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The Relationship Between Unamendable Constitutional Principles and "Democratic Wellbeing": The Past and Present Cases of Italy and Germany

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Introduction - Implicit and Explicit Unconstitutional Constitutional Amendments

I.1. Nature and scope of the amendment powers

Constitutional societies, irrespective of their governmental regime, generally recognise two kinds of powers related to the constitutional charter. The vast majority of them are covered by the umbrella term of "constitut*ed* powers". These legal actions take their legitimacy from the constitution and are sanctioned by institutions created or recognised by the constitution itself. On the other hand, the so-called "constitu*ent* power", wielded by the sovereign of the polity, entails the creation of the constitutional charter[1]. The hierarchy of powers thus described would implicate that constituted powers could not modify constitutions, i.e. the product of constituent powers.

However, constitutions, as any other law, can be modified and even repealed. The nature of the power to amend constitutions has sparked some controversy in the doctrinal debate; assessing the nature of the amendment power is crucial for determining the scope of its action. In fact, it can be logically deduced that the amending power is a way for the "people" to reshape their constitution, to share part of their constituent power with future generations[2]: as such, it must be on par with the primary constitution-making power. On the other hand, even though the amendment power has the potential of being far more incisive than any other constituted power, since it may alter the institutional structure of a State altogether, it still derives from the constitution and is regulated by it. It may be stronger than the legislative, executive and judicial powers, but it still falls under the category of constituted powers, since the constituent power is, by definition, unbound by the document it creates.

There are no legal constraints in creating a constitution *ex novo*. The constituent power, once it has finished its monumental task, entrusts the governance of the polity to the various constituted powers that it created, with the explicit limitations set forth in the constitutional charter. The amendment power thus fits within the range of the delegated powers. It has been argued that this power, with its special status, between the constituent and constituted powers, should be classified as *sui generis*[3]. This dissertation does not benefit from a further clarification on the nature of the constitutional amendment power; this brief excerpt clarified just how the amendment power cannot

[1] The formulation "sovereign of the polity" has been employed to include all the *octroyées* (Conceded) constitutions, given by monarchs without consulting the people or their representatives. However, as most constitutions enforced today are not conceded, rather approved by constitutional bodies operating in countries where the sovereignty rests with "the People", it has been argued that the constituent power is inherent to democracy. Cfr. Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press 1999), 1.

[2] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, (New York: Oxford University Press, 2017), 111.

[3] n° 2 above, 110.

be considered a constituent power, since it lacks the absolute, unfettered freedom that the latter enjoys.

As a delegated authority, it has both procedural, practical limitations and intrinsic, substantial ones. As stated above, for the matters of the procedural limitations, the amendment power must abide by the rules that determine its usage. Many constitutions, called "rigid", establish clear paths for the creation of constitutional amendment laws, different and often much more stringent than the procedures required for ordinary laws. It is then clear that, if an amendment were to ignore or fail to comply with the necessary procedures, it would be unconstitutional on technical grounds, and as such its content invalid. Even if, however, these practical limitations did not exist, it would not mean that the amendment power has no limitations whatsoever. Amending a constitution and replacing it are two different concepts; the first one is permitted, the second, for obvious reasons, cannot possibly be. Any amendment, even if not stated by the constitution itself, must respect its basic structure and foundational principles[4]. For these reasons, any amendment that would exert a drastic change on the very premises upon which the constitution rests, would inevitably spell the demise of both itself and the charter; as such, it and its contents must be deemed unconstitutional. This dissertation will operate on the premises that the amendment power is limited and thus, there exist amendments which trespass those limits and are unconstitutional. It will focus with particular regard on the substantive limitations of this power, especially vis-à-vis the fundamental constitutional principles.

I.2. Positive Law, Natural Law and Foundational Structuralism

Before delving into the definition of the research question that has motivated this dissertation, a brief excerpt on legal philosophy is needed. In fact, throughout this text, terms such as "legal positivism", "legal naturalism" and "foundational structuralism" will be used; it is imperative to have a clear understanding of at least the basic elements of their meaning, else the consequences of their implications will be lost.

Positive law is an ideology that affirms that no other law exists besides what humans decide for themselves. For a positivist, the law written "as it is" is supreme and unquestionable; the law must be obeyed unconditionally and based only on its content, without any other sources of interpretation. This doctrine saw its end concomitantly with the Second World War, as it essentially legitimised the legal rise of the totalitarian regimes which dotted Europe. A legal positivist does not

[4] n° 2 above, 156.

recognise natural law under any declination[5].

Legal naturalism, in its contemporary understanding, has evolved from the theological doctrine of the supremacy of the natural order on the legal one (i.e., the supremacy of God on humans). The main difference with legal positivism is that this doctrine recognises both systems of interpretation, yet affirms that there exist a set of ethical and moral principles to which the legislators must abide when creating the written laws[6]. A positive norm which contradicts these principles should not be respected, as it lacks legitimacy. A legal naturalist seeks the law as "it ought to be", recognising a supreme set of values and principles that transcend the written word and that must be respected at all times[7].

The last legal doctrine worth analysing for the understanding of this dissertation is that of "foundational structuralism". While not applicable to the legal sciences as a whole, this doctrine essentially states that, within constitutions, there are a set of supreme norms, which form the identity of the document and which, if destroyed or replaced, signal the end of the constitution[8].

This dissertation will base itself on a naturalist approach when analysing the law as a whole, while it will weigh all the constitutional charters it will analyse under a foundational structuralist approach.

I.3. Formulation of Research Question

Within the framework thus defined, this dissertation will attempt to highlight the similarities between the descent towards totalitarianism in the 1920s and 30s and the contemporary democratic backsliding from a constitutional standpoint. It will consider the case studies of Italy and Germany, some of the earliest and biggest nations to have experienced a totalitarian moment in the interwar period. In general, it will maintain that any constitutional amendment which clearly modifies the fundamental principles of a constitution should be considered unconstitutional, as changing the foundational pillars of such charters essentially equates to their destruction. As was stated above and as will be made clearer throughout the chapters that will follow, the power to amend a constitution does not have the ability to completely rewrite its contents; if it did, it would merely be a bloodless revolution[9]. While it will be necessary to contextualise the argument and thus to provide some social, historical and political nuance, the analysis and the main argument will be carried out

[5] Norberto Bobbio, *Giusnaturalismo e positivismo giuridico*, (Milano: Edizioni di Comunità, 1977), 133.
[6] n° 5, 130.
[7] The so-called "is-ought problem" is known to both doctrines; this was a mere conceptualisation of this dichotomy and its contrasts. N° 5 above, 127.
[8] n° 2 above, 141.
[9] n° 2 above, 130.

predominantly through legal lenses. It will be argued that the fundamental principles of any constitution (especially those of democratic ones) are delicate and as such deserve the solid protection they currently enjoy. The comparison with the descent of totalitarianism and its eventual embedding into the constitutional charters of both Italy and Germany is presented to show that meddling with a constitution's basis can have tremendous repercussions. The constitutions thus mentioned have had a strong democratic tradition; the fundamental principles of such charters encompass democracy and many of its requirements to be a functioning system. In general, one of the aims of this dissertation will be to analyse the democratic "wellbeing" in all the constitutions mentioned, especially by assessing what ideals and measures the fundamental principles of such charters protect. The concept of democratic "wellbeing" will be intended throughout this dissertation as an assessment of the functioning of the principles of democracy enshrined in the constitutions analysed, i.e. how rooted they are among the societies that should abide by them. In general, an assessment of how "healthy" the constitutional democracy examined is: as an example of the operationalisation of this concept, the Weimar Republic was created with very little democratic wellbeing: its principles prescribed democracy and its processes, yet its Legislative body was inefficient and popular involvement could be easily prevaricated through other legal means, as will be explored in the second chapter of this dissertation. As a topic, democratic wellbeing has been quantitatively analysed by Carnegie UK in their 2022 GDWe Report[10].

The argument is divided into three main chapters and will develop as follows. The first two chapters will follow the constitutional evolution of the Italian and German republics, respectively. They will analyse the strengths and pitfalls of the constitutional charters that were (nominally) in power in these nations during the interwar period, with particular regard to their fundamental principles. Both chapters then proceed with a more in-depth analysis of the current situation of Italy and Germany; in the Italian case, the chapter ends on a note about the constitutional troubles about Italy's participation in the EU and a current proposal to amend the Constitution, while in the German case the matter of the name of the Basic Law and a contemporary scandal about the public funding of parties will be employed to further the dissertation's main points.

The third and final chapter of this dissertation will concern itself with the legal details of how the totalitarian regimes of Hitler and Mussolini established themselves in Italy and Germany, touching especially upon the extreme modification and bending of the meaning of the fundamental principles of their respective constitutional charters. The chapter will then proceed with a definition of the contemporary democratic backsliding, which is intended in this document as the slow movement away from the principles of liberal democracy such as, but not limited to, the ever-

[10] Rachel Heydecker et al., *GDWe: A Spotlight on Democratic Wellbeing*, (Dunfermline: Carnegie UK, 2022).

growing distrust of the democratic institutions, the number of citizens who do not vote at elections at any level and the general trends of populism and polarization that have eroded the strength of public debate. With these definitions clear, the chapter will thus end on a strenuous defence of the fundamental constitutional principles of democratic countries, to preserve their own existence in a functional way.

The dissertation will present some concluding remarks on the importance of institutions such as Courts with constitutional jurisdiction and the various tensions between judicial and political bodies, especially vis-à-vis the fundamental changes that modern societies have undergone.

