardos-Orosz (2012: 304-305) referred to the new instrument as a «real complaint». However, the transitional regime provided that all pending *actiones populares* were no longer admissible unless they matched the requirements provided by the new Constitutional Court Act. This resulted in many complaints filed under the *actio popularis* to be inadmissible.
17. Statistics in English on the Court's activity after 2012 can be found at: *http://hunconcourt.hu/constitutional-court/statistics* (accessed 4 May 2018).

The Transitional Provisions had been repeatedly amended over time[18]; one of them referred to prior registration as a precondition for the right to vote, which was meant to give legal basis to an electoral reform implementing a new Central Registry in view of registration for the general elections. This provision was criticised on substantive and procedural grounds: the President of the Republic refused promulgation and issued a preliminary review before the Court to ascertain whether it was a proportionate limitation to the right to vote, whereas the *Ombudsman* questioned their validity as constitution-ranked laws.

As a response, the Parliament enacted the First Amendment (18 June 2012) declaring that the Transitional Provisions were part of the Fundamental Law. Consequently, in its Decision No. 45/2012, the Court had to respond to both grounds by balancing the power of constitutional amendment and the principle of (constitutional) legal certainty.

The Court observed that the practice of constitutional amendments bringing remarkable changes to the Constitution jeopardized the stability and certainty of the Fundamental Law's text, therefore resulting in a violation of rule of law as provided for in Articles B(1) and U[19]. It also highlighted that it was its duty to police the unity and the stability of the Constitution, and that the legitimate choice to amend the constitutional text could not result in a threat to the necessary consistency that must attach to the written body of a Constitution[20].

In this light, while elaborating on the concept of constitutional amendment, the Court subtly but clearly suggested that a hierarchy within the provisions of the Fundamental Law was to be drawn, so that its basic structure could neither be undermined nor seriously altered by constitutional amendments; thus, should an amendment do so, it would be struck down as unconstitutional.

18. The purpose of this new system of voters" registration was to replace the old system, used since 1990, according to which the national list of voters was compiled automatically.
19. The declaration of unconstitutionality of this amendment to the Transitional Provisions was preliminary for the Court to scrutinise the validity of the electoral bill. In its Decision No. 1/2013, the Court acknowledged that Decision No. 45/2012 had removed the constitutional basis of the electoral reform issuing a Central Register; absent such a constitutional foundation, the Court found the individual application procedure redundant and disproportionate.
20. The Venice Commission (2013) pointed out that «frequent constitutional amendments are a worrying sign of an instrumental attitude towards the constitution as is the resort to the exceptional two-thirds majority in constitution-making without a genuine effort to form a wide political consensus and without proper public debates» (p. 30). Kovacs (2013) underlined that «the frequent amendments had made it difficult to follow and identify the Constitution's normative text in force».

As a reaction, in April 2013 the Parliament adopted the Fourth Amendment: a 14 pages long document that modified 27 articles of the Fundamental Law, inserting «a new Article U in the first part entitled "Foundation" (*Alapvetés*) and "an almost completely new" (Kelemen, 2013) "Closing and Miscellaneous Provisions"».

To sum up, the presented changes could be read along a threefold line.

First, a long, assertive historical claim was laid down in the Fundamental Law aiming to present a non-unbiased version of the events occurred after the Wall's fall. The Communist regime was blamed for a series of events occurred in the history of Hungary and a special legal regime was introduced for criminal and civil responsibility of the political organisations and leaders involved in the Communist regime. The Venice Commission (*Opinion* 720/2013) objected that declarations of that kind were more appropriate for a Preamble, in light of their wide-ranging political value and, on the other side, of their weak normative character. The provisions on criminal and civil responsibility of the State officials of that time, too, raised concerns as to their compliance with the legality principles as enshrined in European rule of law standards, in particular Articles 6, 7 and 8 of the European Convention of Human Rights (ECHR) [21].

Second, some provisions elevated to the constitutional rank formerly legislative provisions that the Court had previously annulled. These provisions referred to very sensible matters, such as family ties[22], recognition of religious confessions[23], *media* access for political parties[24], freedom of speech[25],

21. In general, the Venice Commission (2013) raised doubts on whether provisions on individual responsibility should be adopted more than 20 years after the establishment of the democratic order, since «the time of adoption of this kind of provisions is of relevance».
22. Art. 1 of the Fourth Amendment introduced a new Art. L of the Fundamental Law aiming to overrule decision no. 43/2012 on family ties.
23. Art. 4 of the Fourth Amendment amended Art. VII FL, overruling the Constitutional Court's decision no. 6/2013, where the Court found some provisions of the Act no. 206/2011 contrary to the Fundamental Law.
24. Art. 5 of the Fourth Amendment replaced Art. IX (3) FL on political advertisements for general election of the Parliament or the election of Members of the European Parliament. The amendment was a reaction to decision no. 1/2013 of the Constitutional Court, which had annulled some provisions of the Act on Electoral Procedures on the ground that they entailed a significant restriction of both free expression of political opinions in the course of the electoral campaign and the right of citizens to be appropriately informed by the *media*.
25. Art. 5(2) of the Fourth Amendment added a par. 5 to Art. IX FL. The amendment aimed to overrule several previous decisions of the Constitutional Court, namely: No. 30/1992 on the constitutional principle of legal certainty of criminal provisions; No. 18/2004 on the requirement of a clear and present danger for recourse to criminal sanctions against hate

homelessness[26]. Formerly annulled Transitional Provisions were called back in force, too. This was claimed to be in compliance with the Venice Commission's abovementioned *Opinion*; but the Commission itself replied that it rather resulted in overruling the Court's case law and quoted the Courts" words in Decision No. 45/2012: «Parliament must review the regulatory subjects of the annulled non-transitional provisions, and it has to decide about which ones need repeated regulation on what level of the sources of law (Chapter V)[27].

