

# Constitutional Change in Presidentialised Regimes. Paths of Reform in Hungary and Italy

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**Abstract: Il Cambiamento Costituzionale nei Regimi Presidenzializzati. Percorsi di Riforma in Ungheria e Italia** – The article analyses recent modifications to the Constitution, or the attempts to change it, in Italy and Hungary, by asking whether they may be read as part of a more general process leading the heads of governments to reinforce their position. Indeed recent reform interventions strengthen political leaders in their control of policy making, by fastening the governmental action or eliminating constitutional limits on it. Conclusive remarks are devoted to consider the ongoing processes of constitution making in Italy and Hungary, as part of a new phase of constitutionalism showing the passage from party-dominated parliaments to personal leaders.

**Keywords:** Political Leaders; Presidentialization; Constitution; Constitution Making; Constitutional Change.

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## 1. Introduction

Presidentialization of politics has been one of the most relevant trends in contemporary democracies, denoting the passage of considerable powers from collective bodies, such as parliaments and political parties, to monocratic actors<sup>1</sup>. A consequence of their prominence in electoral and decisional arenas means that political leaders begin to be conceived as both the main governmental driving force and the point of concentration of mass expectations<sup>2</sup>. According to Poguntke and Webb<sup>3</sup>, a de facto transformation of modern parliamentary democracy into a premier-centred political system is occurring. Thus, presidentialization refers to the emerging of the prime minister as a quasi-presidential leader through three distinct and converging arenas: direct access to

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<sup>1</sup> This article was presented at the *Conference on Constitutional Issues and Challenges in Hungary and Italy*, National University of Public Service, Budapest, 2-3 dicembre 2016.

<sup>2</sup> This trend appears as the European fulfilment of the famous Lowi's thesis on the destiny of plebiscitary leadership, see T.J. Lowi, *Personal Presidents. Power Invested, Promises Unfulfilled*, Ithaca, 1985.

<sup>3</sup> The ground-breaking volume, paving the way for a significant number of scientific contributions in this field, is T. Poguntke, P. Webb, (Eds), *The Presidentialization of Politics: A Comparative Study of Modern Democracies*, Oxford, 2005. For a recent analysis of the impact of presidentialisation on political parties see F. Musella, P. Webb (Eds), *Personal Leaders in Party Politics*, in *Italian Political Science Review/Rivista Italiana di Scienza Politica*, 45, 2015.

the electoral constituency through various forms of media populism; a monocratic as well as charismatic grip upon the party organization and, last not least, the strengthening of governmental control over the legislative process. This transforms the cabinet office into the true centre of policy-making power.

Very often, this process is not based upon a formal change in constitutional charters. Indeed, parliamentary regimes become more similar to presidential ones, although their normative asset remains the same over time. Yet, more than a decade on the first attempts to give an empirical formulation to the concept of presidentialization, some parliamentary regimes are adapting their Constitutions to the presidentialization process. Indeed, although presidentialization studies have collected a wide array of evidence from a diverse range of parliamentary democracies pointing to a long-term cross-national structural shift towards a more presidentialized model of politics with no formal change in constitutional charters, nowadays strong leaders are trying also to get involved in constitution-making processes to confirm their institutional supremacy. In new and old democracies, this trend has become so relevant that it has led scholars to talk about “deparlamentarization” to indicate the “deprivation of parliaments of many of their long entrenched powers”<sup>4</sup>. The same process confirms that parliamentary assemblies and political parties are losing their centrality in the field of constitution-making itself that has assured them a crucial position until twentieth century.

Both Italy and Hungary represent relevant example of the growing prominence of personalised executives. Italy has been defined an ideal type of presidentialization<sup>5</sup>, and it is still living in a phase of personal politics<sup>6</sup>. A long march of administrative reforms, since the Eighties, has reinforced the executive accompanying the transformations of the role and functions of the prime minister<sup>7</sup>. No less relevant are the changes affecting the electoral system, where party system bipolarization, the formation of pre-electoral instead of post electoral coalitions and the indication of the leader’s name within the party/coalition symbols shown in each ballot have brought about an informal form of direct election of the prime minister. As far as the legislative process is concerned, many scholars have noticed a relevant shift of prerogatives from the parliament to governmental branch in the last three decades. Emergency bills have become more numerous, representing a predominant part of the total legislative bills, while delegated legislation has largely expanded, especially to respond to necessities imposed by EU regulatory activities and other important structural reforms.<sup>8</sup>

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<sup>4</sup> The concept has been elaborated by the studies on European integration that have portrayed national parliaments as passive victims of EU politics and policy-making, see J. O’ Brennan, T. Raunio, *National Parliaments within the Enlarged European Union: From ‘Victims’ of Integration to Competitive Actors?*, London, 2007.

<sup>5</sup> M. Calise, *Presidentialization. Italian Style*, in T. Poguntke, P. Webb (Eds), *The Presidentialization of Politics: A Comparative Study of Modern Democracies*, Oxford, 2005, 88-106.