Chapter 1 – The Fundamental Principles in the Italian Constitutional and Legal System

1.1. The Albertine Statute

For most of recorded European history, the term "Italy" did not mean anything more than a mere geographical reference to the boot-shaped peninsula at the centre of the Mediterranean Sea[11]. The struggle for a unitary Italy is to be understood in the framework of the nationalistic movements which swept Europe from the French Revolution onwards. Its apex of the 1848 Revolutions, which erupted all throughout its territory, is often used as a symbol of the desires of both creating the new Nation-State and giving it a brand-new Constitution. This chapter will delve into the Constitutional moments of the Italian State, represented by the Albertine Statute and the 1948 Constitution. Scholarly wisdom suggests that Italy has had four main constitutional regimes, the first two of which under the Albertine Statute: from the Unification up until 1922, Italy was governed by a classical liberal regime in which a constitutional monarch governed alongside an efficient Parliament, as were most other European nations at the time. 1922 is the date traditionally used as the benchmark for the beginning of Benito Mussolini's Fascist rule on Italy, which lasted until 1943, when he was ousted as head of the Fascist Party and Italy was divided into two puppet states who fought a gruesome civil war alongside the two opposing occupying forces of Nazi Germany in the north and the Allied forces in the south. This period, known as the fascist *ventennio*, saw some of the most radical changes to the constitutional structure of the Italian state, all while keeping the Albertine Statute formally enforced. The other two constitutional moments were overseen by the 1948 Republican Constitution and the dividing point appears to be 1994, but there is a heated debate which is trying to understand if the separation can be considered of a constitutional nature, as were the others, or if the terms "First" and "Second" Republic are merely journalistic[12]. The first section of the paragraph will concern the first moments, as the critical weaknesses that the Albertine Statute had shown were put as the bases for the drafting of the new, post-war Constitution under which Italy still lives today and which will be analysed in later sections of this chapter. The Albertine Statute, not unlike the Weimar Constitution which will be reviewed in the next chapter, has been chosen as a topic for this analysis because it was crucial to analyse the constitutional charter which was, at least nominally, in force when Italy descended into a totalitarian regime, to better assess what principles failed to protect the liberal-democratic regime that the Statute created.

[11] Count Klemens Von Metternich is widely regarded as the first person to publicly use this phrase, both at the 1814 Congress of Vienna and in an 1847 letter to Count Dietrichstein.
[12] Cfr. Pietro Craveri, 'La cosiddetta Seconda Repubblica' in P. Craveri (ed.) *L'arte del non governo: l'Inarrestabile declino della Repubblica Italiana* (Marsilio 2016); A. Codevilla, 'A Second Italian Republic?' (1992) 71 FA, 146.

The Albertine Statute was the first Constitution of the newly unified Italy. There is a scholarly debate on whether the unification of 1861 created a new State or if it was merely an expansion of the Kingdom of Piedmont and Sardinia, from both political and judicial points of view. While for some it was the political, cultural and historical realization of the freedom and unity of the country, others argue that legal details such as the numbering system of the Legislatures not resetting and King Vittorio Emanuele II not changing his name are signs of the legal system not shifting in order to accommodate the new emerging polity[13]. The debate is nuanced and historically significant, but it transcends the scope of the main argument of this document. It is worth mentioning the uncertainty that, even at the time, surrounded an event as monumental as this one, because it is the exact same popular feeling that King Carlo Alberto tried to placate with the promulgation of the Albertine Statute in 1848. This legal action was the preferred outcome for the King, as, he feared, the Revolts could have potentially led to the creation of a Constituent Assembly in which Giuseppe Mazzini's followers could have advocated for the creation of a Republic[14].

Thus interpreted, the Albertine Statute of 1848 is Italy's longest serving Constitution, even though it only applied to the Kingdom of Sardinia in its first decade of existence. Differently from the 1948 Constitution, it is not easy to clearly delineate the fundamental principles of the Statute. From a foundationally structuralist perspective, the Albertine Statute created a confessional Kingdom, the official religion of which was roman Catholicism, where the executive power was wholly in the hands of the King and his ministers and where the legislative power was shared between a bicameral Parliament (the upper House of which nominated by the King, the lower elected) and the King itself. Quite remarkably, the Statute included a fairly comprehensive Bill of Rights that granted the subjects' personal freedoms, the freedom of the press (barring abuses) and introduced universal and progressive taxation to finance the Kingdom's coffers[15]. The Statute was quite an upheaval at the times and, thus posed, it might even look somewhat progressive for an *Octroyée* Constitution. It had, however, some innate flaws which ultimately led to its demise; to fully analyse them, they must be framed both in terms of politics and in terms of constitutional review of legislation.

One cannot discuss the politics of 19th Century Italy without at least mentioning Camillo Benso, Count of Cavour, and Prime Minister of the Kingdom of Piedmont from 1852 until 1861. He and, albeit more roughly, his predecessor Count Massimo D'Azeglio, are to be credited for the shift from a monarchical executive as described by the Albertine Statute to a form of parliamentary

[13] Steven G. Calabresi and Matteo Godi, 'Italian Constitutionalism and its Origins' (2020) 6 ILJ, 23, 43.
[14] n°13 above, p. 42.
[15] *Statuto Albertino* (1848).

government that resembled quite closely the one under which Italians live today[16]. While the constitutional implications of this will be discussed later, the political side is incredibly nuanced and worthy of note. The 1850s were a tumultuous decade for the Kingdom of Sardinia and Piedmont, one which Cavour had the paramount role in shaping. The Albertine Statute was promulgated amidst conflicts – both physical and ideological – between various sections of the population, who had radically different opinions on what a unified Italy should have become[17]. These conflicts did not disappear with the Statute, but gained another arena into which they could unfold. Cavour led the moderate liberal-conservative party and thought that Parliament was the best counter to the more fringe wings of society. To defend this thesis, he stated that:

> "[…] with a parliament one can do many things that would be impossible under a system of absolute power.... So long as you have no intention of being intimidated by the violence of parties, you have nothing to lose from parliamentary strife. I never in fact feel weak except when parliament is in recess. . .. The Mazzinians, for instance, are less to be feared inside parliament than outside it... for the heavy atmosphere of Turin will always calm them."[18]

His view on the utility of Parliament, coupled with the various historical events which beset the Kingdom during his time as Head of Government, led him to use the institution as a weapon in his conflictual relationship with the King, Vittorio Emanuele II. Among Cavour's greatest achievements, sit undeniably how he managed to secure the efficiency of the Statute in its first years of its promulgation and how he ferried the Kingdom of Sardinia through some heavy crises and wars. However, his tweaking of Art. 2 of the Statute in a time of crisis and his lack of preparation of a successor that could fully understand and operate within the mechanism of the quasi-constitutional Parliamentary government, meant that Cavour left to the State a system that let his successors mistake as a norm what for him had been an exception[19]. Moreover, from his letters, one can assume that he could have had no problems in curbing the efficiency of Parliament if it benefitted him, as he had done when unifying the Kingdom's foreign policy regarding Austria and Crimea[20]. Although most of the other causes and mechanisms must be omitted for the sake of conciseness, what presented here can suffice in explaining why the dreaded doctrine of

[16] Denis Mack Smith, 'Cavour and Parliament' (1957) 13 CHJ 37, 37 https://www.jstor.org/stable/3020630 accessed 2 Mar 2024
[17] Cfr. Giuseppe Mazzini, 'Fede e avvenire' in Giuseppe Galasso (ed.) *Antologia degli scritti politici* (Il Mulino 1961); Vincenzo Gioberti, *Del Primato morale e civile degli italiani* (Utet 1920) 97-101; Massimo D'Azeglio, *Proposta di un programma per l'opinione nazionale italiana* (Le Monnier 1847).
[18] Cavour to Comtesse de Circourt, *Cavour e L'Inghilterra* (Zanichelli 1933) Vol. II, 284-5.
[19] n° 16 above, 57.
[20] Cfr. n° 16 above.

"transformism" was developed in Italian party politics and how that affected the formation of governments going forward. The latter half of the 19th Century saw the succession of two major political factions, colloquially known as the Historic Right and the Historic Left, based on where their deputies sat relative to the President of the Chamber. Their policies achieved results in various areas, but left so much to be desired that, from 1896 to 1900, Italy experienced a period of deep crisis, characterised by uncertainty and social upheavals. Within this climate and with the concrete risk of both a socialist and a clerical extremist view materialising, Sydney Sonnino advocated to "Return to the Statute", to make the subsequent governments accountable not to the Houses of Parliament, rather to the King, as the Statute prescribed[21]. His call remained unanswered. Straying away from the fundamental constitutional principles had fundamentally changed the regime that the Albertine Statute created and, although flawed and incomplete, it was a first proof that no constitution can survive without its fundamental principles.