Third, other crucial provisions curtailed the Court's powers. It was laid down that the «Constitutional Court's rulings delivered prior to the entry into force of the Basic Law» were to be considered as lacking in legal value, although «without prejudice to the legal effect produced by those rulings»[28]. Such a generalized assumption risked generating profound legal uncertainty: as the Venice Commission pointed out, «previous decisions of the Constitutional Court are guidance not only for the Constitutional Court itself, but also for the ordinary courts relying on the Constitutional Court's case-law for their own interpretation of constitutional issues»[29]. It was also highlighted that the Parliament took in no account the constitutional case law's contribution in the transition from a Communist to a liberal-democratic regime[30]. As for the review of constitutional amendments, it was expressly provided that «the Constitutional Court may only review the Fundamental Law and the amendment thereof for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and promulgation»[31].

speech; No. 95/2008 on the *extrema ratio* character that criminal law measures limiting the freedom of expression must possess.

26. Art. 8 of the Fourth Amendment replaced Art. XXII FL. It was held to be in contrast with Decision No. 38/2012 of the Constitutional Court, which declared the punishment of unavoidable homelessness and living in a public area to be inconsistent with the principle of human dignity enshrined in Art. II FL.
27. Venice Commission (2013: 18).
28. Art. 19 of the Fourth Amendment laid down Point 5 of the Closing and Miscellaneous Provisions. It is worth noting that the Hungarian Government in the *Explanatory Statement* to the Amendment argued that this provision sought to allow the Court to freely review its previous jurisprudence.
29. See Venice Commission (2013: 21).
30. As the Venice Commission highlighted, Art. 19 of the Fourth Amendment seemed to disregard the Fundamental Law itself, in particular Art. R, which provides that the Fundamental Law shall be interpreted, among the others, in accordance with the achievements of the *historical constitution* of Hungary. Notwithstanding the vague meaning of this concept, it cannot be interpreted so as to exclude from its range the democratic Constitution of 1989 and the way the latter has been interpreted by the Constitutional Court in its jurisprudence.
31. See Art. 12(3) of the Fourth Amendment, amending Art. 24(5) of the Fundamental Law. Other provisions contained in the Fourth Amendment affected other competences of the Constitutional Court, the time limits for the review of legislation and the category of bodies entitled to apply for abstract review.

The Government argued that this was meant to broaden the scope of action of the Court and not to restrict it[32]; yet, in fact, it amounted to the overruling of Decision No. 45/2012, where the Court had indicated possible ways to review the merits of constitutional amendments. As a matter of fact, it overtly disregarded the Court's suggestion concerning the existence of a hierarchy of norms within the Constitution, according to which constitutional amendments «may not result in any insoluble conflict within the Fundamental Law»[33].

After such an exhausting and relentless struggle, the Court somehow seemed to surrender. In its Decision No. 12/2013, when asked to scrutinise the Fourth Amendment with regard to its compliance with other provisions of the Fundamental Law and its previous case-law, the Court declared itself lacking in competence. Yet, it suggested that the constitutionality of legal acts adopted on the basis of such amendments could be evaluated in light of their compatibility with the obligations stemming from international and European Union law; however, this argument was not developed to such an extent as to give rise to a fully-fledged *Euro-international* review[34].

III. ITALY: A TROUBLESOME POLITICAL SEASON, YET A «CONSTITUENT» ONE?

In spite of the obvious historical, political and socio-economic differences, Italy's history throughout the 90's exhibits in part a Hungary-l*ike* situation; this sounds surprising only to those who overlooked the events occurring at the end of the *Short Century* (Hobsbawm, 1994) and did not fully calculate the implications of the Soviet regime's fall on the Italian political system.

32. As above mentioned, there was no explicit assumption of the Court being competent or incompetent to review constitutional amendments at all in the constitutional text.
33. See Decision No. 45/2012, point 3.6. The Court tied the obligation of coherence of constitutional amendments within the body of the Fundamental Law to a twofold argument: the rule of law and the obligations binding the State under international law. As the Court said, «the constitutional criteria of a democratic state under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic States under the rule of law, as well as the *ius cogens*, which is partly the same as the foregoing» (point 4.7).
34. This orientation seems to be confirmed by Decision No. II/648/2013, where the Court held that «the power of the Constitutional Court is a restricted power in the structure of division of powers», although the obligations deriving from either international treaties or membership in the European Union as well as the generally acknowledged principles of international law «constituted such a unified system (of values), that shall not be disregarded neither in the course of constitution-making or legislation, nor in the course of constitutional review conducted by the Constitutional Court».

Thorough judicial investigations led to proceedings unveiling major scandals of mafia and corruption in the political and economic *elite*[35]; which seriously threatened the stability of the political regime[36]. A moment of rest seemed to be at dawn when, as late as 1996, a broad centre-left coalition won the general elections and Romano Prodi was sworn in as Prime Minister. However, things went otherwise: governments formed and rapidly disintegrated, with little room for the implementation of wide-ranging political programmes.

Yet, since the very beginning and despite the social, economic and political mayhem, constitutional reforms have been called on loud and long as an urgent need for the country[37]. None of them has been approved before 2001, but one, the «fair trial» reform; to be as fair, it dealt with none of the major issues for which reform bills had been urged and submitted. Rather, it looked like a revenge against those magistrates –especially prosecutors– who *dared* to challenge the *status quo* by submitting the political-economic *elite* s behaviour to a fully-fledged legality control[38].