<sup>6</sup> F. Musella (Ed), *Il Governo in Italia. Profili costituzionali e dinamiche politiche*, Bologna, 2019.

<sup>7</sup> A. Criscitiello, *Il cuore dei governi. Le politiche di riforma degli esecutivi in prospettiva comparata*, Napoli, 2004.

<sup>8</sup> An empirical analysis on the growing prominence of the Italian executive in the legislative

Switching the attention towards Hungary shows that some common element may be identified in its twenty-seven years democratic period. For example, it has been observed from an administrative point of view that there has been an evolution of the prime minister and its office to a chancellor model so that as a result of the continuous widening and increasing of their tasks and competencies and growing their staff, the two institutions have become a real centre of political power<sup>9</sup>. The strengthening of government's structures is especially observable after Orbán's mandate, which includes those devoted to direct communication with citizens. On the legislative ground, the parliamentary regulations changed at the end of Nineties in order to reinforce the role of the executive in law making. Moreover, this process is strongly related to Hungarian parties' change and transformation in machines dominated by single leaders, with clear difficulties in establishing internal competition for leadership positions<sup>10</sup>. Thus, the category of presidentialization entered in the Hungarian debate<sup>11</sup> as the process of the prime minister appeared more evident.

This article will analyse recent modifications to the Constitution, or the attempts to change it, in Italy and Hungary, by asking whether they may be read as part of a more general process leading the heads of governments to reinforce their position. It is indeed worth noting that recent reform interventions have been produced by single leaders, even if with very different political positions and orientation toward democratic system. Moreover, new constitutional texts also strengthen heads of governments in their control of policy making, by fastening the governmental action or eliminating constitutional limits on it. Conclusive remarks will be also devoted to consider the on-going processes of constitution making in Italy and Hungary, as part of a new phase of constitutionalism showing the passage from party-dominated parliaments to personal leaders as key actors in constitutional and legislative arenas.

## 2. Renzi's constitutional reform

Italians were asked on November 4<sup>th</sup> 2016 whether they approve the constitutional reform proposed by the Premier Matteo Renzi. This step followed a particularly heated and radicalized public debate, which focused on ideological

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process is provided in F. Musella *Il Premier diviso. Italia tra presidenzialismo e parlamentarismo*, Milan, 2012.

<sup>9</sup> F. Mandák, *A politika prezidencialisációja – Magyarország, Olaszország*, in *Pro Publico Bono-Magyar Közigazgatás*, 4, 2016, 110-119.

<sup>10</sup> M. Punnett, G. Ilonszki, *Leading democracy: the emergence of party leaders and their roles in the Hungarian parties*, in *The Journal of Communist Studies and Transition Politics*, 10, 1994, 101-119.

<sup>11</sup> For one of the first contribution on the Hungarian presidentialisation see A. Körösényi, *Parlamentáris vagy elnöki kormányzás? Az Orbán kormány összehasonlító perspektívából*, in *Századvég*, 20, 2001, 3-38. See also G. Ilonszki, *Az elnöki parlamentarizmus és a parlament*, in *Századvég*, 2, 2002, 109-133; F. Mandák, *Signs of Presidentialization in Hungarian Government Reforms - Changes After the New Fundamental Law*, in S. Zoltán, F. Mandák, Z. Fejes (Eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development. Discussing the New Fundamental Law of Hungary*, Paris, 2015, 148-168.

questions rather than the actual contents of the constitutional amendments. According to its supporters, the change of the constitutional charter represented an important moment in Italian history and from this point of view, Renzi appeared to be the only leader able to overcome the impasse of constitutional change in Italy. Those who contrasted Renzi's proposal argued that it would remove checks and balances on executive power in Italy and disempower parliamentary institutions. According to them, the reform would put Italy on a path of populism that seeks to threaten Europe and would also pave the way for any possible future authoritarian endeavours. There are no doubts, however, that Matteo Renzi appeared as the driving force in the process of constitutional reform and the referendum has been considered as a vote for or against the government<sup>12</sup>. In the end, the constitutional proposal was largely rejected by electors, with close to 60% of voters opting for "no".

The core idea of Renzi's reform plan appeared to be very simple – the transformation of the traditional symmetric bicameralism system into an asymmetric one, with the Chamber of Deputies expressing the confidence vote to the government and a strongly resized Senate. Many observers have underlined that the reform would have led to a substantial abolition of the Second Chamber – a significant departure of the republican tradition. The reform plan also indicated the strengthening of national executive authority, by both centralizing legislative competences currently attributed to the Regions and introducing particular guarantees for legislative initiative coming from governmental branch.

