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## BRIEF REMARKS ON CONSTITUTIONAL COURT AND POLITICS IN ITALY\*\*

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**Summary.** The relationship between the Court and politics is apparent from the use of certain types of judgment and procedural instrument. The fact that the Court has equipped itself with increasingly refined and far-reaching jurisprudential techniques over the years is evidence of the Court's growing encroachment into areas that were traditionally regarded as being the exclusive domain of politics. By the judgments that are normally regarded as the most invasive by politics, namely interpretative rulings in general, the Court has often altered or even created substantive law, in some cases improperly.

**Keywords:** Constitutional Court; politics; Italy; interpretative judgments; courts and politics.

**Kilka uwag o Sądzie Konstytucyjnym i polityce we Włoszech.** Wpływ Sądu Konstytucyjnego na politykę państwa zdeterminowany jest przede wszystkim określonymi instrumentami proceduralnymi. Fakt, że Trybunał wyposażył się w coraz bardziej

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wyrafinowane i daleko idące techniki sędownicze na przestrzeni lat, świadczy o rosnącym wkroczeniu Trybunału w obszary, które tradycyjnie uważano za wyłączną domenę sfery politycznej państwa. Poprzez wyroki, które zwykle są uznawane za najbardziej inwazyjne przez politykę, a mianowicie wyroki interpretacje, włoski Sąd Konstytucyjny często zmieniał, a nawet tworzył prawo materialne. Jak pokazuje praktyka, w niektórych przypadkach odczytując jednak w sposób niewłaściwy intencje ustrojodawcy.

**Słowa kluczowe:** Sąd Konstytucyjny; polityka; Republika Włoska; wyroki interpretacyjne; sądy a polityka.

## 1. INTRODUCTION

Can the Constitutional Court play politics in its decisions? This traditional doubt has resurfaced at regular intervals: the interaction between constitutional Court and politics in Italy has generated, since the Constituent Assembly, a lot of debate<sup>1</sup> in past decades and has been the focus of much literature. The Italian Constitutional Court was introduced by the constituent<sup>2</sup> fathers as the guaran-

<sup>1</sup> The choice made by the Constituent Assembly in favour of a centred system of constitutional review of legislation, rather than vesting similar powers wholesale in the ordinary courts, as well as the creation of the Constitutional Court – a “new” body unknown under the previous legal system – were difficult decisions. That an unelected body – thus without any political responsibility towards the electorate – could assess and control the political choices made by the direct representatives of the people, and even set them aside, aroused perplexity and open dissent in various quarters within the Constituent Assembly. The reluctance of many members of the Constituent Assembly to recognise a body capable of establishing whether the intention of Parliament was legitimate or illegitimate was born out of the conviction that the sovereign decisions of Parliament should be unimpeachable. In this regard it should be pointed out first and foremost the staunch opposition by the Communist Party. The honourable Palmiro Togliatti, a past leader of the Communist Party, defined the Constitutional Court at the session of 11 March 1947 as an “eccentricity” thanks to which “illustrious citizens would end up being placed above all assemblies and the entire system of Parliament and democracy, acting as judges over all the rest”. See the Acts of the Constituent Assembly, session of 11 March 1947, p. 1998, currently available at <http://legislature.camera.it>. The original difficulties at the time the Constitutional Court was created are analysed by G. Silvestri, *Le garanzie della Repubblica*, Turin 2009, p. 89 et seq. See also P. Barile, S. Grassi, *Corte costituzionale e sviluppo della forma di governo in Italia*, Bologna 1982; C. Mezzanotte, *Il giudizio sulle leggi. Le ideologie del Costituente*, Naples 2014; A. Ruggeri, *La Corte Costituzionale davanti alla politica*, available at <http://www.giurcost.org/studi/Ruggeri6.htm>. It’s important to point out that not only lawyers, but also historians and political scientists have done some very interesting research that highlighted the political role of the Constitutional Court through a reconstruction of the choices of appointments and the choices of the majority within the organ, and through analysis of decisions. See for example F. Bonini, *Storia costituzionale della Repubblica. Profilo e documenti (1948–1992)*, Rome 2007; P. Pederzoli, *La Corte costituzionale*, Bologna 2008.

<sup>2</sup> The Italian republican Constitution entered into force on 1 January 1948. According to

tor of constitutional liberties. At the beginning of the 1970s, in effect the Court was considered „the island of reason in the chaos of opinions”. Through this expression, an eminent scholar<sup>3</sup> meant that Italian constitutional judges, at least until 1974<sup>4</sup>, have followed the Kelsenian model of constitutional review, without being strongly influenced by the political situation. This was not too difficult because – as was asserted by the Court itself – in the first years of its activity the Court had to rule on laws enacted prior to the Constitution, by the Fascist Regime. This conception of Constitutional Court is unavoidably outdated. In the following decades the Constitutional Court has increasingly performed the crucial roles of mediating social conflicts, thereby contributing essentially to the adaptation of the legal system to the evolution of society. It is apparent from a glance at the case law, that nowadays Constitutional judges are somehow also political agents<sup>5</sup>. Indeed they are guarantor of constitutional liberties, but at the same time they are guarantor working very close to Parliament and Government. It is difficult to overstate how *political* some rulings are, such as the „Lodo Alfano”<sup>6</sup> that has cleared some of the uncertainty surrounding the political landscape, or such

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Article 137 of the Constitution „A constitutional law shall establish the conditions, forms, terms for proposing judgements on constitutional legitimacy, and guarantees on the independence of constitutional judges. Ordinary laws shall establish the other provisions necessary for the constitution and the functioning of the Court”. The Court took office and finally started its work in 1956, eight years after the adoption of the Constitution. The provisions of *constitutional* and *ordinary* legislation – provided for under Article 137 (2) of the 1948 Constitution – concerning the establishment and operation of the Court were in fact only adopted in 1953 (Constitutional Law n. 1 of 1953 and Law no. 87 of 1953). Until 1974 most of the decisions taken by the Court related to laws enacted prior to the entry into force of the Constitution.

<sup>3</sup> F. Modugno, *L'invalidità della legge*, Milan 1970, p. XI.

<sup>4</sup> Until 1974 most of the decisions taken by the Court related to laws enacted prior to the entry into force of the Constitution. See paragraph 1 of the reasons given in the first historic judgment no. 1 of 1956, issued on 14 June 1956, currently available at <http://www.giurcost.org/decisioni/1956/0001s-56.html>

<sup>5</sup> Also because the appointment mechanism is often politicized and has sometimes resulted in stable de facto quotas for influential political parties. See Art. 135 of the Constitution which provides that the Constitutional Court shall be composed of fifteen judges, a third nominated by the President of the Republic, a third by Parliament in joint sitting and a third by the ordinary and administrative supreme Courts.