In its wake, some have argued, the Albertine Statute should have been a rigid Constitution, not unlike all the others that were conceded in the aftermath of the liberal protests of the time. In effect, its arguably haphazardly combined provisions resulted in a fundamental text that lacked any explicit description on how it should be amended. Two factors, inherent in the Statute or at least extrapolated from its loose wording, have contributed to turning it into a flexible constitution: the omnipotence of Parliament and the lack of an independent judiciary who could conduct a thorough constitutional review of legislation. Barsotti et al. have argued that, barring the absurdity that the Statute was to be thought of as forever unchanging, and since the King had 'irrevocably' resigned his own lawmaking power, the only body capable of amending that Statute would be the legislative[22]. In other words, any law passed by Parliament and sanctioned by the King would become the supreme Law of the land. As mentioned before, Cavour himself endorsed this idea of the superpower of Parliament and came to declare that if both Houses and the King consented to it, even the Albertine Statute itself could be amended. The topic of the judicial review of legislation appears, on the surface, more complex. A landmark case which is helpful in clarifying the opinion of the Courts relating to their involvement in judicial review is the one that was decided upon on the 28th of June of 1886. In 1878, both Houses of Parliament passed a Law imposing a tariff on the importation of cotton textiles, which was then sanctioned by the King. However, the bills that passed in the Senate and the Chamber differed on the quotas that were to be paid, with the King having sanctioned the Senate's higher tax. After the mistake was noticed, numerous merchants sued the government for a reimbursement on the higher tariffs that they unjustly paid, claiming that the

[21] Sidney Sonnino, 'Torniamo allo Statuto' [1897] NA http://bpr.camera.it/bpr/allegati/show/12000_1906_t accessed 24 Mar 2024.
[22] Vittoria Barsotti et al., *Italian Constitutional Justice in Global Context* (Oxford University Press 2016), 6.

law was invalid.

The Court held that the question had various steps to be cleared: firstly, if one of the elements of the legislative (both Houses of Parliament and the King) did not consent to a law, that would not consist in an examination of the constitutionality of both the content and the form of the law. Secondly, pertaining to the *iter legis*, the Court held that sanctioning a Law, a prerogative of the King, and promulgating a Law, a collective duty of the Chamber, Senate and the King were different acts, and it could not have been supposed that they overlapped, as the conflicting law assumed[23]. The Court ultimately rejected the issue on these grounds. However, in an *obiter dictum* of that same opinion, the Court raises some essential points on what the judicial review under the Statute would become. Under a very jusnaturalistic view, the Court noted the difference on a law that was 'unconstitutional' because of a defect in the necessary forms of its promulgation and a law that was 'unconstitutional' because it is substantially repugnant to the foundational Statute of the land. Therefore, their final opinion on the matter was that the judiciary, under the Albertine Statute, could:

> '[…] Contest the external forms of the laws, given their own nature, without at all invading the field of the legislative power. The judiciary can do so because these are external forms and not the substance of the law; because they are determinate and, in their determinateness, they are not subject to interpretation'.[24]

The flaws in the Albertine Statute, coupled with the social and political turmoil that unfolded after the end of the First World War, paved the way for Benito Mussolini's Fascist National Party to grasp power and swiftly ferry Italy into a new constitutional moment. Mussolini's governments drastically changed the constitutional structure of Italy: the Chamber of Deputies was replaced by the unelected Chamber of Fasci and Corporations, fascism was institutionalised into every apparatus of the State and Art. 3 of the Statute was substantially overruled, as in 1922, right before the descent into fascism, the Royal Decree was recognized as a way to emanate norms with full force of law without any external checks and balances[25]. What this meant for Italy and how that relates to the general thesis defended in this document will be the object of a later chapter. Concluding this passage, what shown here was a first argument towards the idea that the unamendability of the fundamental principles of a constitution is a necessity. Whenever the basic structure of a constitution changes, something in the fundamental aspects of the State is lost, rather differently than with any other constitutional amendment.

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[23] Carlo F. Gabba, 'Udienza 28 giugno 1886; Pres. Miraglia P. P., Est. Giudice' (1886) 11 IFI 705, 706 https://www.jstor.org/stable/23091982 accessed 03 Mar 2024

[24] n°23 above, 710.

[25] n. 13 above, 49.

1.2. The 1948 Constitution and the Fundamental Principles

From the Armistice of the 8th of September 1943 up until the 25th of April 1945, Italy was divided into two puppet states. In the North, supported by the Nazi forces, the Italian Social Republic fought under Mussolini's command. In the South, where the Royal Family escaped (bringing the legal order of the Albertine Statute with them), the Allied Forces collaborated with what was left of the Italian Armed Forces to liberate the peninsula under the command of the provisional Government of Marshal Pietro Badoglio. The gruesome civil war that ensued left a deep scar in the population, which could start to heal only when the war ended. The various anti-fascist political parties, outlawed up to that moment, coordinated the various civil Resistance efforts under the flag of the National Liberation Committee (*Comitato di Liberazione Nazionale* - CLN). The CLN was instrumental for the defeat of the Nazi-fascist forces; it was constituted by an extremely wide array of parties, representing ideals ranging from the far left with the Italian Communist Party to the centre-right with the Christian-Democratic Party. The members of the CLN decided to postpone the resolution of their political differences until after the War was won by submitting them to the population, opting instead to prioritize their shared patriotism and anti-fascism.

After the War ended, two fundamental issues were put to the popular vote on the 2nd of June 1946: the form of governance of post-war Italy, via a referendum between Republic and Monarchy, and the election of the members of the Constituent Assembly, the organ tasked with drafting and approving the new Constitution. The referendum was extremely participated and returned an 89% turnout. It marked the first instance of true universal suffrage in Italian history, as women could express their preference for the first time. Both results were balanced and could be used as a testimony of the profound rift dividing the population. The frequency of the vote of the referendum, e.g., followed almost exactly the lines that were drawn during the Civil War: The South overwhelmingly voted in favour of the Monarchy, while the North heavily favoured the Republic. In the end, the Republic was chosen as the preferred system, with a total of more than 12 million votes. The Monarchy was chosen by roughly 10 million voters, with 1 and a half million blank or invalid votes concluding the total[26]. The Constituent Assembly, composed by all the parties of the CLN plus other smaller political formations, needed to avoid exacerbating the differences and divisions among the various strata of the population. The Assembly was a body not directly under the control of either Government or Parliament, which meant that its components could decide and

[26] Data on turnout and results of the 1946 Referendum available at: https://elezionistorico.interno.gov.it/index.php?tpel=F&dtel=02/06/1946&tpa=I&tpe=A&lev0=0&levsut0=0&es0=S&ms=S accessed 24 Mar 2024.

draft the new Constitution in absolute autonomy; in hindsight, coupled with the fact that no one person could predict who would win the next elections, this led all the political formations within the Assembly to create a document that was in the direct interest of the community as a whole, and that favoured no particular institution or ideal[27]. The Constitution, approved and promulgated on the 1st of January 1948, contains articles of liberal, catholic, and Leninist-Marxist approaches and an extensive bill of rights.

Its fundamental principles, the first 12 Articles, are clear and labelled as such in the beginning of the text. The Italian Constitution is rigid: laws amending it must follow a special procedure, outlined by Art. 138. Laws amending the Constitutions must be passed, in two separate readings no less than three months apart, by a majority of two thirds. If that majority is not reached at the second reading but the law still passes by an absolute majority, a Referendum can be demanded by one fifth of the members of one House, five Regional Councils or 500.000 electors[28]. The two focal turning points that differentiate the 1948 Constitution from the Albertine Statute are the presence of a Constitutional Court, which conducts a thorough constitutional review of legislation and ensures that any passed law complies with the Constitution, and a special procedure for amendments, including limits. There is only one explicit limitation to any amendment to the Italian Constitution: Art. 139 posits that the Republican form of the state cannot be the object of Constitutional review. Legal scholars have argued that, as Art. 139 is not self-entrenched, there could be a two-step process to bypass this limitation: a hypothetical first constitutional law could repeal the Article, and a second one could, for example, reintroduce the monarchy, as the provision denying this possibility is no longer enforced[29]. The Constitutional Court helped shed light on this debate. Within judgement 1146/88, sits an *obiter dictum* that states that, concerning the explicit limitations of Art. 139, they are to be understood not in the mere dichotomy of Republicanism-Monarchism, rather as those set of values and fundamental principles that are inherent to the Republic and that the Constituent Fathers tried to encompass when they wrote the first section of the Constitution, such as the protection of democracy and human rights[30]. For this reason, while Art. 139 establishes an explicit limitation on constitutional amendments, this Judgement has established an implicit limit, protecting the fundamental principles on which the Constitution and the system it established rest.

The Italian legal system is known as a "civil law" system. This means that the sources of

[27] Marta Cartabia and Nicola Lupo, *The Constitution of Italy: A Contextual Analysis* (Bloomsbury Publishing, 2022), 10.
[28] Constitution of the Italian Republic (1948).
[29] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017), 139.
[30] *Judgement 1146* [1988] ItCC.

Italian jurisprudence are hierarchically ordered; the Constitution sits at the top. In these systems, sources placed lower on the hierarchy cannot trump or contradict higher ones. The distinction with the regime that the Albertine Statute created is palpable. Not only is the 1948 Constitution rigid, but it also established a Court that could protect its content and verify the compliance of lower legal acts with its express and implied limits. While a substantial distinction from the bygone liberal-monarchist and fascist eras was achieved, it was by no means an absolute one. It would have been enormously costly to build the new legal system from the roots, considering that many provisions, although promulgated by two regimes not aligned with the newly born Republic, would still have been necessary. Much of the current Italian State rests on the legal framework of fascism, which in turn was loosely based on the model of the liberal state. This is why Italian jurisprudence is to this day influenced by its past: as examples, one can notice that the current Civil Code was promulgated in 1942, while the current Penal Code goes as far back as 1930. Coupled with the fact that many civil servants did not lose their employment with the transition from fascism to the Republic, this resulted into a continuity not only identifiable within the legal tradition, but within the people themselves. It would be the responsibility of the Constitutional Court to dispose of the debris of the past, whenever they would prove an obstacle to the new system and its principles[31].