This reform proposal should be analysed and evaluated on an historical ground. The origins of the Italian bicameralism should be examined along with how the reasons that brought about their introduction are largely overcome. Regarding the debate in the Constituent Assembly on bicameralism, Carlo Fusaro notes that "one cannot imagine a more effective propaganda in favour of a reform of the Italian Parliament than reading those proceedings"<sup>13</sup>. In the context of evident confusion on the nature of Italian parliamentary setting, unicameralism was a position encouraged by many representatives on the left side. Other members also proposed the definition of the Senate as chamber of the regions. In the end, perfect bicameralism which brought about exactly the same powers for the Chamber of Deputies and the Senate both in terms of legislative process and in the relationship with the government, was driven by the fear that the return of a strong leader, like Benito Mussolini, would overwhelm liberal institutions. Indeed, voices have been raised in the Constituent

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<sup>12</sup> On how the reform has divided the Italian left see F. Musella, *The Italian Left on the eve of the constitutional referendum*, in *The Progressive Post*, 29 November 2016, [progressivepost.eu/trending/italian-left-eve-constitutional-referendum](http://progressivepost.eu/trending/italian-left-eve-constitutional-referendum)

<sup>13</sup> C. Fusaro, *Bicameralism in Italy. 150 Years of Poor Design, Disappointing Performances, Aborted Reforms*, 13 April 2012, [www.carlofusaro.it](http://www.carlofusaro.it); V. Calabrò, M.A. Cocchiara, *The form of parliamentary government and 'perfect' bicameralism in the Italian constitutional system: at the beginning of the Italian constituents' choices (1946–47)*, in *Parliaments, Estates and Representation*, 35, 2015, 84–108.

Assembly to support the creation of a strong Senate, on the grounds that a complex check and balance system would avoid excessive concentration of powers, whose dramatic consequences had been made very clear during the fascist regime. According to a complimentary historical interpretation, moderation in the definition of the Italian constitutional setting was suggested, and probably imposed, by the emergence of the international bipolarism, with Italy in a relevant position in the Atlantic Alliance. Yet, despite of the variegated positions in the Constituent Assembly, the solutions of unicameralism or a strong differentiation were very far to be excluded in postwar Italy.

Secondly, Renzi's reform proposal is the latest of many attempts of constitutional reforms in Italy. Three bicameral commissions have been formed from the Eighties and more recent projects were defined in 2005 with the Center-Right Reform and in 2007 with the Violante Project. In particular, the third parliamentary commission for constitutional reform, under the guidance of Massimo D'Alema, proposed a project on the reinforcement of the Italian executive. This brought about the introduction of the direct election of the President and the reduction of the members of the Parliament, involving the abolition of a perfect bicameralism, the simplification of law-making and the creation of the Senate of Regions. The abandonment of the perfect bicameralism was proposed also by the group of "saggi", wise men, mostly professors of constitutional law convened by the President of the Republic Giulio Napolitano in 2013 in order to launch a new constitutional reform. Such commission presented their idea of realizing a "monocameral system, following the example of Sweden, Portugal and Greece in Europe, or the adoption of a differentiated bicameralism, transforming the Second chamber into a real regional chamber, the members of which would be representative – in different ways – of the local autonomies".<sup>14</sup> Thus, the Renzi's project of disempowering the Senate, besides tracing back its origin to the constituent Assembly, is also the cornerstone of most of analysis on the necessity to reform the Italian State during the last forty years. After a long legislative path, the constitutional bill, approved by an absolute majority of the MPs in both houses of the Italian Parliament, aimed at changing the composition of the Senate, with a reduction of seats from 325 to 100 elected from regional councilmen and mayors, and its role, attributing competences especially on territorial subjects.

Finally, the reform mirrored recent developments in the Italian political system. As an example, of the triumph of personalisation<sup>15</sup>, Italy is the European case that shows one of the most radical passages from parties' dominance to leaders' prominence. Dismantling the proportional electoral system that has characterised the First Republic, the period following Tangentopoli opened to the introduction of majoritarian rule, with national

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<sup>14</sup> On the reform of the Senate see A. Baraggia, *The Italian Senate Under Reform: From Disguised Unicameralism to a True Regional Second Chamber?*, in *International Journal of Constitutional Law Blog*, 16 July 2014: <[www.iconnectblog.com/2014/07/the-italian-senate-under-reform-from-disguised-unicameralism-to-a-true-regional-second-chamber](http://www.iconnectblog.com/2014/07/the-italian-senate-under-reform-from-disguised-unicameralism-to-a-true-regional-second-chamber)>.