<sup>6</sup> The „Lodo Alfano” („Alfano Law”), named after Berlusconi's Minister of Justice Angelino Alfano, was an Italian law, valid between 2008 and 2009, granting immunity from prosecution to the four highest political offices in Italy (the President of the Republic, the two Speakers of the Houses of Parliament and the Prime Minister). It has been declared unconstitutional by the Italian Constitutional Court in October 2009 as it actually aimed at stopping trials involving the Prime Minister Silvio Berlusconi and would have given him and his Ministers temporary immunity from criminal charges while they remain in office. See Constitutional Court, judgment no. 262 of 2009.

as the decisions on the legality of electoral laws<sup>7</sup> or the proceeding concerning jurisdictional disputes between branches of state<sup>8</sup>. The Constitutional Court has become increasingly the „island of the most reasonable opinion”<sup>9</sup>, because its decisions often include the exercise of discretion which is very similar to political choices. I do not consider it inaccurate when I say that the Constitutional Court is a special kind of judge whose „political” role has evolved over the decades. Ultimately every decision of constitutional judges is likely to have a more or less profound influence on political processes. Conversely, every law which is brought to the Constitutional Court is full of „political” meaning.

When the Court is called on to review whether legislative acts have been enacted in accordance with the procedures stipulated in the Constitution<sup>10</sup> and whether their content conforms to constitutional principles, it has to take account of the legal effects that *have already been produced* according to the contested legislative provision and the legal effects that *might be produced* in the event that the Court rules the contested provision unconstitutional. In other words, when the Court performs the crucial role of ensuring the constitutionality of a law, it compares and weighs up the present and the future juridical situation, i.e. the legislation that may result when the Court rules the contested provision unconstitutional with effect *erga omnes* similar to that of the repeal of a law<sup>11</sup>.

Moreover, the decision of the Court may generate a substantive re-enactment of the previous legislation. In several decisions we can easily assess the mutual

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<sup>7</sup> See below note 26.

<sup>8</sup> Paragraph 2 of Article 134 of the Constitution stipulates that the Constitutional Court shall pass judgement on conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions. See in this regard for example Constitutional Court, judgment no. 118 of 2015. The Court heard two applications from the President of the Council of Ministers challenging Veneto regional legislation providing for the calling of referendums on respectively independence and autonomy for the region. The Court largely upheld the challenges on the grounds that they concerned „fundamental choices on constitutional level, which are as such precluded from the scope of regional referendums according to the case law of the Constitutional Court” as well as the area of taxation, in respect of which the Veneto Statute does not allow consultative referendums to be held. It is not superfluous to note that on 22 October 2017 two consultative referendums concerning a request for greater autonomy as provided for under Article 116(3) have been held in Lombardy and Veneto.

<sup>9</sup> L. Elia, *La Corte Costituzionale tra norma giuridica e realtà sociale*, Bologna 1978, p. 166.

<sup>10</sup> Paragraph 1 of Article 134 of the Constitution provides that the Constitutional Court shall pass judgement on controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions.

<sup>11</sup> According to Article 136 of the Constitution: „When the Court declares a law or enactment having force of law unconstitutional, the law shall cease to have effect on the day after publication of the decision”.

influence of Court and politics: whether we want it or not, it's often a two-way relationship of supply and dialogue, exchange and mutual influence so that it's hard to miss that the Constitutional Court is a political actor. It is apparent from the outset that it is not possible in this brief study to provide an account, even a summary, of the case law and of the various problems surrounding such a broad and fluid issue. We shall thus focus our attention on two specific matters: the role of the Court in proceedings concerning the admissibility of referenda for the repeal of legislation (art. 75 of the Constitution) and the decisions of the Court concerning the balanced budget principle (art. 81 of the Constitution). These matters are significantly different from each other but they have in common a marked political content and are both rightly the focus of sustained public debate.

## 2. REFERENDUM TO REPEAL LEGISLATION PURSUANT TO ARTICLE 75 OF THE CONSTITUTION. THE CONSTITUTIONAL COURT AND RULINGS ON THE ADMISSIBILITY OF REFERENDUMS

As is widely known, amounts the instruments used by modern constitutionalism in order to confront the crisis within representative systems, particular importance is to be ascribed to instruments of direct democracy. These instruments involve the allocation of the exercise of certain functions directly to the people, or rather the electorate, enabling them to take decisions that have immediate effect within state law. More specifically, in Italy, at times the rationale for instruments of direct democracy lies above all in the desire to supplement or correct the system, in an attempt to resolve the parliamentary crisis of representativeness resulting from the tendency of the parliamentary majority to morph into the unconditional locus of sovereignty.

The Italian system provides several instruments of direct democracy<sup>12</sup>. This paper will consider only referendums held on national level, namely the referendum to repeal legislation as provided for under Article 75 of the Constitution because it's only in this kind of referendum that the Constitutional Court has a decisive role<sup>13</sup>.

<sup>12</sup> With regard to the Italian system, the instruments of direct democracy are: popular legislative initiative, the petition and the referendums. The Italian Constitution provides for various types of referendum. The instrument of the referendum was envisaged by the Constituent Assembly as operating on both regional and local levels as well as nationally.

<sup>13</sup> We will thus not consider the *constitutional* referendum that has been held in Italy on Sunday 4 December 2016, even if there is still a lively debate concerning it. The constitutional referendum related to the largest amendment of the Italian Constitution since it was adopted: a

It should be noted at the outset that Italy is one of the Western democracies in which referendums are held with the greatest frequency<sup>14</sup>. Over the course of little more than 40 years, Italian voters have been consulted<sup>15</sup> around twenty times concerning 67 referendum questions. The use of the referendum, in its various forms, has thus become an important issue in Italy and is debated on all levels, from academic analysis through to public debate, from the work of journalists to clashes between political actors and subjects. Despite intense and continuous debate over the past decades – above all in the run-up to votes – this debate has often been reduced to mere partisan interpretation, which has given rise to distortions of perspective, acritical condemnations and equally acritical exaltations of the referendum as an instrument *per se*. However, the referendums provided for under the Constitution have a significant capacity to impinge upon the operation of the institutional system and are capable of causing traumatic effects on the normal operation of representative bodies, as they may result in the open rejection of the actions of Parliament and the Government by the electorate.

Referendums to repeal legislation, governed by Article 75 of the Constitution, involve the subjection to a popular vote of one or more questions concerning the full or partial repeal of legislation already in force. It is thus an instrument through which the electorate may have a direct effect on the legal system by repealing legislation or acts with the force of state legislation, or individual provisions contained in such acts. Paragraph 1 of Article 75 of the Constitution

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„historic” reform (proposed by the government of Matteo Renzi, Democratic Party, PD) as the Italian Parliament approved a radically new architecture for the country’s institution. The reform aimed to strengthen the country’s political stability and facilitate the decision making process; it intended to break from the equal bicameral system, which grants similar powers to both chambers of Parliament.