The fundamental principles of the Italian Constitution cover many grounds. They range from the protection of democracy and human rights to the relationship between the State and the various religions up to the position of the Italian State within the International community. This last topic area will be the particular focus of the next section of this Chapter, as there are many nuances to be explored in further detail. As per the fundamental principles, there has been quite a recent constitutional amendment, which sought to modify, among other things, one of the fundamental principles. In fact, Arts. 9 and 41 were modified by Constitutional Law 1/2022 in order to include the protection of the environment and animal welfare among the constitutional principles and among the limitations to the freedom of economic activity[32]. While this notion does not seem to comply with the general doctrine of unamendability detailed by the Court, it can be argued that these amendments be seen as a general clarification of what the previous text of the Constitution, backed by a judgement of the Constitutional Court relating to the original wording of Art. 9, meant[33]. This speaks also to the general thesis defended in this document, for which, especially from a foundationally structuralist perspective, the wording with which the fundamental principles of a constitution are expressed is subordinate to the general practice that those principles originate

[31] n° 27 above, 14.
[32] n° 28 above.
[33] Piero Gambale, 'The Environment and its Protection as Fundamental Principle of the Italian Constitution: A Constitutional Innovation that Looks to Future Generations?' (2022) 56 GSP 111, 112.

and their reflection within the citizenry.

There has been a debate pertaining to this last stance, vis-à-vis the intrinsic limitations of the Constitutional principles themselves; while the doctrine of unamendability is generally accepted, especially because it is backed by very authoritative pieces of case law, some scholars are starting to identify its limits, as constitutional amendments drift more and more away from the legal sphere and become more closely associated with the political one[34]. Attempting to find a solution to this debate, or even presenting a structured opinion on it, transcends the topic of this argument. To conclude the reflection on the historical moments of Italian Constitutionalism and to resume everything that has been argued until now, the Canadian doctrine of the Living Tree will be presented. The Living Tree is a metaphor for the Constitution: it is an organic document which, even if not directly amended, must be read with a progressive view in order to adapt it to the current times. This might look like a direct contradiction to the doctrine of unamendability of the supreme constitutional principles, but one must never forget that unamendability does not mean eternity, as will be explained in the next chapter about the German legal system. Explicit and implicit unamendability do not necessarily exclude one another; they mutually reinforce one another. The maxim *expressio unius est exclusio alterius*, the meaning of which is found in the argument "since there are some amendments that are explicitly prohibited, every other area of the Constitution was willingly left amendable by whomever wrote it", while being a resonant argument, is faulty: as Yaniv Roznai clearly posited, the explicit limitation to the amendment power should be considered as a mere confirmation of the existence of the limit, not as an exhaustive list of limitations[35]. In the same way in which the roots of a tree cannot be moved but the branches can be pruned in whichever manner one prefers, so too can Constitutions be amended, except without modifying the notions that keep them alive as they are.

1.3. Art. 11 and European Union Law

Among the first twelve articles of the Italian Constitution sits one that has defined Italy's position towards international law since its inception. Art. 11 was written before any kind of post-war European communitarianism or integration; its main aim was to allow the Republic to join the also newborn United Nations. Both the Italian and the German new systems wanted to resign their aggressive approach towards international relations and wanted to become peaceful members of the

[34] Cfr. Silvio Gambino, ' Sui limiti materiali alla revisione costituzionale della forma repubblicana dello Stato' [2008] https://www.astrid-online.it/static/upload/protected/Gamb/Gambino-Sull-art-139-Cost.pdf accessed 7 Feb 2024.
[35] n° 29 above, 151.

new democratic international community[36]. Both countries' constitution drafters could not have predicted the sheer scope of what joining the ever-growing European Communities, from the Treaty of Rome onwards, would have brought to their systems. The German system (as will be explained in further detail in the next chapter) did not suffer many Constitutional troubles due to Art 24(1) of the *Grundgesetz*; the Italian system, on the other hand, had to front the peculiar task of fitting the new supranational model within what was allowed by Art. 11. It can be argued that, *rebus sic stantibus*, the one described by Art. 11 is the fundamental principle that has been under the most consistent amount of stress. However, the Article itself has never undergone a formal amendment procedure, regardless of the long and comprehensive debate surrounding its wording and implementation into law. This section will not present a comprehensive resume of the ongoing constitutional debate, nor will it delve into the specificity of the various judgements by both the Italian Constitutional Court (ItCC) and the European Court of Justice (ECJ), although they will be presented; it will, on the other hand, frame these starting points and try to present an opinion vis-à-vis the Italian participation in the EU as a fundamental principle.

In particular, the debate focuses on whether the wording of Art. 11 is wide enough to support the legal and constitutional weight of what is required by the European Institutions, especially the various limitations of sovereignty in certain key areas. Before analysing some of the differing positions, it will be useful to present some of the landmark Judgements by the ItCC in relation to the constitutional jurisprudence of the ECJ. In particular, with Judgement no. 106/77 (*Simmenthal*), the ItCC accepted the doctrine of direct effect and supremacy of European Union Law, but with some reserves: the so-called "Counter-Limits"[37]. In fact, while EU legislation is directly applicable and supreme, in some systems it cannot derogate from the fundamental principles of the Constitution of a Member State. In the Italian system, which, as stated in section 1, is a civil law system, EU Law is granted the highest status on the hierarchy of the sources, in the same area as the Constitution. As a result, EU legislation can trump over national regulation covering the same subject matter and it can even derogate from the provisions contained in the Constitution, provided that it abides by these fundamental principles. The closest call towards an activation of these counter-limits was with the ItCC Ordinance 24/2017, about the interpretation of the principles vis-à-vis the adjudication of crimes, but the final decision was delegated to the ECJ which punted the issue. Judgement no. 170/84 (*Granital*) developed these tenets even further, excluding the ItCC as a tribunal for EU Law, leaving that job to the lower tribunals in cooperation with the ECJ[38]. The ItCC therefore could only judge the compliance of national norm against EU norm without direct effect

[36] n° 27 above, 27.
[37] *Ministro delle Finanze della Repubblica Italiana vs. Simmenthal S.p.A.* (1977) ItCC.
[38] *Granital vs. Amministrazione delle Finanze* (1984) ItCC.

(e.g. directives) and the compliance of EU Law with the counter-limits. Another key point about the relationship between the ItCC and the ECJ is their understanding of International Law. The ECJ adopts a monist perspective, which claims that International Law and National Law are parts of a single legal system and that the latter is therefore subject to the former. The ItCC, on the other hand, adopts a dualist view, which recognises both systems of law as independent from each other and, as such, each with their own internal hierarchies. For this reason, the ItCC cannot evaluate the constitutional compliance of EU law: doing so would admit the monist perspective of the ECJ[39]. The ItCC and the ECJ however, distant as they might seem, both operate on the fences between separate normative orders and their respective objectives: this means that achieving a true and not partial justice inherently necessitates an upholding of all the systems over which the decision of the Court may spill. Through this theory, fittingly named "Interlegality", Alessia-Ottavia Cozzi has found that the ItCC trends towards an operational cooperation with the ECJ, albeit vigilant enough to grant the domestic Constitution enough space and vitality[40]. The ItCC itself has stated that, albeit the communitarian and Italian legal orders are separate and distinct, they are coordinate by means of precise competences allocated to one or the other.[41]

The judicial debate is fascinating, but it is far too nuanced and detached from the main thesis of this piece. These few judgements and notions should, however, suffice in introducing the constitutional debate and present a brief conclusion to this section. While there is a broad consensus over the fact that the accession to the European Communities was lawful and constitutionally valid, there is a broad disagreement among scholars upon whether it would be possible to leave the European Union via an ordinary law, reflecting what happened when Italy joined the EC, or if such an action should be accompanied by a radical Constitutional review, as such an action would transcend even Art. 11[42]. The most resonant arguments on both sides are poignant and backed by both Italian and EU jurisprudence; for the sake of conciseness, they will not be explored further. These arguments, however, all hinge on the notion that participation in the European Communities is now ingrained in the Constitutional system. It is useful to consider the points brought forward in the doctrinal debate, especially when one applies a meta-reading to their meanings. A foundationally structuralist view recognizes a certain hierarchy of "elite" norms, whose change

[39] Giuseppe Martinico et al., 'The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?' in Anneli Albi, Samo Bardutsky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (TMC ASSER PRESS 2019), 528.
[40] Alessia-Ottavia Cozzi, 'The Italian Constitutional Court, the plurality of legal orders and supranational fundamental rights: a discussion in terms of interlegality' (2022) 1 ELJ 606, 624
[41] Such a notion emerges, *inter alia,* from the so-called "Frontini" Judgement: *Judgement 183* [1973], ItCC.
[42] Cfr. Nicola Lupo, 'L'ART. 11 COME "CHIAVE DI VOLTA" DELLA COSTITUZIONE VIGENTE' (2020) 3 RP 379; Roberto Bin, 'Italexit? Come si potrebbe fare (Se si può fare)' (2018) 4 QC 813.

implies a change in the whole Constitutional identity[43]. In the light of what was shown pertaining to the doctrinal debates and the jurisprudence of both EU and Italian Constitutional law, it can be argued that the participation in the Union, rather than the Article itself, has become the fundamental principle. Leaving aside the huge (geo)political, economic and social advantages of the interconnectedness with the other members and with the legal personality of the Union itself, Italy and the EU are intertwined from a legal point of view, first and foremost. Article 11, with its sometimes described as "loose" wording, actually provides an interpretative wealth, which has often eased Italy's position both within the EU and the rest of the International legal order[44]. Amending the wording of the article to enshrine this participation might be a possibility, but one must always keep in mind that it is the principle that is supreme. In this sense, the unamendability of the fundamental principles of a constitution, as stated above, does not mean that the way in which the principles are expressed cannot be changed, but that the principles themselves cannot. Changing the wording of a constitution is a delicate task; it can, and often does, generate secondary effects which are unseen at the time of the initial amendment. The next and last section of this chapter will further illustrate this concept by briefly analysing a contemporary debate on a proposed amendment to the Italian Constitution.