<sup>15</sup> G. Pasquino, *Italy: The Triumph of Personalist Parties*, in *Politics & Policy*, 42, 2014, 548-566.

consultations changed in an open contest between candidates to premiership. Political parties also represent the field of major innovation, and leaders started to act as the dominus of their parties. For instance, Forza Italia, set up on the basis of the enormous financial power and the organisational resources of the *Cavaliere's* business empire, has marked patrimonial nature since its birth – it constitutes “the first European experiment in a large mass party made up out of a private enterprise, as a mere diversification of Fininvest on the political market”<sup>16</sup>. However, it is the first of several Italian political parties that have found in the leadership their main organisational unit<sup>17</sup>. A recent introduction to a special issue on party leadership states that the “revolution of personal leaders” has occurred in the political body they lead, where until recently the iron law of oligarchy seemed largely confirmed<sup>18</sup>. Moreover, as the overlapping between the figures of party head and prime minister is turning in a consolidated trend, the *Presidente del Consiglio* is also enlarging their prerogatives in terms of government forming and conducting executive's activities. This is the reason why, accordingly with a fortunate analytical framework in political science, a process of presidentialization of Italian political system is occurring, in the three main democratic arenas that have been identified by Paul Webb and Thomas Poguntke<sup>19</sup> more than twelve years ago: election, political party and executive.

With regards to the legislative process, the prominence of political leaders has turned in the progressive increasing of governmental decrees in many relevant fields of public action. In fact, executive decrees have been used to implement the most visible commitments made during the electoral campaigns by the winning coalition as well as major policy decisions on financial grounds or wide-ranging reforms. Consequently, the devaluation of the ordinary law making process in Parliament is quite evident. This is also partly due to the slow law making procedure in Italian chambers, with the “navette system” in which a bill is shuttled from one chamber to the next until it is not in the same form. Yet this, above all, is related to the difficult executive-parliament relationship, which, in the last few decades has been constant notwithstanding the colour of government. This leads the premier not to be able to count on the support of his own majority. On a quantitative ground, more than half of the overall legislative production in Italy comes from decree-laws or legislative delegation to the executive, with the percentage growing up to sixty per cent under Renzi's government.

The frequent use of motion of confidence on the part of government shows the progressive weakening of legislative chambers. Indeed, such an instrument represents the main channel to avoid whatever form of parliamentary intervention and the shortest way to overcome dissension inside

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<sup>16</sup> E. Poli, *Forza Italia: strutture, leadership e radicamento territorial*, Bologna, 2001, 45.

<sup>17</sup> F. Raniolo, *I partiti politici*, Roma-Bari, 2013.

<sup>18</sup> F. Musella, P. Webb (Eds), *Personal Leaders in Party Politics*, in *Italian Political Science Review/Rivista Italiana di Scienza Politica*, 45, 2015.

<sup>19</sup> T. Poguntke, P. Webb (Eds), *The Presidentialization of Politics*, cit.

the majority as well as the opposition's obstructionism. During the XVI legislature, the fourth Berlusconi government went as far as calling for a vote of confidence for more than a third of the procedures of decree conversion (22 out of 74). Matteo Renzi set a record in the association between decree laws and motion of confidence, which occurred in half of cases in the first two years of his political mandate. From this point of view, one of the points of the constitutional reform proposed by Renzi was innovative, in suggesting a fast-track system in the chamber of deputies for priority government bills that has to be approved in the same period of the current decree laws, thus further strengthening the executive branch with respect to parliament.

In conclusion, Renzi's proposal has followed a long republican path impressing a majoritarian asset on the Italian institutions. The abolition of Senate and the new legislative procedure has seemed to confirm the shift in power and competencies from the legislative to the governmental body, that had been occurring, albeit in a slow process during the latest decades. Although differentiated bicameralism has appeared as a very innovative element in Italian republic history, whose "bicameralismo perfetto" (perfect bicameralism) has represented an absolute exception in the international scenario, criticism toward bicameralism was very spread in the Italian political debate even before Renzi. Yet, Renzi's proposal, consistent with the pressing necessity to realize the executive's political program, has been strongly associated with his leadership and was rejected on the base that it would reinforce his premiership.

As a consequence, after the heavy referendum defeat, Renzi resigned because the constitutional reform was a central component of his political mandate. Before the referendum defeat, Renzi had often clarified that "this is not one person's reform, this is the reform Italy needs". Yet, this statement, probably arrived too late and certainly did not acknowledge to what extent personalisation affects politics in our age. The reform plan was largely interpreted as a Renzi's one, though the reform proposal was approved by the parliament in a slow two-year process opening the room for more a hundred amendments.

### 3. Orbán's amendments and regime change

Hungary, in its transition to a post-communist State, was the only Central-Eastern country that did not adopt a new Constitution in place of the old charter. In the transition period, the adopted amendments transformed Hungary into a republic although an entirely new constitution was not introduced. This opened the way for a long process of permanent constitution-making where the old "communist Constitution" (Law No. XX of 1949) was not completely replaced by a new one, but "new laws which create radically new relations were enacted according to pre-existing legal procedures"<sup>20</sup>. From this point of view, Hungary is an incomplete case of democratic constitution making, as the

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<sup>20</sup> G. Halmai, *The reform of Constitutional Law in Hungary after the transition*, in *Legal Studies*, 18, 1998, 188-196, 189.