The constitutional reform process unfolded in an intricate political scenario, whose coordinates may be roughly summarised as such. Silvio Berlusconi, presenting himself as a moderate and brilliant *homo novus*, gained a significant portion of the conservative electorate in the 1994 general elections; yet, his ties with high-ranked members of the pre-1989 *elite* –chief among them, the Socialist leader Bettino Craxi, himself under investigation for bribery since early 1993– were being scrutinised by the judiciary. As such enquiries later unveiled intricate nets of corruption and even disturbing links with *mafia* bosses, which are today coming into brighter light during other trials, it came with no surprise that he eventually acted as front-man of former *elite* members –who largely became his own partisans– while trying to staying in power as the leader of a very diverse coalition including a right-wing conservative party

35. In that period, two major events affected the social and political structure of the Italian Republic: the first mass prosecution against Mafia bosses (culminated in the «Maxi-Trial» sentencing to restricted detention and life imprisonment most of them) which sensibly altered political stability in Southern Italy and the discovery of maladministration and corruption in the management of public functions, including bribery in favour of political parties, whose epicentre was proved to be in Milan – Northern Italy(Galli, 2005: 344). A summary in Vosa (2011: 473).
36. The net of corruption relationships discovered in Italy's 90s" was dubbed *Tangentopoli*, the City of Briberies. An account of the oligarchic structure of the Italian political society in Maranini (1995: 20) more on the issue of its ties with the US military services dating back to the 1943 Sicilian campaign in Casarrubea and Cereghino (2008: 444); reference to the political implications of those years in Galli (1972).
37. Even at the top institutional level: see the formal *Message to the Houses* by the then President of the Republic Francesco Cossiga, 26 June 1991, par. 1.8.
38. Spangher (1998: 345).

(*Movimento Sociale*, then *Alleanza Nazionale*) and a new regional party called *Lega Nord*.

Berlusconi's rivals were the former Communists (Left-Democrats); they had not been involved in massive judicial prosecutions, which allowed them to claim their «diversity» and led many voters to think that they would have restored legality. Yet, even when the Left-Democrats won the 1996 elections, they did not exclude Berlusconi from the ongoing process of constitutional reform; rather, they sought to negotiate with him in view of stabilising the country and calming down the turmoil that judicial prosecutions generated.

This common constitutional ground enhanced both parties" mutual legitimation, which was instrumental to the consolidation of a «new» ruling class yet working for the perpetuation of the *status quo ante*, both as for the people holding posts of power and for the style of governing the country.

In this line, the idea of «reforming the State», one which was in itself quite ambitious, inspired a project of constitutional reform which was set up to enhance the credibility of an allegedly new *elite* through both a *constituent* narrative –vesting them with the aura of constitutional reformers– and the drafting of the institutional arrangements which would have strengthened and protected their power in future. The whole project was purposely stirred up as smoke in the eyes of the electorate as well as of those politicians, mainly from left-parties, who might have had no specific interest in being protected but quite naively aspired to write their names in the book of national history.

Crucial to this common constitutional ground was the restriction of the judiciary's autonomy, both to stop ongoing prosecutions and to avoid future «hazardous» enquiries. «Italy is a Republic grounded on blackmail»[39] declared a then prosecutor in an interview published by *Il Corriere della Sera*, and that statement, indeed very disturbing, exposed the dark side in the narrative of the constitutional reforms. Shielded by an allegedly general «State's interest», different positions converged to preserve the so-called «primacy of the political» and restore a credible government. As other political forces and remarkable portions of the electorate opposed such plan, negotiations on a wide-ranging constitutional reform lay in stalemate, whereas many bribery trials were coming to their end[40].

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39. Gherardo Colombo (1998). In general, see comments in the review *Questione Giustizia*, 3-1997, introduction by Stefano Rodotà; see also Palazzo (1998: 345).
40. Notwithstanding the search for a solution to stop corruption and prevent those future briberies which may have resulted in maladministration had been debated at length: Padovani (1986: 407).

It was under such circumstances, being imminent the conclusion of most *Tangentopoli* trials, that a clash between the Parliament and the Constitutional Court occurred, concerning the rules to be applied in criminal proceedings as for the availability of evidence.

Legge No. 267 of 8 August 1997 modified Art. 513, paragraph 2, of the Criminal Procedure Code, concerning declarations on someone else's liability. In short: before this legislative reform, in corruption crimes, the person who accused of bribery herself and another person by means of a declaration delivered in the hands of a prosecutor had to come to the main hearings to re-state such accusation before both the Court and the accused person; if he/she did not, Art. 513 par. 2 allowed the Court to simply read the declaration before the accused person, meaning that she had to prove that the accusations contained in such declaration were false or unfounded. On the contrary, this legislative reform stated that the legal consequence of the accuser not showing up at the hearings was simply that those declarations were no longer available as evidence of the alleged crime in the trial concerned.

The retroactive effects of this legislative reform caused abundant distress to the ongoing trials. Many people who had accused themselves of corruption and indicated a politician as the person corrupted simply did not show up at the hearings, as they realised that the wind was changing, and they chose to respect the «golden rule» of silence[41].

As a result, numerous trials had to be stopped, or re-opened, and mounting incongruence puzzled the administration of justice[42]. At the request of many judges, the Italian Constitutional Court was asked, by means of incidental ruling pursuant to Art. 23 of the Rules on Constitutional Court (*Legge* No. 87/1953) whether, in light of the constitutional context, it was reasonable that the possibility to utilise pre-trial declarations as evidence was to depend on the mere arbitrary will of somebody that had previously spoken out although he/she could have kept silent. This passage was argued to be equivalent to making the availability of evidence to the judge *de facto* conditional upon the agreement of the parties (Grevi, 1999: 821).