1.4. Contemporary Proposals for Change

The 1948 Republican Constitution, as mentioned in a previous section of this chapter, has overseen two main constitutional moments, aptly named "First" and "Second" Republics. The phenomenon of the confirmative Constitutional referendum is wholly exclusive to the Second Republic; the first instance of such an act was in 2001. For this reason, it has been argued that, although the shift from the two Republics in 1994 was not due to a significant Constitutional alteration, the political one was so profound that it impacted the criteria behind the proposition of Constitutional amendments as well[45]. The main purpose of this section will be to highlight the most recently proposed Constitutional Law as per the time of writing this (March 2024), seeking to change the system of government of the Italian Republic, and to conclude the chapter on the Italian legal system. It will be evaluated, as proposed, on its effects on the fundamental principles of the Italian Constitution, if any.

Senate Act n° 935/2023 is a proposed Constitutional law which seeks to amend just four

[43] n° 29 above, 143.
[44] Cristina Fasone, 'QUALE È LA FONTE PIÙ IDONEA A RECEPIRE LE NOVITÀ DEL TRATTATO DI LISBONA SUI PARLAMENTI NAZIONALI?' (2010) 3 OSF 4 https://www.osservatoriosullefonti.it/archivi/archivio-saggi/407-4-cristina-fasone accessed 12 Mar 2024.
[45] n° 33 above, 113.

Articles (59, 88, 92 and 94), all included within Part II of the Constitution. The proposal would maintain the republican form of government, in line with Art. 139, but it seeks to alter the relationship between the Executive, currently represented by the President of the Council of Ministers (PotC, for brevity), and the Legislative, i.e. Parliament. In essence, this law aims at substituting the head of the Executive with a directly elected PotC, in order to ensure that the political will of the citizens through the five-yearly elections is upheld for the full mandate; if the elected PotC were to end their term for whichever reason, a new cabinet could be created only by a MP who upholds the same program with which the governing faction was elected. Moreover, this law would also grant a 55% majority bonus to the list(s) associated with the winning PotC. The proponent of this amendment, the current PotC Giorgia Meloni, defended the proposal under the logic that it would rid the Parliamentary system of the far too frequent switches among the parliamentary parties (and thus the possibility of too many defections "eroding" a solid majority and crumbling it) and grant stability to the system as a whole.

Thus posed, the line of reasoning seems solid enough. The Italian legal community has had instability as a point of concern for quite some time now, given that in the last thirty years the average government only lasted for roughly two years out of the natural five, which is the duration of the Legislature. While this proposal has not been signed into law yet, in fact it is still object of debate among the various government forces that submitted it, it did manage to cause some controversy[46]. As can be imagined, the more radical voices opposing this amendment come from the opposition parties. It is still uncertain whether this proposed amendment will reach a second reading stage and whether it will be put up to referendum, but one aspect of this whole manoeuvre which might appear clear from the onset is that, from this moment onwards, most of the ensuing debates and the resulting vote will be politically motivated. The politics of it all do not fit into the general thesis of this document, so the analysis will be conducted purely through legal lenses.

At a first glance, two fundamental principles seem in jeopardy: the principle of the democratic form of the Republic and the principle of the Separation of powers. The former is put at risk chiefly due to the proposed majority bonus. Its implementation is justified by the notion that it would give the winner of the elections a solid enough majority to form a stable executive, yet apart from one singular word in the description of the proposed law, there seems to be no limitation to how big the gap could be between the winning list or coalition thereof and the therefore obtained majority bonus of 55%, which has no minimum accession threshold. Theoretically, this amendment might also violate two more articles of the Constitution and a Judgement of the Constitutional

[46] Giovanni Lamberti, 'A che punto è la riforma costituzionale' (*AGI*, 12 Feb 2024) https://www.agi.it/politica/news/2024-01-12/riforma-istituzionale-costituzionale-premierato-24790177/ accessed 21 Mar 2024.

Court[47]: Art. 48 posits that the vote must be expressed freely and that each vote has equal weight, which is difficult to imagine when the bonus exists regardless of the vote share and thus a not insignificant number of MPs would see themselves elected just to consolidate the Prime Minister's position. Art. 57 states that the Senate be elected on a regional basis, which is contradictory to the disposition imagining that both Chambers' electoral laws be similarly posed. Lastly, Judgement 1/2014 of the Constitutional Court warns against electoral laws with big majority bonuses, for the express reason that it would cause a dissonance between the votes cast and the actual distribution of seats[48]. The amendment might be subject to these contradictions, but it must be noted that it is in no way definitive and that it can be subject to substantive changes before the second reading in Parliament. It was however necessary to locate these flaws, as they speak to the thesis of this piece, which staunchly defends the idea that uncontrolled or ill-motivated amendments are often harbingers of secondary unforeseen circumstances.

As per the issue of the separation of powers, one must first notice that the main difference between a Parliamentary and a Presidential system is that in the former, the separation of the Executive and the Legislative power is less pronounced due to the need of a vote of confidence, which gives the Executive an indirect electoral legitimation, at the cost of depending on the trust of the Legislative. In the latter, however, the President is directly elected, as is the Parliament, which could create the problem known as "cohabitation" (President and Parliamentary majority of different political colours). This proposition would combine the weak division of powers of the Parliamentary system with the political dominance of both the Executive and Parliament through the majority bonus. This plan, although often wrongly called "Premiership" by the media, is a hybrid of the two systems which, from the onset, seems to radically switch from the actual governmental practice in Italy, contrary to the PotC's best wishes[49]. Some exponents of the Italian legal community are sceptical about this text, with some even arguing that, rather than simplifying the party-political landscape, such an amendment would further enshrine the chaos that has manifested itself in recent times[50].

In conclusion, while no concluding remarks can be made as the text is still under deliberation by Parliament, even a concise analysis has proven sufficient in recognizing the flaws of this Constitutional amendment vis-à-vis the fundamental principles of the Italian Constitution. It has been argued that the season of macro-amendments in Italy is over; in its stead, a plethora of micro-

[47] Francesco Bilancia 'Il c.d. "premierato" all'italiana. A prima lettura' (*Diario di Diritto Pubblico*, 25 Jan 2024) https://www.diariodidirittopubblico.it/il-c-d-premierato-allitaliana-a-prima-lettura/ accessed 21 Mar 2024.
[48] *Judgement 1* [2014] ItCC.
[49] Presidenza del Consiglio dei Ministri, 'Comunicato Stampa del Consiglio dei Ministri n° 57' (2023) https://www.governo.it/it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n-57/24163 accessed 21 Mar 2024.
[50] Stefano Civitarese Matteucci, 'Paving the Way to Autocracy?' (*Verfassungsblog*, 16 Nov 2023) https://verfassungsblog.de/paving-the-way-to-autocracy/ accessed 21 Mar 2024.

amendments can be identified[51]. There is some truth to it, as the last attempts of significantly and substantively change not only the text of the Constitution, but the governmental practices as well (proposed by the Berlusconi and Renzi governments), were decisively rejected at the ensuing referenda. The only other two constitutional laws that were ever put to referendum in Republican history were accepted, but they did not alter the governmental practice in such a drastic manner that the Constitutional foundation of the state could be deemed different. While it is still far too early to attempt to predict the political or legal result of the popular referendum of this law, it can be argued that they would fit into the category of macro-amendments, even though the actual contents of the law are brief and concise. Ultimately, another facet of this issue that is worthy of note is that the referenda that were rejected were politically divisive, while the accepted ones enjoyed a partial but substantive multi-partisan support. Constitutions create countries. As such, both those who argue for total democratization of Constitutions and those who adhere to a more rigorous system of institutional counterbalances must recognize that partisanship is an inadequate and dangerous tool with which to amend them. Rather than being a bulwark against progress, the theory of unconstitutionality of some amendments, especially those modifying the fundamental principles, is the best guarantee for the future; a constitution which forgets its foundational elements loses its value, significance, and *raison d'être.*

[51] n°33 above, 113.