Constitution has been “drafted in a process of several stages, during which no institution or representative body can claim to represent fully, in an unlimited fashion, the sovereign people”<sup>21</sup>. Thus, from 1989, several amendments have taken place and successive plans for constitutional change did not reach fulfilment<sup>22</sup>. This changed in 2010 when the Fidesz political party lead by Viktor Orbán won a second mandate and obtaining the two-thirds majority necessary to change the constitutional charter. This significant Fidesz victory was caused by both the crisis of the left wing parties and the lack of trust in Hungarian Socialist Party after the very negative economic indexes at the end of the previous legislature. The draft Constitution was introduced to Parliament on 14 March 2011 and came into effect on 1 January 2012.

During his second mandate as prime minister, Orbán and his majority also introduced a set of amendments to the electoral law that has significantly contributed to the creation of a one party supermajority, which is not effectively challenged by other parties either in elections nor in governmental activities<sup>23</sup>. Fidesz did indeed preserved its two-thirds majority in the 2014 general election and Orbán remained Prime Minister, with sufficient parliamentary numbers to introduce new constitutional amendments. This time also included changes in the sphere of civil rights. This was the point, according to many scholars, when an unleashed majoritarianism started to weaken the old constitution, with no adequate parliamentary instruments to avoid potential abuses of a dominant executive<sup>24</sup>.

The Hungarian Constitution has been the object of controversy and it has been often criticised in other European countries. For some observers, recent developments are considered as part of the anti-liberal trends that have swept in Central and Eastern Europe in the last years. Governments very frequently try to alter constitutional order and then attack any verdict of constitutional courts they do not like<sup>25</sup>. Other scholars tend to look outside the confines of central-Eastern countries and consider how the rise of populism, especially on the right side of the political spectrum, is becoming quite a constant elements in Western democracies, from the most stable to more fragile. Nevertheless, radical critics

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<sup>21</sup> A. Arato, M. Zoltán, *Constitution Making and Transitional Politics in Hungary*, in L.E. Miller (Ed), *Framing the State in Times of Transition: Case Studies in Constitution Making*, Washington, 2010, 350.

<sup>22</sup> C. Dupré, *Importing the Law in Post-communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*, Oxford, 2003.

<sup>23</sup> See K.L. Scheppele, *Hungary and The End of Politics*, in *The Nation*, 6 May 2014.

<sup>24</sup> M. Bánkuti, G. Halmai and K.L. Scheppele, *Disabling the Constitution*, in *Journal of Democracy*, 23, 2012, 138-146.

<sup>25</sup> On this point see B. Bugarcic, *Populism, Liberal Democracy and the Rule of Law in Central and Eastern Europe*, in *Communist and Post-Communist Studies*, 41, 2008, 191-203; and also C. Pinelli, *Populism and Illiberal Democracies: The case of Hungary*, in Z. Szente, F. Mandák, Z. Fejes (Eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development. Discussing the New Fundamental Law of Hungary*, Paris, 2015, 211-220. Other more radical studies state that “Central and Eastern Europe is a neoliberal horror story”, see G. Dale (Ed), *First the Transition, then the Crash: Eastern Europe in the 2000s*, London, 2011.



say that Hungarian reform have hemmed in the mechanisms of checks and balances and marginalise the political opposition's role<sup>26</sup>.

Focusing on the new constitutional contents, a first change regards symbolic elements. The Constitution, has been very deliberately denominated the Fundamental Law and tries to create an emotional link between the State and Hungarians. It also emphasizes a Catholic and conservative vision on the person, the family, community and the nation e.g., marriage is assumed to be a bond between a man and a woman. The Venice Commission has noticed in its *Opinion on the New Constitution* that while the constitutional preamble has not a clear juridical effect, a constitutional charter should avoid defining or establishing once and for all values of which there are different justifiable conceptions in society. Indeed, "such values, as well as their legislative implications, should be left to the ethical debates within society and ordinary democratic procedures, respecting at the same time the country's human rights and other international commitments"<sup>27</sup>. On the contrary the preamble, rather of being a conventional legal text, shows the will of politics to have an overdeveloped role in society and also overcome some of the more evident contradictions in Hungarian national history<sup>28</sup>.

The new Fundamental Law, with respect to state powers, has devaluated Hungarian division of powers, as the Fidesz's government has searched for a monopolistic control of democratic institutions.

The structure of government *strictu sensu* has not been changed from 2010, as in the case of Italian constitutional reform specific constitutional dispositions reduced the size of Parliament from 386 to a maximum of 200. This modification is absolutely consistent with recent trends of Hungarian parliamentarism, where the formal rules have not prevented strong party leaders to dominate government activities and parliament itself has become more presidentialized as a consequence of Orbán's strong position as party head<sup>29</sup>.