By Decision No. 361 delivered on 2 November 1998 the Constitutional Court recalled its own case law to assert that such legislation was in contrast with Art. 3 (equality principle) and Art. 24 (right to a defence) of

41. Often the person who had submitted to a shortened penal trial, or had pleaded guilty, or come to a bargain, was sentenced for corruption of a politician; but the other person involved in the corruption – namely, the corrupted politician – could walk free as those very same accusations were no longer available as evidence before the Court.
42. As sarcastically declared by the General Prosecutor of Palermo Giancarlo Caselli (1997): «La mafia è stata abrogata per legge» («Mafia has been abrogated by legislation»).

the Constitution[43]. The Court elucidated a principle of «non-dispersion of evidence» to be balanced with the right to a fair trial, and crafted a solution which it found reasonable. According to the Court, had the accuser not shown up at the hearings, the discipline of the reticent witness should have applied to enforce an adversary trial, meaning that the accuser would have been charged with a separate crime in case of persistent absence.

This was the Court's solution to balance the public interest to effective exercise of the judicial function –and the right of the victims alike– with the right to a fair trial (Mantovani, 2003: 627). The Court aimed to effectively enforce an adversary trial, the rationale being that accusations were re-formulated before the accused and, at the same time, that they were as accurate as possible – for the accusers would have been charged with false testimony had they repeatedly failed to show up at the hearings (Bifulco, 2002: 537).

The ruling generated a wave of tremendous criticism against the Court both in the institutions and in the *media*; personal abuse to members of the Court –including the judge *rapporteur*, Prof. Guido Neppi Modona– was as frequent as violent[44].

Meanwhile, the left-wing coalition was replaced by a new centre-left alliance encompassing Democrats and many of the small parties originating from the disintegration of Christian-Democrats and Socialists; those parties included many of the politicians who had sided for these parties before 1992, including «new» figures with close ties to the old *élite*.

The new majority's reaction to the Court's ruling was quick. A constitutional amendment to Article 111 was launched in Parliament, according to Art. 138 Const. It aimed to insert into criminal proceedings the principle of «fair trial» according to «the due process of law»; or, at least, it was presented in this light by the *media*. The Senate approved it at first reading on 24 February 1999. On 22 November 1999 an overwhelming majority –such as to rule out the possibility of a *referendum*– infused Article 111 of the Constitution with a few new paragraphs, manifestly crafted in such a way as to counter the Court's ruling word by word, by elevating its legislative object to constitutional

43. Italian Constitutional Court, Decision No. 361/1998, par. 4.1 *Considerato in diritto*. As for the conflict with Art. 3, the Court found the legislative solution unreasonable as it hampered the function of judicial proceedings with no benefit for individual rights. As for the contrast with Art. 24, the Court found that the legislation in question violated the principle of fairness among the parts, as it gave an unjustified advantage to one of the parties, who could basically dispose of the evidence gathered hitherto.
44. An accurate overview of the Constitutional court case-law on the adversarial principle is in Montanari (2003: 627). Worth noting that *media* 's independence from political *elite* whose key figure was a media-tycoon like Berlusconi is in itself questionable, but this was a sort of taboo topic for the Italian politicians.

parameter. Legal scholars all noticed this point and some (Grevi, 2000: 425) claimed that criminal and constitutional lawyers should have played a role to oppose the reform.

Implementing legislation first came under alleged circumstances of extraordinary necessity and urgency (law-decree No. 2/2000) and then under *Legge* No. 35/2000 and legislative decree No. 63/2001 (Bifulco, 2003: 552). Many accusations were withdrawn by the prosecutors themselves for lack of available evidence, even provided by those who pleaded guilty and got sentenced; the result being that the other person implicated in the same act of bribery walked free (Franceschelli, 2000; Maddalena, 2000).

IV. A 'SOFT» APPROACH TO «UNCONSTITUTIONAL» CONSTITUTIONAL AMENDMENTS: BENDING LIKE A REED AND LEAVING IT TO THE GENERAL PUBLIC

As a result, the Court was urged to accept as a constitutional rule what they had struck down as legislation: it did not engage in an arm-wrestling with the majority, and promptly committed itself to abide by the new constitutional parameter. By an Order (*Ordinanza* No. 439 of 25 October 2000) the Court expressed that Art. 513 of the Criminal Proceedings Code was no longer in force, as Art. 1, paragraph 1 of the law-decree No. 2/2000 declared that the constitutional principles enshrined in Art. 111 Const. as reformed were immediately applicable. Constitutional judges recognised that their interpretation of «fair trial» had to be modified in light of the reform, and acknowledged that the latter prevailed, due to the legislative provision endowing it with direct effect. In their reasoning, the contrast between Articles 111 Const. and 513 of the Criminal Proceedings Code was to be solved according to chronological criteria among norms which were equal in hierarchy, as the constitutional provisions found immediate application pursuant to the referral provided for in Art. 1 para. 1 of law-decree No. 2/2000[45].

The blatant surrender of the Court, while emphasising the mutated constitutional parameter, conveyed criticism on the new provisions, which fostered a counter-narrative opposing that one underpinning the reform.

On the side of the critics, some pointed to the inaccuracy of the new text. Focussing on the criminal law aspects, many scholars highlighted that no adversary principle was enforced, as the Constitutional Court did in No.

45. Therefore, the constitutionality question referred was manifestly inadmissible. Other major implications, hampering the principle of non-dispersion of evidence, came under question – (Galantini, 2011: 7).

