Presentation

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The International Conference on *Constitutional Issues and Challenges in Italy and Hungary* held at Budapest on December 2-3, 2016, represented a common effort of Italian and Hungarian legal scholars to understand legal and constitutional changes, lines of reform, the complex dynamics of politics and party-systems in both countries under UE law and the common fundamental principles enshrined in International Conventions.

It is undeniable that comparing Italy and Hungary is a challenge as "the two countries had much more in common during the 19th Century and the first half of the 20th than they did after World War Two". At first glance, it appears "an incomparable comparison" [Ferrari]; it is undisputed, on the contrary, that the common European framework induces similarities that make it possible to find some common facets. Moreover, both countries are still facing some common - at least - regional phenomena like the financial crisis or massive immigration flows.

In both countries, like in many others parliamentary systems, took place a process of presidentialization of the Executive which, from the one hand, was the solution to the longstanding need for improvements in governability through the reinforcement of the Head-of-Executive's administrative machinery and the preeminence of the Executive in Legislation; from the other hand, the party-systems and the electoral laws instigated an excessive personalization of politics that, paradoxically, was one of the causes of failure of Renzi's constitutional reform in December 2016 [Criscitiello and Musella]. Taking the personalization of politics to the extreme, it may be tempting to refuse procedural limits to the Executive power and to look for constitutional solutions that erode those limits, for example by reducing the role and prerogatives of the Constitutional Court [Musella].

So, in a country like Hungary with "a long-standing tradition of unwritten and flexible constitution" and with a party-system that rendered it easy to reach a 2/3 majority, it wasn't hard to pass Amendments to the Fundamental Law that repealed every decision of the Constitutional Court delivered before the entry into

force of the new Constitution in 2012, that limited the scope of the constitutional review [2013] or that introduced new constitutional clauses, whose effects are uncertain in the common European framework, like the one that aims to protect "the constitutional identity and Christian culture of Hungary" [2017]. Thus, "the seven amendments of the past years show that Hungary is clearly on the way of democratic backsliding and the Fundamental Law with its hampered checks and imbalances is not able to fulfil the power-restraining function of a constitution. Thus, Hungarians do not trust in their constitutions and do not really respect them. The underdeveloped constitutional culture of the written constitution means that the constitution itself will not help with political backsliding" [Chronowski].

It is reasonable to assume, then, that the introduction of a "German type constitutional complaint (*actio popularis*) was rather a side benefit of the constitution-making and legislative procedure that aimed to cover the loss in the general competence of the Constitutional Court" [Gárdos-Orosz].

In this respect, the growing involvement of Constitutional Courts with electoral laws might be described as being part of a wider trend towards the judicialization of politics [Delledonne], that is exactly what some Executives wish to avoid.

It appears that the "negative" liberal constitutional model, adopted in reaction to the communist past, was not suitable for this context" and that "the great sacrifices required to "join Europe" were not rewarded. Among the limits of the democratic conditionality process, one can include the lack of clarity in identifying the different values on the basis of abstract categories such as democracy and the rule of law. All of this has contributed to resurfacing the "unresolved problems" of the transition to democracy in countries like Hungary (and Poland) [Di Gregorio].

Notwithstanding Hungary was one of the first and most thorough political transitions, which provided all the institutional elements of constitutionalism (checks and balances) and guaranteed fundamental rights [Halmai], Hungarian parliamentarianism has sinister perspectives [Szente]. The weakness of the Copenhagen criteria and the lack of their application after accession caused a discrepancy between EU accession conditions and membership obligations, which might be one of the reasons for non-compliance after accession in some of the new Member States. Moreover, before the 2010 elections, most voters had grown dissatisfied not only with the government, but also with the transition itself, more than in any other East Central European country. Fidesz fed these sentiments by claiming that there had been no real transitions in 1989-1990, and that the previous nomenklatura had merely converted its lost political power into economic influence. So, "the backsliding has happened through the use of "abusive constitutional" tools: constitutional amendments and even replacement. The case of Hungary has shown that both the internal and the external democratic defense mechanisms against this abusive use of constitutional tools failed so far. The internal ones (constitutional courts, judiciary) failed because the new regimes

managed to abolish all checks on their power, and the international ones, such as the EU toolkits, mostly due to the lack of a joint political will to use them [Halmai].