In accordance with Article 138 of the Constitution, Italian voters have been asked whether they approve the constitutional reform. A wide majority (59.11%) of Italians rejected the draft constitutional reform and Matteo Renzi, the President of the Council at the time, resigned.

<sup>14</sup> In this regard, it must be pointed out that the Constituent Assembly that adopted the Constitution of the Republic of Italy was elected by the Italian people on 2 June 1946 in the first election according to universal suffrage. At the same time as elections to the Constituent Assembly an institutional referendum was also held in which Italians were asked to choose whether the country should be a monarchy or a republic. The history of the Republic of Italy thus started with a referendum. The adoption of the referendum within the Italian system by the Constituent Assembly was thus facilitated by the evident consideration that the Republic had originated from a plebiscite.

<sup>15</sup> Between May 1974 and April 2016, 17 referendums were held in Italy to repeal legislation pursuant to Article 75 of the Constitution, and two constitutional referendums under Article 138 of the Constitution. In addition, a consultative referendum was held in 1989 concerning the grant of constituent authority to the European Parliament, although this was made possible by a constitutional law enacted on an *ad hoc* basis.

stipulates that at least 500,000 voters must support any request for a referendum; alternatively, it also stipulates that such requests may be supported by at least five regional councils. The following paragraphs address two other very important issues of the legislation on referendums: those relating to the substantive limits and those relating to the procedural limits on the effects of referendums.

## 2.1. ARTICLE 75 OF THE CONSTITUTION (PARAGRAPH 2). THE SUBSTANTIVE LIMITS AND THE (POLITICAL) ROLE OF THE COURT

First and foremost, as regards the substantive limits, the Constitution stipulates that, due to their complexity and importance, certain areas of law may not be the object of referendums. These include tax and budgetary laws, amnesties and the remission of sentences as well as the authorisation to ratify international treaties. The inadmissibility of referendums in relation to laws in these areas is based on different principles. Such laws are in general merely formal in nature, although in reality amount to acts of political direction of and control over the activity of the government. Likewise, it is also necessary to prevent the repeal of laws that impinge upon the wealth of private individuals and impose financial charges, and also to block any pressure in favour of referendums that lend themselves to evident demagogic exploitation.

According to a renowned political scientist<sup>16</sup>, referendums have a greater weight in Italy compared to other countries because they are not called by the Government but rather by the people. Well, as will be set out below, it should also be added that, within the Italian system, this decision also falls to the Constitutional Court, which plays a fundamental role in the referendum procedure. Article 2(1) of the 1953 constitutional law provides that it is the duty of the Constitutional Court to rule on the admissibility of referendums.

The reference parameter of constitutional law<sup>17</sup> is provided by Article 75 of the Constitution, paragraph two of which provides that „No referendum may be held on a law regulating taxes, the budget, an amnesty or sentence remission measure, or a law ratifying an international treaty”. However, after an initial

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<sup>16</sup> A. Lijphart, *Patterns of democracy: government forms and performance in thirty-six countries*, New Haven 2012. In effect, the grant of authority to the Constitutional Court to review the admissibility of referendums does not reflect a „natural” competence of that body (in contrast to the review of the constitutionality of legislation), as is also apparent from the rules applicable in other countries.

<sup>17</sup> The constitutional law (to which Article 137(1) of the Constitution refers) concerning the conditions, procedural arrangements and time limits for the eligibility of proceedings, was approved on March 11, 1953. See Constitutional Law no. 1 of 1953. See above note 3.



period<sup>18</sup> during which the constitutional provision cited above was interpreted literally, the Court identified other implicit limits in addition to the express limits, thereby creating a particularly stringent filter for requests for referendums. Following a leading judgment at the end of the 1970s<sup>19</sup>, the Court started to change its approach, substantially expanding the scope of admissibility proceedings. First and foremost, it held that the limits laid down by Article 75 were to be interpreted broadly. This meant that not only laws concerning the approval of budgets would be inadmissible, but also other laws relating to the much broader „corrective financial legislation”, including the so-called finance law, now known as the stability law; in addition, not only [questions relating to] laws granting authorisation to ratify treaties are inadmissible, but also [those relating to] laws required for their implementation. It should be added in this regard that a referendum such as that recently held in the United Kingdom, in which British citizens were called upon to choose whether to remain in or leave the European Union, could not be held in Italy.

The Court also noted that „there are various values of constitutional standing that require protection, which call for the introduction of new criteria for establishing admissibility beyond those laid down in Article 75(2) of the Constitution”. A fundamental criterion introduced by the Court was that the referendum question must be homogeneous, clear and coherent.

In the opinion of the Court, applications formulated in such a manner that each question to be submitted to the electorate contains a variety of heterogeneous questions lacking a rationally unitary core, with the result that they cannot be brought within the logic of Article 75 of the Constitution, will for example be inadmissible.

Article 75 postulates a clear and precise response of either yes or no to a question which must in turn be clear and precise. Otherwise, this would result in a manifest and arbitrary departure from the goals for which the referendum to repeal legislation was introduced into the Constitution as an instrument for the „genuine expression of popular sovereignty”<sup>20</sup>.

<sup>18</sup> Constitutional Court, judgment no. 10 of 1972 and judgment no. 251 of 1975.

<sup>19</sup> Constitutional Court, judgment no. 16 of 1978. That this was a unique event has been confirmed by the lively debate that this decision has aroused within the literature on the pages of the main public law journals. See: *Giurisprudenza costituzionale*, *Politica del Diritto*, *Giurisprudenza italiana*, *Foro italiano*, *Diritto e Società*.

<sup>20</sup> The opportunity resulted from an application to subject to one single referendum a total of 97 articles of the Criminal Code, ranging from violations of the press laws, through the expulsion of foreign nationals, to incitement and corporate sabotage. The Court held that, in stipulating a clear alternative between a „yes” and a „no”, which cannot be differentiated from case to case, multiple non-homogeneous questions fall foul of the essential prerequisites for referendums, dis-



The Court also held that the referendum question must relate to provisions that may be associated with a „common principle”, which must be clearly apparent. On this basis it ruled inadmissible questions that were deemed to be „non-homogeneous” and „incomplete” on the grounds that they left certain provisions intact even though these also fell under the „common principle” or because the consequences of repeal were not clear. The Court also introduced the criterion of laws with a content mandated under constitutional law, which are not amenable to repeal or amendment by referendum, and laws required under constitutional law, which are by contrast not immune to referendums. The boundaries of this criterion appear to be unclear as it is certainly difficult to establish the difference between the two types of law<sup>21</sup>.