Particular criticism has been raised by provisions on the Constitutional Court. Indeed, this actor, which has played an especially vital role in the Hungarian political system, loses part of its power in counterweighting the legislative and the executive powers. The modifications in 2010 forced on the Constitutional court "limitations of its power for the first time in its twenty

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<sup>26</sup> A. Sadecki, *In a State of Necessity. How Has Orban Changed Hungary*, in *OSW Center for Eastern Studies Point of View*, 41, 13 April 2014.

<sup>27</sup> See Venice Commission, *Opinion on the New Constitution of Hungary*, adopted at its 87<sup>th</sup> Plenary Session, 17-18 June 2011.

<sup>28</sup> B. Fekete, *The National Avowal: More than a Conventional Preamble to a Constitution...*, in Z. Szente, F. Mandák, and Z. Fejes, *Challenges and Pitfalls in the Recent Hungarian Constitutional Development*, cit., 11-24.

<sup>29</sup> On the presidentialization of political parties in Eastern-Central Europe, and the following consequences on the overall political systems, see V. Hloušek, *Two types of presidentialization in the party politics of Central Eastern Europe*, in *Italian Political Science Review/Rivista Italiana di Scienza Politica*, 45, 2015, 277-299.

years existence”<sup>30</sup> and the Fundamental Law upheld this limitation at the point to change the structure and competencies of the highest juridical body. The new constitution increased the number of the members of the Constitutional Court from 11 to 15; prolonged their term in office from 9 to 12 years and all the members became elected by Parliament, with high probability to be dependent on the ruling party. In addition to this, it transferred the election of president from the Court to Parliament by two-thirds majority, which is the majority that the electoral law assured to parliamentary majority after 2014 election. The old guardian would become an expression of the ruling party. Moreover, the Court’s competencies rest on a limited number of issues numbered in the Constitution. In particular, instead of giving the Constitutional Court full scope of control over the constitutionality of the budget and taxes legislation, the Fundamental Law gives a special power of intervention in this domain to the new Budget Council, with a consequent curtailment of previous powers of Constitutional Court.

Other restrictions concern constitutional review<sup>31</sup>. In particular, the new Basic Law abolished *actio popularis*, a legal possibility that anyone could turn to the Constitutional Court claiming that a law, legal provision or a regulation is contrary to a constitutional provision. *Actio popularis* had been a well-functioning legal instrument in Hungarian law since the political transition of 1989–1990 and its elimination further narrowed down the means of protection of fundamental rights.

Other significant constitutional amendments have also strongly affected the autonomy of judicial courts and media actors. For example, an attack against the juridical powers was made through a new regulation on retirements of judges, who had the possibility to remain in their post until the upper age limit set at 70 before the reform. Indeed, the Fundamental Law provides that “except for the President of the Curia and President of the National Office for the Judiciary the service relationship of judges shall terminate upon their reaching the general retirement age”, with the immediate and brutal consequence that 274 judges (approximately 10% of all Hungarian judges) were notified of their imminent retirement<sup>32</sup>. A new regulatory system for the media was adopted in 2010, which rendered the funding and content production for all public media centralized in one body, the Media Service Support and Asset Management Fund (MTVA) which is controlled by the government. It is not a complete surprise that very clear accusation of excessive concentration of power was made by the

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<sup>30</sup> P. Paczolay, *The Transformation of the Constitutional Court in Hungary*, in Z. Sente, F. Mandák, and Z. Fejes (Eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development. Discussing the New Fundamental Law of Hungary*, Paris, 2015, 169-184, 171.

<sup>31</sup> F. Gárdos-Orosz, *The Hungarian constitutional court in transition—from actio popularis to constitutional complaint*, in *Acta Juridica Hungarica*, 53, 2012, 302-315.

<sup>32</sup> See European Commission for Democracy through Law (Venice Commission), *Background document on the Fourth Amendment to the Fundamental Law of Hungary*, Opinion 720/2013, 24 April 2013. <sup>30</sup>; Worldwide Movement for Human Rights, *Hungary: Democracy under Threat Six Years of Attacks against the Rule of Law*, November 2016.

President of European Commission and the European diplomacy<sup>33</sup>, while according to Freedom House, although Hungary is still classified as a free country, “editorial bias and political pressure persist as problems at both public and private media outlets”<sup>34</sup>.

#### 4. Constitutionalism under stress

A comparison between Italy and Hungary may show both common elements and significant differences. The parallel has been already tempted during the Berlusconi’s government, on the ground that the Italian governments have been formed during the Second Republic by all parties that had not participated at the post war constitution-making. Indeed, the premise of constitutional activities relied on both the presence of political parties and leaders with different values and perspectives from the past dominant forces and the general climate very favourable to political innovation matured after the Tangentopoli scandals. Thus, as it was noted, in both Hungarian and Italian constitutional experience, very often “debates and proposals on constitutional and institutional reforms could be seen also as a way of de-legitimising the Constitution currently in force, in order to soften the constitutional limits on majoritarian politics”<sup>35</sup>.