The packing of almost all institutions by the Government parties, the curtailment of the power of the Constitutional Court, the restrictions on certain fundamental rights, especially the freedom of speech and the freedom of religion are the well-known symptoms or signs of the authoritarian tendencies in Hungary. The backsliding of constitutional democracy has been perceived by the European institutions, but they have not been able to stop this process. So many important changes have been introduced in parliamentary practice and rules of procedures: a) the frequent use of *omnibus* legislation; b) the use of "cardinal laws" to transform not only the whole constitutional system, but also to introduce fundamental changes to economic and social policy; c) the general speed-up of parliamentary procedures that curtailed opposition MP's rights; d) the introduction of the so-called "block vote" in 2014; e) the so-called "extraordinary urgent procedure", introduced in 2011, allowed the enactment of a new law the day following its introduction in Parliament; any bill could be amended fundamentally right up to the final vote: that is, after the closure of the plenary debate. Although these parliamentary contrivances were abolished in 2014, some new procedures were established instead, such as dispensing with the second reading of bills, depriving Parliament of the opportunity to debate on their detail or providing new ways of the accelerated legislative procedure; f) the constitutional position of the Budget Council, a not a pure advisory body, since its prior consent is required for the adoption of the State budget by the Parliament: although the Council may refuse to give consent only in specified cases (e.g. if the budget bill would allow state debt to exceed half of the GDP), its decision may not be reviewed or annulled, so it will have a real veto right, which is an exceptional restriction of the Parliament's budgetary power. All of this contributed in the last few years to the approval of many laws without a transparent preparatory stage and public debate [Szente].

Among the great perils of the "backsliding", the compression of the right to participation of minorities in public life is certainly one of the most serious. The new constitutional structure, developed from democratic transition in Hungary gives a strong, but symbolic position to minorities recognizing them as state constituent elements. The question of parliamentary representation of minorities was finally resolved in 2010 in a rather ambiguous way but under international standards [Balasz].

This scenario nurtures many contradictions in the complex relationship between the free movement of goods, capital, services and people and intense national sentiments. This contradiction between the open ranges of the market and the physical boundaries of national elements is clearly visible in Hungary [Azzutti].

The several violations of the rule of law perpetrated in Hungary as stated by the Strasbourg Court in the *Baka* case lead to the question of supranational limitations to amending power and to the need to define a clear role for the

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ECtHR. To reinforce the theory of "unconventional constitutional amendments" at least two strategies are required: "The first one is the introduction of explicit limitations - in the form of unamendable provisions - in the text of the Constitution; the second one is to refer to some *supra-constitutional* supreme principles, which are recognised - and not established - by the Constitution and that are binding even for the amending power". Nonetheless, comparison with other regional courts - namely the Inter-American Court of Human Rights and the Central American Court of Justice -, suggests that it will be necessary to allow the ECtHR to issue rulings with constitutive effects. However, as the status of the Convention in the hierarchy of norms of the Council of Europe member States is, almost without exception, *infra* - and not *supra* - constitutional and as any change to the Convention and its Protocols requires the unanimous will of Member States, the perspectives for the Strasbourg Court are uncertain [Simonelli].

Anyhow, the idea to solve problems within national boundaries looks outdated. As regards mass migration policy, for example, EU centralisation appears an irretrievable tool for EU integration [Romeo]. The need to look for and consolidate best European practices is evident, for example, with respect to the treatment of statelessness persons, irrespective of the lawfulness of their stay [Berenyi].

As regards the parliamentary system and its rules of procedures, in Italy happened quite the contrary: the negative outcome of the Constitutional referendum of 4 December 2016 and the resultant failed reform of symmetrical bicameralism marked an important moment in the evolution of the Italian institutions. The process aimed at reforming the Second Part of the Constitution on the institutional framework, which was started in the mid-80s, is destined to undergo a rather long setback. This means that there will no longer be an excuse or an alibi for not achieving small-scale and sub-constitutional self-reforms of the two Houses [Lupo].

The failure of the Italian Constitutional reform in 2016 leaves some underlying problems unresolved, for example the lack of participation of Local Authorities in the definition of public policies, especially on public finance subject matters (this would have been the role of the new Senate). The result is the annihilation of thousands of Municipalities that are asphyxiated by an utter centralized digital control and an overload of administrative tasks that are impossible to be fulfilled under strict budget constraints [Tarzia].