On the basis of this and other criteria<sup>22</sup> introduced by the Court, to date more than 60 questions have been „blocked”, i.e. ruled inadmissible. Almost one referendum application out of two is struck out following the Court’s ruling.

In this regard it should be pointed out that the Court’s ruling, which is evidently not framed in precise and foreseeable terms, could excessively expand the role of the judges on the Constitutional Court and could have repercussions on politics by exposing the judges to the risk of being dragged into political controversy. It has been pointed out on various occasions in the literature<sup>23</sup> how the Court has vested itself with substantively unlimited and practically uncontrollable freedom of choice, and thus a power of review of the will of the people which is probably broader than that which theoretically falls to it under the Constitution<sup>24</sup>.

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torting the will of the electorate and thus the freedom of the vote. In 1981 referendums concerning 31 articles of the Criminal Code were also ruled inadmissible on the grounds of non-homogeneity. See Constitutional Court, judgment no. 28 of 1981.

<sup>21</sup> See S. Penasa, *L'ondivaga categoria delle leggi „a contenuto costituzionalmente vincolato”*, 19 aprile 2005, on-line available: [http://www.forumcostituzionale.it/wordpress/images/stories/pdf/old\\_pdf/550.pdf](http://www.forumcostituzionale.it/wordpress/images/stories/pdf/old_pdf/550.pdf)

<sup>22</sup> See Constitutional Court, judgment no. 49 of 2005. The Court ruled inadmissible a referendum concerning the law governing the use of medically assisted procreation, and ruled that no referendum may be held on laws that provide „minimum protection” to interests protected under constitutional law.

<sup>23</sup> A. Chiappetti, *L'ammissibilità del referendum abrogativo*, Milan 1974, p. 197; A. Pertici, *Il giudice delle leggi e il giudizio di ammissibilità del referendum abrogativo*, Turin 2010, p. 249; V. Onida, *Principi buoni, applicazioni discutibili*, „Politica del diritto” 1978, n. 5.

<sup>24</sup> For some time there have been calls within the literature for the Court to make its decision at an earlier stage, precisely in order to avoid the Court becoming involved in the last stage of the long referendum process, when a consensus surrounding the questions has already been established and the attention of all political players is focused on this last obstacle.

In addition, whilst it is the case that a referendum to repeal legislation is a form of „negative” legislation in the sense that its aim is only to repeal, or to eliminate statutory provisions from the legal order, but not to introduce new provisions, this does not however preclude the possibility of introducing new rules as an effect of the „manipulation” of the legislative text: in some cases, the removal of individual words from the legislation previously enacted may give rise to meanings that differ significantly from the original meaning, resulting in the creation of new norms.

The most striking proof of the potential legislative capacity of a „manipulative referendum” may be found in the 1993 referendum on election law: by eliminating individual articles, paragraphs, propositions or parts thereof, the nominally majoritarian electoral system for the Senate was transformed into a completely different system<sup>25</sup>.

## 2.2. ARTICLE 75 OF THE CONSTITUTION (PARAGRAPH 3 AND 4). THE PROCEDURAL LIMITS

Due to the serious nature of the effects resulting from a referendum to repeal legislation, the Constitution provides for a two-stage quorum<sup>26</sup>: one relating to overall participation, according to which the referendum can only validly repeal legislation if a majority of the electorate (for the Chamber of Deputies) participated, and another requiring a majority in favour of the proposition. The legislation is only repealed if a majority of the votes validly cast approves the repeal. The rationale for such a high turnout threshold, laid down in paragraph four of Article 75, is explained by the fact that a law cannot be repealed by a majority calculated on a modest turnout of the electorate, because in such a scenario it would in actual fact express the opinion of a *minority* of the electorate. In other words, the Constitution imposes the quorum in order to ensure certainty that a large percentage of voters actually wishes the provision to be repealed.

It must thus be pointed out in this regard that the electorate need not necessarily state its position by participating in the decision making procedure but also by refusing to do so, precisely because if a majority of the electorate decides not to participate in the referendum it has the effect of invalidating the popular vote. In this case, the popular will is thus the result of a „negative act” and not a

<sup>25</sup> This referendum registered an extremely high turnout: on 18 and 19 April 1993, 77% of registered voters participated.

<sup>26</sup> See: *Nota breve, I quorum del referendum abrogativo nel dibattito presso l'Assemblea Costituente*, Servizio Studi del Senato no. 31 – March 2012.

positive decision. In practice the quorum is quite a sore point. Almost half of all referendums to repeal legislation<sup>27</sup> held to date have failed precisely due to the failure to achieve the quorum.

It should be added that there is no doubt that the instrument of the referendum has been abused, and that perhaps referendums have been proposed to repeal legislation that is not always of major importance. But naturally every person has the right to abstain. However, it is quite serious that calls to abstain have often been made by constitutional figures from for instance the government or by the president of one of the Houses of Parliament, namely by the very representative institutions for the decisions of which the referendum is an „instrument of countervailing power”. Looking now more closely at the role of the Constitutional Court and at the power of comment of the judges similarly, the author considers even worse when the President of the Constitutional Court invites voters not to abstain or discusses his own voting intentions<sup>28</sup>. On the contrary, the Court should have no role at all in this area. The prestige of the Court will remain high if it is perceived as an institution that stands aloof from political debate. Were that perception to change, the Court would be open to attack in

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<sup>27</sup> The fact that 28 out of the 67 referendums on the repeal of legislation – including the most recent referendum held in April 2016 – have not reached the quorum explains very well the difficulties which the instrument has encountered over the years. There may be various reasons for such difficulties: from the abuse of the referendum, which has on some occasions been used as an instrument for casting an overall protest vote against the government’s general policies (for example by the Radical Party – the party which has by far been the most assiduous in presenting requests, proposing 32 referendum questions in the 1990s alone), through problems relating to their comprehensibility, to attempts by the political class to exploit or „neutralise” in various ways the possible effects of votes (as occurred in the referendum on the public financing of politics held on 18 April 1993). The strong increase in abstention, which has now spread to all forms of voting, has often favoured the opponents of the various referendum questions who, rather than campaign in favour of a no vote, have found it easier to argue in favour of abstention.

<sup>28</sup> Equally, it is quite serious for an invitation to vote a certain way in a constitutional referendum (Article 138 of the Constitution, see above note 13) to have been made by a Constitutional Court judge who might in future have to rule on the constitutionality of the laws in question.

Comments made by the President of the Constitutional Court and judges on the Court have often been highly critical. We may recall here the period during which Antonio Baldassarre was President of the Constitutional Court, in which various comments made by him to the mass media attracted universal and unequivocal criticism.