Chapter 2: The Fundamental Principles in the German Constitutional and Legal System

2.1. The Weimar Constitution

The German and the Italian Republics share some striking similarities in their past state-building processes. Both were unified under one name in the second half of the 19th Century, both experienced the evils of totalitarianism in the interwar period, and both built their current Constitutions in open rejection of those times and ideals. This chapter will concern itself with the constitutional structures created by the 1919 Weimar Constitution (*Weimarer Reichsverfassung* - WRV) and by the 1949 Basic Law (*Grundgesetz* - GG). They and their fundamental principles will be analysed in a linearly historical manner, to contextualise them in their periods and to link their achievements and failures to the societies that drafted them. While the temporal scope of the analysis is narrower than in the Italian case, it was crucial to analyse the fundamental principles of the Constitutions that were nominally in power during the bleak totalitarian years, hence the decision to exclude the 1871 *Reichsverfassung* which was abrogated with the post-WWI transition from the Imperial regime to the Republican. The WRV oversaw a destroyed and fragmented country. Post-WWI Germany experienced several social, economic, and political crises, which, coupled with the various weaknesses of the WRV, allowed Germany to descend into totalitarianism. The GG was built to deepen the divide with the past and to create a new nation based on a negative example. It oversaw one of if not the most important moment in contemporary geopolitics, which happened to coincide with a major shift in the German constitutional regime: the reunification of the two polities into which Germany was divided, symbolised by the fall of the Berlin Wall. The first section of this paragraph will analyse the fundamental principles, structure and pitfalls of the WRV, without mentioning the legal details of Adolf Hitler's rise to power, which will be one of the objects of the next chapter. Later sections will discuss the fundamental principles of the GG, with particular regards to its Art. 79, the so-called "eternity clause" and their ramifications on the contemporary German State.

Not unlike the Albertine Statute, the WRV was drafted after a period of deep social turmoil. Immediately after the First World War, factory workers throughout Germany started to organise themselves in Soviets, led and coordinated by the *Spartakusbund* (Spartacus' League). In connection with the Revolution of November 1918, which brought the downfall of the German Empire, the Spartacists wished to give the newborn Republic a decisive communist turn, not unlike what had happened two years prior with the October Revolution in Russia. From the 5th to the 12th of January 1919 the streets of Berlin saw immense bloodshed, as the League clashed in an armed

uprising against the provisional government forces led by Friederich Ebert, of the Social Democratic Party (SPD), helped by the *Freikorps*, a para-military right-wing organization composed of veterans, students and disillusioned citizens[52]. This was the first instance of a social tension that would not see a resolution until all the parties involved were disbanded and outlawed by Hitler. The uprising ended in a decisive loss for the League, which saw both its leaders (Rosa Luxemburg and Karl Liebknecht) killed. The main drawback of these quarrels was that the government did not hesitate to legitimise a para-military formation by employing it to defend the constituted (or, more precisely, the constitu*ent*) order. Moreover, the social tensions that had arisen were so deeply imbued within the German society that even the promulgation of the WRV proved insufficient to placate them.

For these reasons, Berlin was not chosen as the seat for the Constituent Assembly, for its atmosphere would have been too politically divisive; the city chosen was Weimar, for its rich classical heritage[53]. The Assembly, which after the elections acted as a provisional Parliament until 1920, was tasked with drafting the new constitution, passing some urgently needed laws and accepting, albeit reluctantly, the strict conditions set by the Treaty of Versailles. For the sake of conciseness, only the constitution-making will be analysed. The three biggest political formations, the ones which above all the others had the final say on the Constitution, were the SPD, the German Democratic Party and the Christian Centre Party. The WRV was defined as a feat of impressive "constitutional engineering"[54], since it aimed to build a new society from scratch with two negative examples: the past imperial Monarchy and the Russian Soviet Republic. The work was based on the draft composed by Hugo Preuβ[55], a Law Professor from Berlin. Although there was support for both a return to the Monarchy and a shift towards the Soviet regime, the majority of the three parties supported neither and worked towards a democratization of the system, ultimately achieving the WRV as it was adopted on the 31st of July 1919. On that same day, the Minister of the Interior defined the system it created as "the most democratic democracy in the world"[56].

His words were proven wrong not even a mere 15 years later, but they were well founded at the time of the WRV's promulgation. The WRV provided many options for popular engagement, starting with the direct election of the two main bodies: the *Reichstag* (the lower House, representing the whole citizenry) and the President of the Republic (head of State) should have represented both the differing opinions of the German people and their unity under the same

[52] Rudolf Höss, *Comandante ad Auschwitz* (Torino: Einaudi, 1985), 20-23.
[53] Robert Poll, 'The Weimar Constitution' [2020], KAS, 3 https://www.kas.de/en/web/rspno/single-title/-/content/the-weimar-constitution accessed 19 Feb 2024.
[54] Hagen Schulze, *La Repubblica di Weimar: La Germania dal 1917 al 1933*, (Bologna: Il Mulino, 1987), 7-14.
[55] n° 53 above, 5.
[56] Eduard David, Speech at the Weimar National Assembly on the 31st July 1919. Available at https://www.reichstagsprotokolle.de/ Blatt2_wv_bsb00000013_00070.html

figurehead, respectively[57]. Although the Parliament was representative, some elements of direct democracy were planned by the WRV: popular action could not only resolve conflicts between the two Houses of the Parliament, but it could also annul an existing law if so requested by a third of the *Reichstag* or by the President of the Republic[58]. However, the thresholds required by Art. 73 were too stringent to allow a significant involvement of the public in the lawmaking process. In general, the fundamental principle of democracy was employed not only in Part I, which described the roles and duties of the State, but also in Part II, which contains a comprehensive bill of rights, covering major areas such as: education, religion, economic life, and collective life. Art. 76 forced a special procedure and a higher majority for constitutional laws, making the WRV more rigid than the Albertine Statute.

It would be reductive and erroneous to shift the blame for the failure of the Weimar Republic on the WRV alone. Extensive research has been conducted on the social, historical, and economic developments which led Hitler to grasp power; for the purpose of conciseness, not every facet of this condition can be evaluated here, although some context is necessary. First and foremost, the conditions set by the Treaty of Versailles were extremely stringent on the newborn Republic, which, *inter alia*, not only had to pay the staggering amount of 132 billion *Goldmark*, but saw also part of the French army occupy the valuable *Ruhr* region, further endangering the already struggling economy. The economic struggles were mostly summarised by the rampant hyper-inflation, which saw its apex in the 1929 global crisis. This was the poor frame which the divided German society had to collectively endure: the *Reichstag* would prove the wrong arena to do so.

Falling into the classification of a constitutional, rather than socio-politico-economical shortfall, the organisation of the *Reichstag* did not help in placating and stabilising the ever-growing social unrest. The electoral law was founded on the principle of proportional representation, yet it did not establish a threshold to access Parliament[59]. This meant that every small formation had a small number of representatives, resulting in either weak majority governments which were prone to collapse or weak minority governments which did not have the parliamentary numbers to actually operate and stayed in power only because of an explicit lack of a vote of no confidence[60]. In essence, rather than being a peaceful arena in which dividing issues could be debated, the poor organisation of the *Reichstag* translated the popular fragmentation into parliamentary fragmentation. It incapacitated the Government and accrued the President's powers, since a Chancellor could see their confidence withdrawn by Parliament, but it was up to the President to

[57] n° 53 above, 3.
[58] *Weimarer Reichsverfassung* (1919), Arts. 73 and 75.
[59] Dieter Grimm, 'Weimars Ende und Untergang', in Horst Drier, Christian Waldhoff (eds.) *Das Wagnis der Demokratie: Eine Anatomie der Weimarer Reichsverfassung* (München: C. H. Beck, 2018), 280.
[60] n° 53 above, 5.

nominate a new one[61].

Although a part of the blame has to be put on the *Reichstag*, especially because the political parties therein were not used to the closer relationship to the Government that the WRV introduced[62], the bulk of the constitutional woes of the Weimar Republic saw their cause in the overarching powers of the President. Art. 48 of the WRV and its loose wording endowed the President with the powers to: "[…] take all necessary measures to the restoration of public order and security, whenever they are being threatened or disturbed in a significant way […]". Within the wording of the same Article, the use of armed forces was not precluded, nor was the suspension of many of the rights being constitutionally granted to the German people. It has been argued that Art. 48 let the President become a "substitute Emperor" whenever he pleased[63]. This imbalance of the Presidential powers made it all too simple for both Friederich Ebert and Paul von Hindenburg to legislate via decree, as the short life of the Weimar Republic was dotted with events that could be recognised within the requisite criteria set out by the Article[64]. Many German constitutional scholars tried to draft policies for reforms which could save the WRV in the critical period which started with the fall of Heinrich Brüning's government in 1930 and ended with the *de facto* ending of the constitutional regime in 1933 with the appointment of Adolf Hitler as Chancellor and the Reichstag Fire Decree. However, the political will of some of the most prominent figures of the political scenario at the time did not align with this view.

The final years of the Weimar Republic saw the importance of the *Reichstag* plummet. Although the idea of a Presidential regime which would formally bypass Parliament was discarded so as not to completely exclude the German people from the constitutional framework, the last two Chancellors of the Republic, Franz von Papen and Kurt von Schleicher, employed a far heavier use of the so-called "25/48/53" formula[65]. Its name refers to three articles of the WRV, which allowed the President to be able to govern within the sphere of legality but without relying on the *Reichstag* through a mixture of decrees and political coercion. In essence, Art. 25 gave the President the power to dissolve the *Reichstag*, Art. 53 stated that the President could appoint and remove the Chancellor, supplying him with a highly coercive weapon against any Chancellor unwilling to collaborate with

[61] This mechanism, fully constitutional and sanctioned by Arts. 53 and 54 WRV, inspired the 'positive motion of no-confidence' active in Germany today: the Parliament cannot remove its confidence in the Government if it does not find an adequate substitute beforehand.

[62] In fact, the 1871 Imperial Constitution did not give the political parties any powers to influence the process of government creation, which was left to be the sole responsibility of the Kaiser. This was different under the WRV, as governments were still appointed by the President, but the parties had a considerable political weight in the decision-making process.