361/1998[46]; the object of protection was rather a subjective right «not to be sentenced guilty» in cases when an adversary trial could not have occurred. (Grevi, 2000: 446-447). In this vein, for the alleged «guilty party», the right resulted in a defence *against the trial itself*, rather than against the adversary part and the accusations brought *in the trial* (Ferrua, 2000: 55; Fois, 2000: 582-585). Many others underlined that, even in the definitions adopted, the judgmental attitude that the reform took towards the previous Constitutional Court's ruling was clear, and so was the intention to endorse a partial version of the history's events by profusion of rhetorical expedients. According to many scholars (Maddalena, 1999; Ferrua, 2000; Chiavario, 1999; Grosso, 2000) to call the new trial «due» and «fair» somewhat implicated that the *pre-r*eform trial was «undue» and «unfairK; the same went for the emphasis added on the need for a «third and impartial» judge (Chieffi, 1998: 114; Patrone, 2001; see also Frigo, 1999). Other scholars considered the insertion of the adverb «confidentially» as a slogan against the spreading of information concerning the alleged corruption events.

In fact, a manifest bias against the Constitutional Court and the judiciary laid at the core of the narrative supporting the Art. 111 Const. reform. The connection between judicial scrutiny of politicians" behaviours and exercise of the freedom of expression concerning the enquiries was presented as unlawfully turning a lawsuit into a guilty sentence[47]; hence, a tenacious refrain spread out from the side of the reformers, «it is not for judges to decide who can hold a public office, but for the electorate»[48]. The confusion between political and criminal responsibility was the most evident implication of this slogan, which was vigorously aired to prevent the decreasing credibility that could have descended from such events becoming public knowledge (Grevi, 2000: 434).

All this led to consider that, on the side of the reformers, the temptation to use criminal law arguments meant to protect the rights of the convicted as political-constitutional arguments had not been resisted. The mounting awareness of the reform's political implications entailed that matters of criminal law and procedure blurred into politics: hence the need to look at them under the perspective of the constitutional scholar (Cordero 1991: 96).

46. Fois (2000: 576) highlights that «the accused has the right to have the evidence forged in the trial, unlike the Prosecutor». Bifulco (2003: 562-563) underlines the political nature of this passage of the reform.
47. See the chronicles in Ceccanti (1998: 329).
48. As noticeable, words of a new language were coined to foster the constitutional change, and words of common use were attributed new meanings; seminal, as one can figure out, was the role of the *media* at that point: Zagrebelsky (2009).

In this light, the «fair trial» constitutional reform appears as a *constitutional* solution to the massive briberies; yet, a solution which did *not* entail any reconsideration of the bribery events, nor any withdrawal from office by those implicated in scandals. By force of the reform's narrative, another view prevailed: namely, that a politician should be exempted from criticism until sentenced guilty, no matter how ethically and politically reprehensible its behaviour is found to be (Moccia, 1996: 448; Pulitanò, 1999: 19). In short, a principle of the following sort was forged: the holder of a public office can be submitted only to a limited judicial scrutiny; yet, the judicial scrutiny is the only parameter on which his or her behaviour as a civil servant can be censored. Therefore, as far as administration is concerned, political control –based on public ethics– and judicial control –based on criminal rules– do not add one to the other, but rather the contrary (cfr. Rodotà, 2016). In this light, a restriction of the judiciary's boundaries was persistently pursued as a tenet to legitimise the «new» ruling class, and Art. 111 as amended was instrumental to this conspicuous constitutional change.

Yet, to restrain the boundaries of the judiciary is matter for an additional threefold consideration, for it may refer to three different constitutional issues which need not being confused.

First, one may say, there is the long-standing constitutional issue concerning the legitimation of Constitutional Courts *vis-à–vis* elected governments; one which has been addressed to by several critics of judicial review. Among the arguments, one may say, there is the primacy of the electoral legitimation *vis-à–vis* the rule of law[49]. Such primacy, nonetheless, is confronted with the crisis of the general representation: in the *post-n*ational world, Courts prove instrumental to granting rights to individuals beyond, if not despite, the State's political power.

Second, a separate issue concerns the range of the powers to be allowed to the judiciary in criminal cases – that is, the duty of strict interpretation

49. The scarce legitimacy of judicial review in light of the representative principle enshrined in parliamentary legislation is in Ely (1980: 120) in light of the so called *proceduralism* on which the US Constitution would be grounded. In Ely's opinion, civil liberties are better protected by the overall functioning of the system, rather than by a judge as a single man. In Sunstein (1993: 101) it is argued that applying the laws implies a certain margin of reference from an external source of moral values; which in fact weakens the difference between legislation and jurisdiction. In this light, Michelman (1988: 1493) reads both the Court and the legislator as parts of a self-determination law-making process and sees the Court as instrumental to the safeguard of the pluralism conditions. In a similar perspective, Ackerman (1984: 1039) looks at the Court as the guardian of the people's will beyond constituent times in the framework of his «dualist democracy» theory.

of criminal laws by which the judge is bound[50]. This is another highly controversial constitutional topic, as the «classic» legality turns into a rule of law principle due to the legislative formant being recessive (Sacco, 1993:1).

None of these issues comes at debate here, nor could either of them be dealt with even in a nearly exhaustive manner. Rather, these two issues must not be confused with a third one that is being discussed: the urge to construe a constitutional protection for those who exercise public powers. In such cases, another constitutional topic comes to light, namely the raise of personal privileges related to the offices held[51]. Whether such privileges are compatible with Italian constitutional law is controversial; nonetheless, absent a specific constitutional provision, it goes without saying that ordinary crimes committed by so called «white collars», whether or not they hold public posts, are to be regarded as all other crimes, and any difference in treatment would amount to an obvious violation of the equality principle.