Many constitutional specialists have expressed „great perplexity” at the excessively frequent use outside of the appropriate contexts of the so-called „authority to comment” of the President of the Constitutional Court. „Perplexities have increased when such comments have concerned highly polarised issues such as abortion, a classic question of conscience, which as such is also protected by parliamentary regulations”. See *inter alia* A. Manzella, *Finisce male l’era Baldassarre*, *La Repubblica* dell’8 luglio 1995.

the same way as any other body. In the end, its prestige would be considerably undermined.

In conclusion, the very fact that the Court's decisions on the admissibility of referendums cannot be classed under formal categories is testament to the fact that the Court performs exclusively the role of arbitrator, which is characterised by a considerable degree of discretion.

It is important to recall in this regard that an authoritative commentator within the literature, and a former President of the Constitutional Court<sup>29</sup>, has asserted that Constitutional Law no. 1 of 1953, which vested the Constitutional Court with the task of reviewing the admissibility of referendums, presented the Court with a „poisoned chalice”.

Precisely because they are made in relation to requests regarding which the promoters of the referendum have garnered broad popular consensus, the Court's decisions often risk taking on a highly politicised and not infrequently dramatic aspect. The various criteria according to which it establishes the situations in which requests for referendums are not admissible have allowed the Court to strike the balance considered most appropriate in each individual case within relations between the Constitutional Court and the political sphere.

### 3. ART. 81 OF THE CONSTITUTION AND THE DECISIONS OF THE COURT CONCERNING THE BALANCED BUDGET PRINCIPLE

The issue of the constitutional principle of a balanced budget and the role of the Constitutional Court is highly topical for Italian law. At a time when spending cuts have also impinged upon inviolable rights, including specifically social rights, the Constitutional Court must of necessity increasingly question how the balance is to be struck between budgetary requirements and the guarantee of rights: in other words it is necessary to oversee the delicate balance between public spending requirements and the satisfaction of the rights in question.

The so-called „spending judgments” in reality represent a sore point, which has divided the literature for a long time and there is no doubt that they are full of „political” meaning. As is well known, the economic and financial crisis<sup>30</sup>

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<sup>29</sup> Leopoldo Elia was elected Judge of the Constitutional Court of Italy by the Parliament on 30 April 1976 and was the President of the Court from September 1981 till the expiration of the justices' term of office (May 1985).

<sup>30</sup> The economic and financial crisis started in the USA between 2007 and 2008, following which it also hit the economies of EU countries hard from 2009 onwards, including in particular those of the Eurozone, as is highlighted in the various reports by the Department of the General

which broke out in 2009, in fact induced the European Union to implement a broad reform of its own governance processes with the aim of reinforcing the instruments and procedures for implementing a more rigorous budgetary policy and guaranteeing Europe's financial solidity, thereby reinvigorating its prospects for growth. Italy initiated constitutional reforms seeking to enhance fiscal rules in order to avoid excessive deficits with the approval of the constitutional reform in April 2012<sup>31</sup> – extremely quickly and almost without any debate<sup>32</sup> – amending the previous Article 81 of the Constitution through the addition of new paragraphs.

In leaving unchanged the fundamental principle – according to which „any law involving new or increased expenditure shall provide for the resources to cover such expenditure”, originally provided for under the fourth paragraph, which has now become the third paragraph – the constitutional amendment introduced the concept of cyclical budgetary equilibrium based on the *economic cycle*, a concept which had not featured in Article 81 as previously in force. According to some authors<sup>33</sup>, the method for containing costs and ensuring ef-

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State Accounting Office of the Ministry for the Economy and Finance, on-line available: [http://www.mef.gov.it/primo-piano/documenti/Nota\\_breve\\_pareggio\\_di\\_bilancio\\_\\_12\\_02\\_2013.pdf](http://www.mef.gov.it/primo-piano/documenti/Nota_breve_pareggio_di_bilancio__12_02_2013.pdf)

<sup>31</sup> See Constitutional Law no. 1 of 20 April 2012, „Introduction into the Constitution of the principle of a *balanced budget*”, in *Gazzetta Ufficiale* no. 95 of 23 April 2012, the provisions of which have applied from financial year 2014 onwards.

<sup>32</sup> Within the literature various authors have commented critically on the climate of silence surrounding the approval of the constitutional law and the implementation law. See M. Luciani, *Costituzione, bilancio, diritti e doveri dei cittadini*, „Astrid Rassegna” 2013, n. 3, Id, *L'equilibrio di bilancio e i principi fondamentali: la prospettiva del controllo di costituzionalità*, presentation at the workshop on „Il principio dell'equilibrio di bilancio secondo la riforma costituzionale del 2012”, Constitutional Court, 22 November 2013, p. 12, on-line available: [http://www.cortecostituzionale.it/documenti/convegni\\_seminari/Seminario2013\\_Luciani.pdf](http://www.cortecostituzionale.it/documenti/convegni_seminari/Seminario2013_Luciani.pdf)

See also the critical comments of S. Rodotà in „Repubblica” 20 June 2012, according to whom the absence of any debate was a mark of the incapacity of the political class to maintain a proper relationship with the electorate, who cannot be confronted with a *fait accompli*. A similar point is also made by A. Brancasi, *L'introduzione del principio del c.d. pareggio di bilancio: un esempio di revisione affrettata della Costituzione*, „Quaderni costituzionali” 2012, n. 1, p. 108 and L. Grimaldi, *Costituzionalizzazione del principio di equilibrio di bilancio e possibile „rilancio” europeo del ruolo dello Stato nell' „ordinamento composito” europeo*, „Rivista AIC” 2015, n. 1. In addition, it has been pointed out in various quarters that the choice to give constitutional status to the requirement of a „balanced budget” was not imposed by Community law and that the constitutional amendment was not in itself strictly indispensable. See F. Coronidi, *La costituzionalizzazione dei vincoli di bilancio prima e dopo il patto Europlus*, in [www.federalismi.it](http://www.federalismi.it); see also G.L. Tosato, op. cit., p. 2.

<sup>33</sup> Luigi Einaudi defined the balanced budget as „the rigorous and effective bulwark sought by the Constituent Assembly in order to prevent spending increases being approved lightly without having first secured the relative revenue”, cfr. L. Einaudi, *Lo scrittoio del presidente*, Turin 1956, p. 205. See also G. Di Gaspare, *Diritto dell'economia e dinamiche istituzionali*, Padova 2002, 100 et seq.

ficient spending was already incorporated into Article 81 of the Constitution of the Italian Republic right since its original promulgation in 1948. It already imposed the obligation to achieve a substantively balanced budget<sup>34</sup>. In order to contain spending and reduce waste, it would thus have been sufficient to apply it to the letter. These authors consider that the real problem was that „the virtuous mechanism was defused over time”<sup>35</sup> by the actions of successive governments, cultural and political conditioning and the configuration of Italian society which led to the prevalence, within the context of democratic struggle, of policies involving „unchecked and excessive public spending”<sup>36</sup>. According to the authoritative contributions to the literature, the budgetary and spending policies pursued by the Italian state since the end of the 1960s, which were endorsed – not without contradiction – by the Constitutional Court<sup>37</sup>, represent a serious departure from the principles originally enshrined in Article 81, and were destined to cause a massive wave of damage<sup>38</sup>.