[63] Cristoph Gusy, *100 Jahre Weimarer Verfassung: Eine gute Verfassung in schlechter Zeit*, (Tübingen: Mohr Siebeck, 2018), 202.

[64] n° 53 above, 6.

[65] Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham and London: Duke University Press, 2004), 163.

the measures of Arts. 25 and 48 discussed above. These constitutional machinations, coupled with some irresponsible political choices, were fertile grounds for the growing NSDAP; rather than being the guardian of the Constitution, and in the absence of any other institutional body which could have substituted him in this task (in the absence of a Constitutional Court), the President had decided to mingle with party politics, abandoning this position in favour of a more neutral one at the worst possible time[66].

Although flawed, it would be a mistake to identify the WRV as the sole culprit of Hitler's rise to power. Historians are to this day divided on what role each of the key factors had in Weimar's fall, whether it was the economy or the social divide which was the most prominent driver. However, the institutional account is always given a precise highlighting, given that the Führer came to power in a fully legal way and without resorting to a coup. The objective of this section was not to present a comprehensive review of the short and troubled lifespan of the WRV; it was to highlight the ease with which a constituted power system imploded, using merely the instruments that it codified for itself. Democracy and some sense of individualism was central in the WRV, but it was the fundamental principle of the separation of powers that fell before all the others. As it will be explored in the next chapter, the WRV was amended to accommodate the totalitarian regime that substituted the Republic, but its end is traditionally put before that moment; this goes to show that the wording of a constitution is subordinate in importance to the praxis that it generates, especially when that praxis is actively repugnant to the constitution's core values, which remain then just mere words on paper.

2.2. The 1949 Basic Law and Human Dignity

World War II canonically ended in Europe on the 8th of May 1945, but the three Allied Forces instrumental to the defeat of Nazi Germany had a clear agreement on what the future would look like as early as the 12th of September 1944. The London Protocol, such is the name of the Agreement, sanctioned the terms for the division and areas of influence of Germany once the war would have been over. The Protocol described in great geographical detail the zones into which the defeated nation would have been divided and the military powers who would have occupied them. To the London Protocol is owed not only the division between West and East Germany (the Federal Republic and the Democratic Republic, FRG and DRG respectively), but between West and East

[66] Kim Lane Scheppele, 'Constitutional interpretations after regimes of horror', in S. Karstedt (ed.) *Legal Institutions and Collective Memories* (Oxford and Portland: Hart Publishing, 2009), 263.

Berlin as well[67]. The national borders were restored to the extent of 1937, before the annexations of Austria and the Sudetenland, and a military Komendatura, tasked with verifying any law passed, was imposed throughout the Berlin administrative area, even after the drafting of the GG.

In the midst of the post-war chaos and under the watchful eye of the joint occupation forces, in 1948 the Governors of the 11 West German *Länder* decided to create a panel of experts on constitutional matters, with the explicit aim of drafting what would eventually become the German Basic Law. The Council met on Herrenchiemsee, Bavaria, from the 10th to the 23rd of August 1948. Although the creation of such a council was heavily favoured by the Allied forces, there still was an elected constituent assembly, convened in the city of Bonn, called "Parliamentary Council"[68]. The 11 *Länder* were merged in the FDR on April 8, 1949; the draft version of the GG was approved on May 8 and it entered into force on the 23rd of the same month. The drafters of the GG had three negative examples from which to distance themselves in the composition of the document[69]. They were vivid in the memory of the German people and tackled three pivotal parts of each democratic Constitution.

Firstly, the Council had to avoid a repeat of the Weimar fiasco. The WRV initially seemed like a model liberal-democratic charter, but it lacked an organ laden with the task of "guarding the Constitution". Without such an organ, the initial meaning and principles of the WRV were bent in such a way that the rise of Nazism was enabled without any significant violations of the text of the WRV; the drafters of the GG wanted to avoid a repeat of such an occurrence. Secondly, the new German state, still wounded by the atrocities committed by the previous regime, wished to build itself around the highest levels of human rights protection and the equal treatment of each citizen. Lastly, the division of the German territory, with its easternmost parts under the relentless Communist regime, instilled into the mind of the GG's drafters the notion that the preservation of the *Rechsstaat* was invaluable; as Kim Lane-Scheppele defined it, "[…]like the amputated limb that still generates sensation in the brain[…]", so did the Eastern *Länder'*s distance generate a strong sense of purpose in the Western ones[70].

With these ideals in mind, first the panel of experts and then the Parliamentary Council toiled over the creation of a Constitutional Court that could ensure the proper defence of the values which lacked in these negative models and upon which the future GG and German state would be built. A political concept which would help the Constitutional Court (*Bundesverfassungsgericht* -

[67] Protocol on the zones of occupation in Germany and the administration of "Greater Berlin" (12 September 1944), Art.2.
[68] Donald P. Kommers and Russell A. Millers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Durham and London: Duke University Press, 2012), 7.
[69] n° 66 above, 236.
[70] n° 66 above, 237.

BVerfG) in achieving such a feat is that of the so-called "Militant Democracy"[71]. Inspired by the failures of the Weimar institutions, the German forefathers wished to create a liberal democracy which was strong enough to protect itself from illiberal threats, coming from either inside or outside of the constituted order. Inspired by this concept and Art. 79(3) of the GG, the BVerfG keeps a watchful eye on any act or political group which could potentially transform in an extremist, anti-constitutional threat.

Art. 79(3) is the constitutional base upon which both the doctrine of the Militant Democracy and the limits to the constitutional amendment powers are based. It is sometimes referred to as the "eternity clause" of the GG, and it explicitly prohibits amendments "[…] affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 […]"[72]. Art. 1 states that human dignity is inviolable and grants direct applicability to all the rights and fundamental principles of the GG. Art 20 is about the democratic, social and federal character of the German state and about the principles of popular sovereignty and rule of law. The list of basic rights that follows Art. 1 gives a more detailed understanding of the general notions of protection enshrined in that article. While not under the direct protection of the eternity clause, these fundamental rights are kept under close scrutiny by the BVerfG and are the central point of the GG.

Before delving into the constitutional jurisprudence that links Art. 79(3) to the BVerfG, it is necessary to critically assess the GG from a legal-theoretical approach. The list of rights described by the first articles of the GG are strikingly similar (sometimes even identical) to the same provisions of the WRV granting those same rights to the German people[73]. However, the meaning behind the words attributing the rights is different. While the WRV intended for those rights to be "aspirational" and emanating from the state, the GG recognizes a pre-constitutional status to the basic fundamental rights of people[74]. Contrary to the WRV, the GG treats those rights as inexorably linked to people by nature, rooted in the universal concept of human dignity. Statute law (i.e., positive law) could limit those rights, but it is located on a lower place in the hierarchy of norms. Such limitations can (and have), under the GG, be weighed against the higher constitutional principles. For these reasons, the BVerfG has adopted a "moralistic" view of the Basic Law and its principles, sparking some debates around what is seen as a controversy[75]. In general, however, its rich jurisprudence has defined the GG as an "objective order of values", rejecting the notion of a value-free state and marking a decisive break from the past tradition of legal positivism and the

[71] n° 68 above, 51.
[72] *Grundgesetz für die Bundesrepublik Deutschland* (1949), Art. 79(3).
[73] Cfr., *inter alia*, Art. 117 WRV with Art. 10 GG, and Art. 115 WRV with Art. 10 GG.
[74] n° 68 above, 44.
[75] Cfr. Ulrich K. Preuss, 'The implications of "Eternity clauses": The German experience', (2011) 44 ILR 429, 446.

Begriffsjurisprudenz (conceptual jurisprudence)[76].

The GG does not contain, apart from a brief excerpt on the protection of mothers, any explicit provision towards positive state action in preserving the fundamental rights. They all fit within the well-established negative conception of freedom which has characterised Western state-building and constitutionalism for the better part of two centuries, as of 2024. The BVerfG has, however, developed a solid tradition pertaining to positive obligation. Starting with the seminal *Lüth* case of 1958, the BVerfG solidified the status of the GG as an objective order of rights, but in the same judgement it reached the decision that the GG's objective values (i.e., its fundamental principles) "reinforce the objective values of these rights", extending their reach into private law and thus any agreement contracted among two non-state entities[77]. This so-called "horizontal" or "third party" effect means that, according to the BVerfG, private law is to be interpreted also according to constitutional law, as the effect of the latter "radiates" on the former. The *Lüth* case has also, however, highlighted how the basic rights, framed as an objective value order, concern the common good as well. This means that these values have an independent existence under the GG, and, as such, any action by the State must respect them as well. As a final consequence of this landmark judgement, any individual involved in a claim both against a state entity or against another private individual can, if all the other measures are exhausted, directly appeal to the BVerfG for a judicial review, since these rights are directly applicable and horizontal.

The BVerfG has deepened the jurisprudence on this theory in many other cases: in *Abortion I*, the concept of positive right vs. objective value was clarified, as the latter is about the organization of the polity and society as a whole, while the former relates to a right that any individual can claim from the State at any given moment[78]. They are closely related, but quite different. As to what pertains the work of the BVerfG towards building an objective, normative theory of rights, it has chosen five different paths, all rooted in the social, political and constitutional traditions of Germany: liberal, institutional, democratic, value-oriented and social. It would be impractical to cover all of them in this document, but the main point that has to be understood is that, although there are points of friction among these theories, they are not insurmountable; the judges at the BVerfG can, and often do, choose one theory to apply in a judgement on a case-by-case basis. The German system is not a common law system; as such, it does not employ the *stare decisis* principle and can afford its BVerfG the freedom and might that it currently possesses[79].