Similarities between the two countries may be found also under Renzi’s government. First, both the Italian and Hungarian constitutional charters are amended through the initiative of the leader of the government party, who has considered the reform plan as a relevant part of their political program. Matteo Renzi, is known as *Rottamatore*, the Demolition Man of dusty institutions, pushed through reforms to boost the efficiency of the State, but also as a way for introducing a new political phase in Italy<sup>36</sup>. After the defeat, reform supporters have complained that Renzi “had staked his entire future on the outcome by framing the vote as a plebiscite on him and his executive”<sup>37</sup>.

In Hungary it has become even more evident that the aim of the head of government is the use of constitutional amendments as part of its political initiative. The Fundamental Law represents a way to introduce a new phase in Hungarian politics, with full coincidence with Orbàn’s ascendancy. The new constitution dedicates relevant space to the Preamble, where identitarian aspects are stressed in order to restore the great Hungarian tradition coming from the

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<sup>33</sup> The European position on Hungarian Constitution is expressed in the document of the Venice Commission, an advisory body to the European Council on constitutional matters, see *Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87<sup>th</sup> Plenary Session*, Venice, 17-18 June 2011.

<sup>34</sup> See the 2016 report on Freedom of the Press, <<https://freedomhouse.org/report/freedom-press/2016/hungary>>.

<sup>35</sup> N. Lupo, *What Hungarian Constitutional Experience Can Teach European Constitutionalism*, in Z. Szente, F. Mandák, and Z. Fejes (Eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development*, *cit.*, 114-128, 124.

<sup>36</sup> F. Bordignon, *Il partito del capo. Da Berlusconi a Renzi*, Sant’Arcangelo di Romagna, 2013.

<sup>37</sup> See also J. Newell, *The result was not simply another anti-establishment revolt*, in *Europop blog*, London School of Economics and Political Science, 5 December 2016.

Middle Age<sup>38</sup>. The first sentences state “We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago”. This construct is a way to consider the communist period as an historical parenthesis and the drafters aim at restoring “country’s self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected body of popular representation was formed”. Moreover, the Orbàn’s constitution has been direct expression of the current prime minister in that it overcomes the traditional differentiation of ordinary and constitutional politics. Different provisions in the new Constitution, in fact, contain specific policy preferences,<sup>39</sup> as in case of fiscal, economic, social, family or educational programs.

Such leaders take full advantage from the constitutional change in terms of legislative-executive relationship, produced by a concentration of powers on personalised governments. In both reform plans, the point of the composition of parliamentary assemblies and their function has been dealt with. In Italy, the constitutional referendum has proposed a significant public spending decrease though a drastic reduction of the number of Senators. Moreover, the executive bills would have fastened their discussion though the abolition of the *navette system* and the provision of a restricted span of time (about sixty days) for their approval. In the Hungarian unicameral system, the number of MPs has been almost halved, with the new disproportional mixed electoral system assuring large majority to the winning party. The effect of internal rules and the still inadequate institutionalisation of the parliamentary chamber<sup>40</sup> are such that Hungarian parliament was not conceived as the arena where debate and pass crucial legislation. Instead, parliament has had its role progressively diminished so that law making has become discontinuous, it can be interrupted for weeks and there is a low level of attendance of MPs at plenary sessions and committee activities<sup>41</sup>. As also seen in other national cases, the rise of personal leaders is usually associated with the idea that the parliamentary assembly tends to collide with the decisional urgency of the executive chiefs, as its *modus agendi* is made of

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38 Bauman would insert Orbàn reform plan among example of “retrotopia” as “imagined aspects of the past, genuine or putative, serve as the main landmarks today in drawing the road-map to a better world”, see Z. Bauman, *Retrotopia*, Cambridge, 2016.

39 See Brodsky 2015, 3.

40 C. Chiva, *The institutionalisation of post-Communist parliaments: Hungary and Romania in comparative perspective*, in *Parliamentary Affairs*, 60, 2007, 187-211; G. Ilonszki, *From Minimal to Subordinate: A Final Verdict? The Hungarian Parliament 1990-2002*, in *Journal of Legislative Studies*, 13, 2007, 38-58; P. Norton, D.M. Olson (Eds), *Post-Communist and Post-Soviet Parliaments: The Initial Decade*, London, 2008; G. Ilonszki, K. Jáger, *Changing government advantage. Challenging a dominant executive*, in B.E. Rasch, G. Tsebelis (Eds), *The role of governments in legislative agenda setting*, London, 2013; G. Ilonszki, *The Hungarian Parliament and EU Affairs: A Modest Actor Dominated by the Executive*, in C. Heffler, C. Neuhold, O. Rozenberg, and J. Smith (Eds), *The Palgrave Handbook of National Parliaments and the European Union*, Basingstoke, 2015.