<sup>34</sup> Given the maximum limit of a balanced budget with spending covered by actual revenue, and thus without running deficits (Article 81(3) of the Constitution), the optimum allocation of resources could and should have been achieved through transparent parliamentary discussion concerning draft legislation entailing new spending commitments, subjecting any person tabling a bill to an obligation to state *the resources in order to cover it*, thus precluding the ability to incur deficits.

<sup>35</sup> On the regrettable Italian propensity to indulge in excessive and wasteful spending and to use the dangerous techniques of unchecked and unlimited deficit spending for this purpose, see G. Boggetti, *Il pareggio di bilancio nella Carta Costituzionale*, „Rivista AIC” 2011, n. 4.

<sup>36</sup> G. Di Gaspare, *L'art. 81 della Costituzione, abdicazione della sovranità finanziaria dello Stato?*, „Amministrazione in cammino”, December 2014, available on-line: [http://www.amministrazioneincammino.luiss.it/wp-content/uploads/2014/12/DiGaspare\\_art81cost-e-sovranit%C3%A0-finanziaria-Stato.pdf](http://www.amministrazioneincammino.luiss.it/wp-content/uploads/2014/12/DiGaspare_art81cost-e-sovranit%C3%A0-finanziaria-Stato.pdf)

<sup>37</sup> According to this view within the literature, the Constitutional Court also contributed to the emergence of a bloated spending policy by the state in judgments that ignored the issue of financial coverage. The principle of a substantively balanced budget was only respected until judgment no. 1 of 1966 in which the Constitutional Court held for the first time that it was constitutionally legitimate „to have recourse to future spending cover by contracting of loans”.

<sup>38</sup> A renowned left-wing reformist intellectual compared public spending in Italy to a massive avalanche which has engulfed us all. In particular, the fiscal crisis is stated to have its roots in the 1970s within that peculiar Italian version of Keynesian „deficit spending” through the economic policy pursued by centre-left governments, which subsequently degenerated into an unending race between clientelist public spending and fiscal laxity, between deficits and public debt. See L. Cafagna, *La grande slavina*, Padova 1991.

A careful account of the Italian public debt shows that Italy has always had a high debt-to-GDP ratio, which has been without parallel within the contemporary experience of the major industrialised countries. See the contribution by M. Francese, A. Pace, *Il debito pubblico italiano dall'Unità a oggi*, publication edited by the Bank of Italy, October 2008, p. 20, available on-line: [www.bancaditalia.it](http://www.bancaditalia.it).

Another part of the literature<sup>39</sup> considers on the other hand that the Constitution does not contain a rule that commits government and parliament „to a balanced budget”. In any event, there is no doubt that public spending over the last fifty years has increased dramatically in Italy. Furthermore, it has increased through a growing dependence on deficits. The deficits in the state budget reached extremely high levels in the 1980s and the budget became one of the principal factors causing the major imbalances from which the Italian economy suffers.

The delicate role of the Constitutional Court is played out within this framework.

In fact, the use of the principle laid down in Article 81(4) (now 81(3)) by the Constitutional Court is by no means new: far from it. The Court has dealt with the issue of balanced budgets in a broad spread of case law right since it came into life. However, the issue of relations between constitutional proceedings and the principle of financial coverage has been much debated above all with reference to the cases in which the Court itself has issued judgments resulting in an increase in public spending or otherwise a deterioration in the equilibrium of the public finances. These are known as „spending judgments”: there have been innumerable cases in which the judgments of the Court have had more or less traumatic ramifications on the public finances<sup>40</sup>. For example, the striking down as unconstitutional of a revenue-raising law will result in a lack of financial coverage for the laws for which those revenues are intended to provide spending coverage, thereby violating the principle of the requirement of financial coverage. In these cases, it is the repealing effect brought about by the Court with the judgment accepting the question which acts as the immediate cause of the breach. The unconstitutionality of a revenue-raising law propels the Court into the delicate mechanism involving the relations between Government and Parliament with regard to the allocation of financial resources. In fact, since a declaration of unconstitutionality takes effect immediately, it forces governmental bodies to attend promptly and according to new arrangements to the financial burden which is now devoid of cover.

<sup>39</sup> V. Onida, *Le leggi di spesa*, p. 437 et seq; S. Bartole, *Articolo 81*, in *Commentario alla Costituzione*, edited by G. Branca, vol. II, Bologna–Rome 1979.

<sup>40</sup> The literature is extremely broad on this point. See in this regard the workshop on „*Le sentenze della Corte costituzionale e l'art. 81 u.c. della Costituzione*”, Milan 1993; G. Zagrebelski, *La giustizia costituzionale*, Bologna 1988; E. Grosso, *Sentenze costituzionali di spesa „che non costino”*, Turin 1991; R. Romboli, *Aggiornamenti in tema di processo costituzionale (2011–2013)*, Turin 2014; F. Donati, *Sentenze della Corte costituzionale e vincolo di copertura finanziaria ex art 81 Cost.* „Giur. Cost.” 1989, II, p. 1508 et seq. For an updated account of the very broad case law of the Constitutional Court, see G. Scaccia, *La giustiziabilità della regola del pareggio di bilancio*, „Rivista AIC” 2012, n. 3.



But above all, in the most complex cases, through its efforts to establish and broaden the principles of the welfare state, the Constitutional Court is increasingly often required to engage with questions concerning the constitutionality of laws granting rights to benefits financed out of public funds to individuals or social groups. At times it has been requested to extend welfare and pension benefits. On other occasions it has been called upon to sanction the insufficiently general award of particular benefits to specific classes of public servant. Finally, at times, legislative measures limited to the transfer of public resources to particular categories of individual, undertaking or association, to the exclusion of others, have been referred to it for review. In all of these cases involving laws providing for spending, the Constitutional Court is confronted with a difficult situation. In fact, it is able to extend the scope of the law but not to indicate the new financial means which are necessary in order to deal with the increased spending.