Thus, giving reasons referred to the first two issues mentioned above to back a restriction of the judiciary aiming at a third one would be inappropriate. Indeed, from a constitutional law standpoint, there is little doubt that the general public has the right to know what is of general interest, including the behaviour of politicians and other public figures: this would be a legitimate exercise of the freedom of information under Art. 21 Const. The presumption of innocence only applies to criminal rulings; should certain facts concerning private and public behaviours of *elite* members arise to public, this would not trigger any definitive guilty sentence *per se*, as highlighted even in the ECHR case-law (Chenal, 2017: 39) [52].

Nonetheless, this conceptual confusion largely occurred and seemed to be deliberately triggered by the *elite* involved in the scandals. However, although stigmatised by many commentators and politicians alike, this was depicted by the reformers as a legitimate defence against trials being used as a political weapon (Cicchitto, 2006: 158).

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50. Most continental scholars do not find themselves at ease when accepting that the legality principle does no longer refer to positive legislation alone, but to an overall set of principles, whose boundaries to a substantive extent fall within the discretion of the judiciary: both criminal (Salcuni, 2016: 1) and constitutional lawyers alike (Luciani, 2005: 501; Bifulco, 2008; Bin, 2013). Cfr. Manes (2012: 48).
51. The Italian Constitutional Court has established that a crime cannot qualify as committed while in office –therefore allowing for an immunity– on the sole ground of the mere identity between the holder of the office and the person concerned (Dec. No. 154/2004, *Cons. dir*. 5; No.87/2012, *Cons. dir.* 5; No. 88/2012, *Cons. dir*. 3.1.)
52. Although it is recognised that the question is delicate, as several public and private legal issues intertwine: for a public person there is an enhanced right not to *appear* guilty in light of its electorate, but this would not have to be subordinated to the right of information, provided that such right is exercised correctly.

This argument would entail that there is in fact a thick, grey area relating to politics and public administration with three characteristics: it is for the *elite* alone; its mechanisms are widely unknown to the public; is largely based on illegality. Only in this framework would accusations entailing criminal responsibility be leaked to the judiciary and to the press alike in case one or some members of the *elite* act in a way which «others» feel uncomfortable[53]. This argument, though empirically meaningful, is manifestly unacceptable from any legal perspective. Be that as it may, in fact, unveiling the dark side of the Italian Republic could not justify the cover-up of what looks hardly compatible with the principles of both criminal and constitutional legality.

In brief: due to the reformers" actions, a criminal law question was put in constitutional law terms – or, if one prefers, a political issue was made out of a criminal one, yet gigantic in proportions. The fact that it was *their own* criminal issue, and *they* put it in constitutional terms, results in the identification of their personal destiny with the destiny of the State as a whole; which is utterly problematic in constitutional terms. It is true that the need for political stability must be taken into account as beneficial for the entire country, but such an identification risks granting a permanent personal privilege to people in charge of public offices while claiming to do so for the sake of the State. Consequently, as such, to call for such identification brings the constitutional model quite close to a refreshed version of «*L"État c"est moi*».

53. A claim has been raised, concerning the existence of such an area of political and administrative discretion, which –it has been argued– must run exempted from judicial scrutiny. According to Violante (2009: 162) «a relevant part of the judiciary» is to be blamed for engaging in a 'scrutiny of legality» instead of merely «applying single criminal laws». The A. claims that legality is «not only the sum of the existing laws, but also the values at the ground of the laws and of the Constitution, and the synthesis of their meanings, which are nurtured by a continuous circle between theory and practice» [*my translation*]. In this line, legality belongs to «public ethics», too, and not to criminal law only. Such claim can be read in two ways. Either the systematic interpretation of the laws in light of core constitutional values is not in the domain of the judiciary at all, as it is matter for «public ethics» only, therefore entirely falling within the sphere of the «political»; or there must be an exception based on the personal *status* of people charged with crimes, as different regard must be used if they are engaged in public administration. In the former, the claim would turn into one of severe self-restraint in all Courts" activities; thus, it would not touch on public administration alone, but on the whole domain of the judiciary. In the latter, being a civil servant would not raise a need for enhanced transparency, but precisely the opposite –as it would justify exceptional opaqueness– and a personal ground for exemption from criminal prosecution would be tied to the mere holding of a public office. As Carlassare (2010) pointed out, «the appeal of authoritarian models seems evident, though this is never declared openly. Apparently, it is denied, but it is endorsed *de facto*. New models are presented as innovative, capable of refreshing the Italian constitutional architecture; but they are neither innovative nor new» [my translation].

In this vein, the descendants of an *elite* which had been severely undermined by the surfacing of *mafia* and corruption scandals stabilised themselves into power with the aim to reduce the powers of the judiciary. As a result, they have monopolised the Italian political scene until recent days, by means of the so called «coalitions system» –a distinctive feature of the *Seconda Repubblica*[54]. What laid beneath this system was the common aim to restore a «moderate» government by using *media* to control the information delivered to the general public; while the two coalitions kept competing, oppositions seeking more radical changes were marginalised and their political priorities alike, this being the effect of the centripetal tendency of a two-players political game (De Cesare, 2011: 15).

In light of the overall circumstances, there can be no doubt that, although limited in scope, Art. 111 reform has a profound constitutional meaning. Evidence of this can be found in the harsh institutional struggles which repeatedly occurred in Italy during the first decade of the 21st century, when attempts to effectively curtail the powers of the judiciary were carried out.

The political scenario of those years spoke of the difficulty to assume Berlusconi, yet a popular leader, as a recognised statist, due to his private interests overlapping public affairs as well as the corruption scandals and the emerging ties with *mafia*.

In fact, Berlusconi was the leader that was needed to overcome the political stalemate. He occupied the centre-right space that the Christian Democrats had left empty and, as much as Christian Democrats, was a key player for most of the centre-leftist politicians, for he enjoyed both *consensus* with the electorate and full control of the *media*; therefore, he had means to secure a common constitutional ground for the major players. Such ground would have been instrumental to the enforcement of the common narrative, including the anti-judiciary bias, which was held necessary to heal the wounds of 1992 and to provide the country with the long-desired stability – the renovated stability of the *elite* into power.