41 A. Ágh, *Early Consolidation and Performance Crisis: The Majoritarian-Consensus Democracy Debate in Hungary*, in *West European Politics*, 24, 2001, 89-112.

a combination of slowness, confusion and mediation<sup>42</sup>. Consequently, according to critics of majoritarianism, as the leader of government becomes the true *dominus* on the legislative arena, it may become closer the autocratic dream “to have a legislative assembly useful only to “approve”, enslaved and obliged to an obedient execution; and, at the same time, to boast the permanence of the democracy thanks to the existence of an elected chambers”<sup>43</sup>. Other scholars maintain the opposite view that democracy is not realized when a government is not able to realize its political program, although a stable check and balances asset is preserved.

A strong difference between the Italian and Hungarian case is the association between majoritarian intervention on political institution and a strong weakening of veto powers, which may prevent the government from acting in illiberal way. Indeed, the redefinition of the role and functions of the Hungarian Constitutional Court was the start for a conflictual period with the executive so that when the court found an act to be incompatible with the constitution, parliament would amend the constitution and adopt the act in unchanged form or raise the rank of its regulations to constitutional level”<sup>44</sup>. The freedom of expression was limited in Hungary by abolishing previous protection against media monopolies. Thus, the creation of the new Media Council, with the mandate to monitor and fine media for not complying with standards of political balance, may be a relevant premise for silencing opposition. Thus, the majoritarian tendency, very often a marked feature in new constitutionalism, may represent an important test for the young Hungarian democracy.

## 5. Toward a personal constitutionalism

Both Italy and Hungary clearly show a tendency that is occurring in many Western democracies. Notwithstanding different political traditions and constitutional settings, these countries are experimenting an impressive shift of power from collegial bodies to monocratic ones.

This opens a new phase for constitutionalism, where the charters are produced as the project of individual leaders. This is radically different from the past. According to the liberal theory, constitutions have been recognized as the field where citizens’ rights have been defended through a legitimised parliament. During the second part of the last century, parliamentary assemblies were substituted by political parties in making constitutions responding to the growing demands of their mass constituency<sup>45</sup>. Indeed, while golden age

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<sup>42</sup> G. Pasquino, *Parlamento e governo nell’Italia Repubblicana*, in *Rivista Italiana di Scienza Politica*, 37, 2007, 3-24, 9.

<sup>43</sup> L. Carlassare, *Il Primo Ministro legislatore*, in F. Bassanini (Ed), *Costituzione. Una riforma sbagliata. 63 costituzionalisti discutono il progetto approvato dal Senato*, Firenze, 2014.

<sup>44</sup> A. Sadecki, *In a state of necessity. How has Orban changed Hungary*, in *OSW Center for Eastern Studies Point of View*, 41, 13 April 2014, 13.

<sup>45</sup> M. Calise, T.J. Lowi, *Hyperpolitics. A Interactive Dictionary of Political Science Concepts*, Chicago, 2010.

constitutionalism starting from Seventeenth Century Revolutions had celebrated the rise of citizens with his rights, the Nineteenth century constitutionalism brought about the advent of mass party as a new collective actor representing the sovereign will of people. The presence of leaders in creating or modifying constitutions is a very recent story, with new monocratic actors finding a new channel to realize their political will. Governments are becoming more presidentialized and a direct relationship between leader and people is established<sup>46</sup>. This may result in tempting presidents to change Constitutions in order to shift powers from legislative to the executive, so enlarging their space of action. In this way, as the Italian case of the referendum on constitutional reform has largely shown, a constitutional project ends to be identified with its proposing leader.

This sheds light on a crucial point on the methodology of constitution-making. The Fundamental Law, indeed, was born in order to realize a system of legal constraints on official power. Giovanni Sartori states that a Constitution is a technique of liberty providing “a fundamental set of principles and a correlative institutional arrangement, which would restrict arbitrary power and ensure a ‘limited government’”<sup>47</sup>. This definition would prevent a Constitution from being in the field of government’s will, as it represents an act to be produced through the contribution of relevant part of democratic forces. Instead, very often the Constitution is finding in the leader a more or less constrained political engineer.<sup>48</sup>

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In this personal constitutionalism, one of the latest steps in the demanding process of personalisation of politics, it may be asked whether the old liberal asset has been put under stress. While in Italy the strengthening of political leader has gone hand in hand with the growing of judicial activism and public opinion attention, a critical issue of Hungarian evolution over the last past decades is the reduction of the role and prerogatives of the Constitutional Court. An element that confirms frequent political leadership’s intolerance against procedural limits to their action.

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<sup>46</sup> F. Musella, *Political Leaders beyond Party Politics*, Cham, 2018.

<sup>47</sup> G. Sartori, *Constitutionalism. A preliminary Discussion*, in *American Political Science Review*, 56, 1962, 853-864, 853; M. Gaber, *A New Introduction to America Constitutionalism*, Oxford, 2015.

<sup>48</sup> According to the metaphor used in G. Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, New York, 1997.