The Court thus appears to subject the public administration to financial burdens greater than those ordinarily provided for by law, thereby violating the requirement of coverage. A problem thus arises concerning the violation of Article 81(4) of the Constitution by the Constitutional Court itself when, acting in the name of equality, it resolves a defect by extending the scope of a law. In particular, it is precisely with regard to questions involving the principle of equality<sup>41</sup> that the risk that judgments by the Constitutional Court ruling legislation unconstitutional may result in financial imbalances is particularly high. Moreover, this risk is even higher where the principle of equality is applied in the area of social rights, which inevitably entail a range of discretionary political choices on a greater scale than in other areas of the law. The problem is extremely complex as it involves highly disparate aspects: the techniques used in constitutionality proceedings and rulings that legislation is unconstitutional; the limits on legislative discretion; the uses to which the Court has, and may, put this discretion; the limits and arrangements applicable to proceedings in which principles such as equality or reasonableness are applied; relations between the Court and Parliament, and whether or not it is possible to rely on subsequent action by Parliament in the wake of judgments in which the Court strikes down legislation; finally, the relationship between the rulings of the Court and the individual rights or expectations of citizens, who may or may not draw benefit from the laws.

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<sup>41</sup> The violation of the principle that it is necessary to state the sources of funding that are to be used to finance specific public spending (pursuant to Article 81(4)) becomes particularly serious in cases involving so-called „judgments providing for expanded provision”, in which the Court declares that the legislature has not sufficiently guaranteed the principle of equality and also specifies the other classes to which certain benefits are to be extended. See G. Zagrebelski, *La giustizia costituzionale...*, p. 299.

Each of these aspects has been considered in greater detail in a lively debate within the literature and the close relationship between Court and politics is evident in all rulings related with Article 81 of the Constitution.

This context of complexity, and in particular the open context within which the Court has asserted its spending power, results specifically in friction and objections and has been a sore point creating division within the literature for decades. The power to order spending which the Court has more or less implicitly recognised within its case law when confronted with the ongoing fiscal crisis of the state has appeared as an increasing threat, exposing the Court's decisions to the most questionable of arguments: „there is no more money”<sup>42</sup>.

In fact, in parallel with the debate concerning the original intentions of the Founding Fathers<sup>43</sup>, there has been a long-standing debate within the literature concerning the legitimacy of case law that grants redress for the violation of certain constitutional provisions, whilst at the same time giving rise to situations that are unconstitutional. It is a paradoxical result<sup>44</sup> of the activity of constitutional review that the Court should issue a judgment, *legibus soluta*, which, rather than applying Article 81 as a parameter applicable to proceedings before it, by contrast disregards it entirely, thereby being able to create new expenditure burdens without indicating the resources necessary to cover them.

According to a significant and authoritative current of opinion within the literature, in the same way as the legislature – at which the requirement laid down in Article 81(4) of the Constitution is more directly aimed – the Court cannot be exempt from the constitutional obligation to make provision for the increased charges foreseen through new revenue. Consequently, any judgment that stipulates new expenditure without indicating how financial cover is to be provided must be inadmissible<sup>45</sup>.

These authors consider that Article 81 expresses a constitutional value of general primary importance. The requirement that the public finances must not have destabilising effects on general economic equilibria is a value which must

<sup>42</sup> G. Zagrebelski, *Problemi in ordine ai costi delle sentenze costituzionali*, [in:] *Le sentenze della Corte costituzionale...*, p. 103.

<sup>43</sup> See above note 35.

<sup>44</sup> M. Nigro, *Le giurisdizioni sui pubblici poteri fra sistema normativo e spinte fattuali*, „Dir. proc. amm.” 1984, p. 455.

<sup>45</sup> G. Bognetti, *La Costituzione economica italiana...*, p. 111 et seq. V. Caianiello, *Corte costituzionale e finanza pubblica*, „Giur Cost” 1984, n. IV, p. 284; A. Cerri, *Appunti sul sindacato di costituzionalità relativo al principio di eguaglianza*, „Giur. Cost” 1973, p. 860; A.G. Zorzi Giustiniani, *Una nuova sentenza „additiva di prestazione”*, „Giur. It.” 1988, n. 1, p. 23; M. Mainetti, *Abuso del potere interpretativo da parte del giudice e del legislatore: un'occasione mancata per un conflitto di attribuzione*, „Giur. Cost.” 1984, p. 2326.

be taken into account when interpreting any other constitutional rule. In this regard it is evident that, *inter alia*, the Court's approach to the application of the principle of equality must also be conditioned by it.

However, an opposing school of thought, which is decidedly predominant within the literature<sup>46</sup>, by contrast asserts that Article 81(4) of the Constitution is not directed at the Court. On this view, it must not shoulder responsibility for the state of the public finances but rather solely the rigorous application of constitutional law (including in particular the principle of equality). Insofar as it requires Parliament to state the resources required to cover new spending, the constitutional provision cannot be considered to be applicable also to the judgments of the Court, even though they give rise to the same result. In other words, according to this position within the literature, the Court is able to act in a manner precluded to Parliament under Article 81. This is claimed to result directly from the inherently different nature of judgments compared to legislative provisions and the content and scope of the principle of constitutional law.

The essence of that principle, according to this view, is that spending decisions, i.e. decisions concerning the use and allocation of public financial resources, must be taken by Parliament within the context of overall financial equilibrium. Were the Constitutional Court to conclude that it was obliged not to adopt „costly” judgments, considering such matters to be reserved to the political authorities, it would be forced to acknowledge a deficit within its own legitimation, thus essentially committing institutional suicide<sup>47</sup>. Whilst the case law of the Constitutional Court appears to have endorsed this view for a long time, in actual fact it must be pointed out that, on various occasions, it has in fact attempted to take account of Article 81(4)<sup>48</sup>. Drawing on a rich spread of procedural instru-

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<sup>46</sup> C. Colapietro, *Le pronunce „erogatorie” della Corte costituzionale ed il vincolo costituzionale della copertura finanziaria: le „additive di prestazione” sono per loro natura esenti dai vincoli e limiti dell'art. 81 Cost.*, „Giurisprudenza italiana” 1989, n. 8–9, p. 1249–1260; A. Pizzorusso, *Tutela dei diritti costituzionali e copertura finanziaria delle leggi*, [in:] *Giudizio „a quo” e promovimento del processo costituzionale*, Rome, Palazzo della Consulta 13 and 14 november 1989, Milan 1990, p. 271–288.

<sup>47</sup> M. Luciani, *L'equilibrio di bilancio e i principi fondamentali: la prospettiva del controllo di costituzionalità...*, p. 33; Id, *Art. 81 della Costituzione e decisioni della Corte costituzionale*, [in:] *Le sentenze della Corte costituzionale...*, p. 53 et seq.

<sup>48</sup> As was noted many years ago by one of the most important constitutional experts from the 20th Century, even the Constitutional Court has felt a certain level of concern for the financial burden caused by its decisions. See C. Mortati, *Appunti per uno studio sui rimedi giurisdizionali contro comportamenti omissivi del legislatore*, in *Problemi di diritto pubblico nell'attuale esperienza costituzionale italiana*, Raccolta di scritti, vol. III, Milan 1972, p. 964 et seq.