In this light, it comes with little surprise that Berlusconi has got to public power in a relatively easily manner, although laws dating back to 1957 were terse in preventing someone holding concessions from the State –such as TV broadcasting concessions– from becoming a Member of the Parliament. For the same reasons, as well known, he was a major interlocutor in the second *Bicamerale* Committee for the constitutional reforms[55]; he was companion in approving the «fair trial»

54. «Second Republic» (to indicate the period of the Italian history from 1992 onwards) is a nickname which has *constituted*, more than described, a reality: Urbinati and Ragazzoni 2016: 119-179).
55. The debates on *Bicamerale* chaired by on. D"Alema, as well as on its scope and activities, were huge. Many critics pointed to the reiterated illegality of the derogation to Art. 138 Const. for the constitutional reform; especially (Di Giovine, 1997: 387) on the rupture of

constitutional amendment, too. Yet, his behaviour, both in public and private affairs, was something that an increasing portion of the general public, including most of the centre-left electorate, could hardly tolerate. In fact, the so-called «anti-Berlusconism» was a major issue among the «centre-leftist» parties, as they got stuck in an awkward conundrum. They could not fully recognise Berlusconi as a legitimate political rival, as this would have probably caused strong disaffection on the side of their voters; yet, as mentioned, they could not afford either to get rid of him, because this would have undermined the constitutional common ground helping Italy receive the political and economic stability that was deemed necessary[56]. Thus Berlusconi, whose interests to counter judicial trials were becoming rapidly urgent, was fiercely opposed by many; but less in Parliament, one may say, than in public protests[57].

The fragmented centre-left alliance got bogged in this contradiction and left him with enough room to pass legislation aiming, in one way or in another, to make him escape trials. Legislation altering criminal and procedural law to reduce or exclude the likelihood that he or others could have been found guilty for facts already committed was adopted with poor opposition from rival parliamentary forces; the same occurred for blatant *ad personam* measures letting him run free from accusations raised in trials that were coming to end. They rather chose to oppose him in a softened way, never claiming his actions were in breach of the Constitution; which prompted some commentators to insinuate that it was in fact for mutual convenience[58].

Therefore, constitutionally relevant conflicts were frequent, sometimes harsh; they reached their peaks when Berlusconi's majority tried to grant him immunity as Head of the Government, while strengthening the Executive's

constitutional legality as a «non-resistible precedent». Other critics pointed to the merits of the reform (Ferrara, 1999: 25; Cheli, 1998: 23; Luciani: 1999: 221). An overview of the facts in Ceccanti (1998: 179).

56. That a collaboration existed in fact, and that the control of the media was crucial to its functioning for both parties, was revealed in a notorious plenary speech delivered by centre-leftists frontbencher MP Luciano Violante (28 February 2002). That speech, too, became iconic (*https://www.youtube.com/watch?v=RSPs85eKP6o*, accessed 6 May 2018). More in Vosa (2011: 509).
57. See the speech in Piazza Navona, 2 February 2002, by Nanni Moretti, a celebrated Italian movie director and actor, blaming Left parties" key members for inefficiency: «Con questi dirigenti non vinceremo mai» (*https://www.youtube.com/watch?v=fUjjwXIGB_s*, accessed 6 May 2018). Noteworthy that Tarchi (2015) highlights that, by means of the speech in question and of the reactions concerned, a new claim for popular sovereignty is put forward from the left part of the political spectrum, beyond the then existing parties and through a communicative channel other than the parliamentary one. Therefore, he seemingly links the inefficiency of the leftists to the rise of popular democratic movements repudiating the political parties" mediation and come from the left, as opposite to Berlusconi's right winged claims to charismatic leadership.
58. See Travaglio (2010: 193).

control on the judiciary. Yet, the core constitutional principles resisted those attacks, and crucial to this was the approach of the Constitutional Court.

The arm-wrestling between Berlusconi's Governments and the judiciary culminated in the clash with the Constitutional Court as for legislation broadening the scope of immunity of Heads of Government while in office, that the then *Cavaliere* 's men passed twice. In a first Decision –No.24/2004– the Constitutional Court partially annulled the so-called *Lodo Schifani*[59]; in 2008 another such Act, dubbed *Legge Alfano*[60], was passed and the Court declared it unconstitutional (No.262/2009) on the basis of Art. 3 (equality) and 138 (enhanced procedure for constitutional reforms) of the Constitution. The reasoning unfolded as follows: the Constitution does not grant to the holders of these offices a prominent position with respect to the bodies that they chair, thus it does not justify enhanced immunity for them alone; the discipline of immunities is exhaustively regulated by the Constitution, ordinary legislation being therefore unfit as issued in violation of Art. 138.

The intertwining of the two passages leaves it unclear whether the Court would have accepted a constitutional Act in the *Legge Alfano* 's guise under Art. 138 Const. despite the violation of the equality principle, undoubtedly a core constitutional one[61]. No far-reaching theory of «unconstitutional constitutional amendments» was crafted by the Court, which decided to prudently leave it to the general public to temper the arising debates on the immunity.