Whilst not openly expressed, this concern is at times clearly apparent within the „substratum” of its decisions.

ments, it has attempted to mitigate the financial consequences of its decisions, above all by adopting judgments that avoid striking down legislation as unconstitutional, whilst at the same time addressing a warning to the legislature that it must make provision, or issuing judgments the effects of which are deferred over time, as occurs for example under German law<sup>49</sup>.

This debate, which is already very rich and articulate, also includes the constitutional amendment from 2012 which threw up new questions: did the reform in the area of balanced budgets and its implementing law alter the powers of the Constitutional Court? Do the new rules impose further limits on the Constitutional Court in relation to constitutional review proceedings? Is it really possible for the Constitutional Court to use the new rules requiring balanced budgets or cyclical budgetary equilibrium as a parameter for judgment? In what sense are the new budgetary rules actually justiciable? Can the requirement of a balanced budget be regarded as so far-reaching as to preclude or at least limit the adoption of constitutional judgments that entail a cost? The Constitutional Court appears to provide contradictory answers to these questions in different „spending judgments”<sup>50</sup>.

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In effect, a variety of judgments have now been issued by the Constitutional Court in which a recognition of the scope of the competence which must be left to Parliament and the Government – as bodies naturally and primarily required to take decisions which, by committing public resources, impinge upon budgetary equilibria, and also to answer for them in political terms – takes on either explicit or implicit significance. Drawing on the rich spread of procedural instruments used by the Court, it attempts to mitigate the financial consequences of its decisions. These mainly include rulings that questions referred are inadmissible or unfounded „on the grounds of legislative discretion”, or decisions striking down legislation as unconstitutional which seek to „govern” (i.e. limit) their consequences over time, or again transitory decisions which, whilst demonstrating that law is unconstitutional, do not „for the time being” actually rule it unconstitutional but address an invitation or warning to the legislature requesting that it make provision accordingly.

<sup>49</sup> R. Arnold, *Le strutture fondamentali*, [in:] *Il federalismo fiscale in Europa*, ed. S. Gambino, Milan 2014, p. 145–154; D. Schefold, *Appunti sulle conseguenze finanziarie della giurisprudenza costituzionale in Germania*, [in:] *Le sentenze della Corte costituzionale...*, p. 63–70.

<sup>50</sup> See decision no. 10 of 2015 of the Constitutional Court filed on 11 February 2015 concerned the so-called „Robin Hood Tax”. For the purposes of this paper, the importance of the judgment lies in the Constitutional Court’s decision to regulate the temporal effects of its decision by providing that it was to apply solely *pro futuro*. The „Robin Hood Tax” was thus unconstitutional, but was not ineffective *ex tunc*. By the express decision of the Court, the decision – contrary to the procedure normally applied within decisions accepting questions challenging the constitutionality of legislation – did not extend its ruling of invalidity „to all legal relations still outstanding” at the time the judgment was issued. In order to justify the singular (albeit not new) ruling with effects only *ex nunc*, the judgment states that a repayment of taxes already paid would create serious consequences for the state exchequer. With great prudence and realism, the Constitutional Court thus considered that it was not possible to avoid taking account of the impact which such a ruling could have caused on other constitutional principles. At various points of the judgment it is asserted that

#### 4. CONCLUSIONS

To conclude these brief notes, we may assert that the legal instruments available to the Court when calibrating the balance between public finance and social rights point to a high level of political involvement of the Court. The relationship between the Court and politics is thus apparent from the use of certain types of judgment and procedural instrument. The fact that the Court has equipped itself with increasingly refined and far-reaching jurisprudential techniques over the years is evidence of the Court's growing encroachment into areas that were traditionally regarded as being the exclusive domain of politics. By the judgments that are normally regarded as the most invasive by politics, namely expansive and interpretative rulings in general, the Court has often altered or even created substantive law, in some cases improperly. Bearing in mind the values and the balance between the values to be safeguarded, the Court always makes a comparison and engages in a genuine balancing operation between the current normative situation and the normative situation that could result from the annulment of the contested provision.

Where the Court considers that the scenario that would result from the annulment would be unconstitutional and inappropriate, it may temper or reduce the scope of the annulment through interpretative rulings. The same applies in relation to rulings concerning the admissibility of referendums in which the Court's creative case law – which has resulted in the creation of a series of extra-

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„the retroactive application of this declaration of unconstitutionality would result first and foremost in a serious violation of the balanced budget requirement under Article 81 of the Constitution. [...] This applies, *a fortiori*, after the constitutional amendment which introduced the principle of a balanced budget into the Constitution”. Only three months after asserting its role as the „guarantor of the Constitution as a whole” the Court disregarded its previous precedent and did not engage at all with the problem of how to reconcile the task of rectifying the violation of constitutional law with the aim of averting even more serious negative consequences for other interests and values also protected under the Constitution. The Court's exemplary lucidity in the face of the complex and serious Italian financial situation appears to have vanished. In judgment no. 70 of 30 April 2015, the Constitutional Court ruled unconstitutional Article 24(25) of the „Fornero” Decree-Law (no. 201 of 2011) which had imposed a block on automatic increases in pensions. The judgment ruled unconstitutional a reduction in the automatic adjustment in line with the cost of living for all pensions higher than three times the minimum INPS pension. However, in contrast to the decision on the „Robin Hood Tax”, here the Court did not hold that the decision was only to take effect *pro futuro*, and did not give the slightest consideration to the financial requirements which, also in this case, could certainly have legitimated a contraction of the „natural” retroactive effect of judgments ruling legislation unconstitutional. The two judgments are on-line available at: <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2015&numero=10> and at <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2015&numero=70>

constitutional rules – may at times extend far beyond the literal wording of the Constitution. This therefore entails a risk that the Court may be transformed into a constitutional legislator with a role that is undoubtedly political. To summarise: the reconciliation of politics and judicial action is a highly problematic operation. It is entirely evident that the overall function of a court may take on an active political dimension and cannot be considered to be limited to simple legalistic analysis of constitutional principles and legislative provisions. However, it is equally evident that there is a risk that creative case law may spread beyond what the natural confines of the function of the Constitutional Court should be. In this regard, it falls to the Court itself to impose limits that can enable a balanced relationship to be maintained with political bodies. As Yves Meny has commented<sup>51</sup>, the greatness and difficulty of the role of the constitutional courts lies in having enough power to stop power without usurping power.

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<sup>51</sup> Y. Meny, *Istituzioni e politica: Stati Uniti, Francia, Gran Bretagna, Italia e Repubblica federale tedesca*, Rimini 1990, p. 542.

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