This attitude enhanced pro-activity from the *civil society* and was somehow shared by the then President of the Republic Giorgio Napolitano, who did not make overt use of its powers under Art. 74 Const. (returning approved bills to the Chambers) with regard to any such piece of legislation –yet, often suspected of contrast with constitutional values– which was passed

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59. «*Lodo*» is the term used for arbitration judgments; it was adopted in the press to indicate that the then Senate's Speaker, Renato Schifani, found an agreement between Berlusconi's party and the oppositions, concerning the extent of the immunities to be awarded to the five key Offices of the State –President of the Republic, Speakers of the two Houses, Prime Minister and Chair of the Constitutional Court– and that agreement was translated into a legislative measure, *Legge* No. 140/2003). The Court annulled it in part and deprived the remainder of legal substance, as it relied on the duty of consistent constitutional interpretation and rejected the question while saying that judges were to interpret it in accord with the Constitution (Pugiotto, 2004; Giupponi, 2006).
60. The new *Legge* (No. 124/2008) provided immunity while in office to the four key offices of the State (the Chair of the Constitutional Court had been excluded). Angelino Alfano was the then Ministry of Justice.
61. Pace (2009) holds that such critics are «inaccurate»; Morrone (2009) believes that this was a rather unclear passage; Pugiotto (2009: 8) maintains that there would be an absolute protection to the equality principle in case the reform were reiterated as a constitutional reform. See also Bifulco (2009: 21) and Cecchetti (2009: 83).

by Berlusconi's majority. He rather preferred acting informally to have the most intricate passages disentangled by means of a *moral suasion* (Galliano, 2011: 605).

Berlusconi's era collapsed gradually, under the combined action of multiple factors: his decreasing political credibility before the general public, the internal fractures in the majority coalition and the effects of the Western economic and financial crisis. All those factors concurred in President Napolitano prompting Berlusconi to resign and inaugurating a new era of strong presidential activism – which, though highly questionable from a legal and constitutional standpoint, has been backed by a majority, yet changeable and unsteady, of the political forces (Scaccia, 2013; Lippolis and Salerno, 2013).

In light of what happened, it is doubtful whether the transition toward the new political situation –still lacking a clear definition– would have been possible at all, had the Court (and the President alike) more openly countered the attempts to reform constitutional matters. The fact that they both acted not to disrupt but to preserve the «new» constitutional compromise while keeping it as much as possible in line with the core values of the Constitution has apparently worked to protect the country from unpredictable changes. Yet, this has not helped the political class to fully regain consensus *vis-à–vis* the electorate, as the steep emergence of *anti-élite* movements in recent years proves.

V. CONCLUSIONS

As a result of the attempted comparison, two different attitudes by the Constitutional Court in Italy and Hungary have emerged. The Hungarian Court has strongly and overtly countered the Government's action by construing well-refined arguments in order to nullify its political actions. Yet, this has led to a major clash between the Government and the Court and has offered the Government the chance to severely restrict the latter's powers when its political consensus was the highest. Conversely, the Italian Constitutional Court has not overtly challenged the constitutional feasibility of the political choices supported by the majority; and, yet seemingly prone to accept potential constitutional illegalities, in the long run it has allowed itself to play a crucial role in the defence of constitutional legality throughout the last decades.

Therefore, if compared to the Constitutional Court of Hungary, the Italian institutions –with special regard to the Constitutional Court– took a more moderate attitude. They did not openly counter the government's

majority, even when it was a matter of threat to constitutional values. This moderate attitude has protected these institutions against the possibility of being wiped out or otherwise de-legitimised by aggressive occasional governments enjoying temporary electoral consensus. One might even say that such institutions have preserved themselves to keep intact their institutional role; which has allowed them to resist to temporary storms and, in the long run, to survive and defend the constitutional legality. Yet, as they were operating in a problematic environment –as for the fragile legitimation of the compromise linking the major political groups– their attitude was of little avail in restoring the credibility *deficit* undermining the overall Italian political spectrum; but it is indeed doubtful whether it is up to them –to Constitutional Courts, in particular– to restore such credibility, or whether this is the task of democratically elected credible political forces.

On the other hand, the Hungarian Constitutional Court has played it stark in countering the Government when it aimed to pass laws which could have hampered constitutional values. They sought to restore a fully-fledged legitimacy in accord to such coordinates, in view of preserving the young –thus, delicate– constitutional traditions of Hungary. Yet, brilliant as it may be from a purely theoretical constitutional standpoint, this proved counterproductive: it resulted in a clash with the majority backing the Government, whose overwhelming electoral legitimation led to the enactment of constitutional measures restricting the Court's very same powers even in future perspective.

Whether this is possible or opportune for an institution whose legitimation is based on legal reasoning –though of supreme constitutional level such as the Constitutional Court– seems doubtful. Not because of the judiciary's self-restraint duty before a political law-maker: this argument looks loose in a world dominated by judge-made law. The doubts lie in the possibility of a Court, endowed with non-political legitimation –therefore, supplying a solution which is to be accepted by all parties– to stand such a blunt clash with a political body.

In principle, most Western scholars and politicians would probably subscribe to the substance of the judgments delivered by the Hungarian Constitutional Court and perhaps even defend it against a *pseudo-a*uthoritarian Government. Yet, it would be a *political* battle. The *heroic* stance taken by the Court has turned to a defeat, in both substantive and general political-institutional terms. The Government has vested the contested measures with constitutional form and the Court's powers have been reduced, thus undermining future possibilities of defending the constitutional legality in the long run. It is worth noting that the Government has done so by virtue of the electoral legitimation, that is a much more workable pretext for political

action than a legitimation based on an artificial reason – though a noble one, such as constitutional law.

The hazardous strategy played by the Hungarian Constitutional judges may well turn productive in the long run, as it has helped triggering a debate on an imminent and serious threat to fundamental rights which lastly features in the European Parliament's Resolution of 12 September 2018. Yet, whether this may result in a substantive restoration of constitutional legality pursuant to a broader public debate within both the newly elected legislature and the European society, it is another part of the story, which still has to be written.

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