[76] Cfr. n° 68 above, 55; Maarten Stremler, 'The Constitution as an Objective Order of Values', (2017) 4 KULR 498.
[77] Lüth Case, 7 *Bundesverfassungsgericht* 198 (1958).
[78] Abortion I Case, 39 *Bundesverfassungsgericht* 1, 73– 74 (1975).
[79] n° 65 above, 62.

After having briefly underlined some of the facets of the complex theory of interpretation of the basic rights employed by the BVerfG (their dual character, their horizontality and part of their normative background), it is necessary to present a brief overview of the duality of how the Court operates, in order to complete the context of this institution. For the purposes of this analysis, it is better to frame the fundamental principles of the GG as "counter-limits", similarly to the Italian case presented in the first chapter. Although the relationship between the BVerfG and the European Institutions will be given greater consideration in the next section of this chapter, it is still important to notice a difference in the actions of the Court when the use of Art. 79(3) is directed internally or externally. Internally, it has been argued that the BVerfG treats the eternity clause just as a safeguard against a new legal rise of totalitarianism. In the seminal *Abhörurteil* case, in which the BVerfG pronounced itself on a proposed constitutional law which would have reduced the protection of the secrecy of telecommunications. Although this case is interesting for many reasons, the main drawback for this analysis is that the BVerfG, in the final judgement, *in abstract* enlarged the principle in jeopardy under the conceptual perimeter of the *Rechstaat* (thus going beyond Arts. 1, 20 and 79), which is one of the intangible fundamental principles of the GG, while *in practice* it did not recognise any violation to the fundamental principle of the limit to constitutional revision[80]. On the other hand, externally, the Court has adopted a much more stringent interpretation of the eternity clause, using it as a natural prosecution of the jurisprudence set by the *Solange* judgments and as a bulwark against the enlargement of the European Communities[81].

In general, the BVerfG has adopted two distinct conceptions of Art. 79(3). When operating within the scope of the German polity, it uses this clause as a mere legal technicality against a repeat of 1933, rendering the criteria for any declaration of unconstitutionality very hard to reach and employing a strictly puritanical view of this Article. When operating on European matters, the Court decides to enlarge the scope and meaning of the eternity clause, giving it a largely progressive view, more in line with the Canadian Living Tree than with the prevalent German legal tradition[82].

The brief overview thus presented should suffice in laying the bases for the meta-reading indispensable for the main thesis of this document. The BVerfG might not be wholly consistent on the normative or judicial bases used in its verdicts, but all of them are consistent on the doctrine of unconstitutional constitutional amendments. Not only is the GG one of the most detailed charters on the matters of limits to the amendments of its fundamental principles, but the BVerfG itself is extremely proactive in its defence of the stated and unstated principles of the German state.

[80] *Abhörurteil*, *Bundesverfassungsgericht* 30, 1 (1970).
[81] Pietro Faraguna, *Ai confini della Costituzione: Principi supremi e identità costituzionale*, (Milano: FrancoAngeli, 2015), 53.
[82] Ibid.

Although it might be sometimes used for different purposes, it is undeniable that the eternity clause and the norms it protects are held in the highest regards by the Court. Art. 79(3) is, as defined by K.E. Heim, "the basic sentence of the Basic Law"; on it, and reflexively on what it protects, rest the whole identity and functioning of the German Federal Republic.

2.3. Why "Basic Law" and not "Constitution"

"Grundgesetz" is not the literal translation of "Constitution" in the German language; that word is "*Verfassung"*. The difference in the naming of the foundational text of the Republic of Germany is not a mere etymological matter; it was a precise and deliberate choice made by the constituent fathers. As was mentioned above, after the Second World War the victorious Allies decided to divide the German polity into various occupation zones. After a transition period and the unification of the Western ones, the separation from the East was felt acutely at both the institutional and the popular level. This notion let the makers of the constitutional charter decide that the name "Constitution" was not adequate, as the full German State was not constituted yet[83]. Therefore, to highlight the provisional status of both the newborn GG and the political division of Germany, the constitutional document was given the name "Basic Law", and the seat of the political power, the provisional capital of the FDR, was identified in the relatively small city of Bonn. Konrad Adenauer, the first chancellor of the FDR, was a strong proponent of both these choices, especially regarding the choice of this capital: although big cities in the West such as Frankfurt or Hamburg would have been more suitable in terms of size and facilities, they would have in all likelihood have remained the capitals of Germany even after the reunification. At the time of the creation of the GG, the division of the country was merely institutional. Germans felt like a single population; even prominent men in the West recognized that Berlin should have been the capital of the whole nation, and that the division would pass; they acted accordingly in creating their institutions. The primary sources acknowledge this position as well: both the original preamble and the original Art. 23 of the GG make an explicit reference to the transitional character of these measures and wish for a reunification of all Germans under one polity.

In November 1989, a monumental event started the chain reaction which would eventually result in the present Germany (and GG). The fall of the Berlin Wall and eventually of the Soviet Union let the communist-backed DDR into a deep economic crisis, rendering the reunification with

[83] Jenny Gesley, 'Anniversary of the German Basic Law', (*Library of Congress Blog,* 23 May 2017) https://blogs.loc.gov/law/2017/05/anniversary-of-the-german-basic-law/ accessed 9 Apr 2024.

the West not only convenient, but outright desirable. The normative basis for the reunification was given by two Articles of the GG and two international treaties: the colloquially called "Two Plus Four Treaty", in which the four occupying military forces renounced any residual claim over the two halves of the German territory, which was once again redefined (following some uncertainties regarding the Saarland in the West and the Polish border in the East), gave Germany its full sovereignty back[84]. The actual unification Treaty between the two halves of Germany was signed even before the Two Plus Four (August 1990, as opposed to September 1990 for the latter), but it did not affect the reunification process, with the exception of the peculiar situation of Berlin[85].

From a constitutional standpoint, the reunification was a monumental event. In hindsight, it was wise to choose Bonn as the provisional capital of the FDR since, after the reunification, there was some uncertainty as to what the seat of government would be. The Treaties designed Berlin as the capital, but many states employ a dual city system, wherein one acts as the capital internationally and the other as the seat of government internally[86]. The dispute was resolved with a vote in the Bundestag and an ordinary law, but this defended Adenauer's thesis: had a more well-established city such as Frankfurt or Hamburg been the capital of the FDR, this debate would have been much more difficult to resolve. Currently, Berlin is both the Capital and the seat of government of Germany. Bonn retained some federal administrative and judicial offices and was awarded the unique title of "Federal City". The transition started in 1991 and its most crucial moment was when the Bundestag moved offices in 1999, permanently operating from the old Reichstag palace from that moment onwards[87].

The predictions in various sections of the GG regarding a united and free Germany were fulfilled; as such, they lost their value as norms and were either abrogated or modified via constitutional amendments. In total, 6 parts of the GG were updated[88], including the Preamble. Art. 146, positing the self-destruction of the GG on the day of the adoption of a new, free Constitution by the German people, was changed only in the recognition of a united Germany; although the GG was chosen as a permanent constitutional charter by the first all-German Bundestag for practical and political reasons, this article serves as a relic of the past and as a way to trigger the primary constituent powers of the German people. Another article referring fully to the reunification of the German people and *Länder* was Art. 23. It was then modified to fully refer to Germany's

[84] Treaty on the Final Settlement with respect to Germany (12 September 1990).
[85] Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (31 Aug 1990).
[86] Cfr. The Netherlands, where Amsterdam acts as the capital but The Hague is the seat of government, or South Africa, with Cape Town as the legislative capital and Pretoria as the administrative one.
[87] 1991 Berlin/Bonn Act (*Berlin/Bonn Gesetz*) (FRG).
[88] They were: The Preamble, Art. 23, Art. 51(2), Art. 135a(2), Art. 143 (EX NOVO) and Art. 146. Franco Bartolomei, *La carta costituzionale della Repubblica Federale di Germania* (Milano: Giuffrè, 2000), 157.

commitment to the EU, thus earning the name *Europa-artikel*.

The article is quite long; it details the view of establishing a united Europe, the involvement of both the German people through the *Bundestag*, the German *Länder* through the *Bundesrat* and the Federal Government in European affairs. As mentioned in the third section of the last chapter, this article saved Germany from constitutional troubles regarding the EU. However, the article makes an explicit reference to arts. 79(2) and 79(3), on the matters of constitutional amendments. The jurisprudence of the BVerfG on European matters is vast and treats the participation in the Union as a fundamental principle of German identity. As mentioned above, however, it is also quite restrictive on the inferences of Community Law into its internal system, having had a long dialogue with the ECJ and having established a rigorous doctrine of counter-limits, much alike the Italian case with the ItCC. The two most recent judgments regarding the constitutional standing of European jurisprudence take their names after the two most recent treaties; they were, in essence, reviews of constitutionality of such treaties. Although both judgments are fascinating and fit into the European tradition of the BVerfG, they will be analysed just as for matters of constitutional amendments and fundamental principles of the GG. The *Maastricht-Urteil* of 1993, which set to review the namesake Treaty and the subsequent amendment of Art. 23 of the GG which transferred some sovereign rights to the EU, was contested because it would deprive the *Bundestag* (and thus the German people) of its political rights, defended under Art. 20 GG. In line with the *Solange* judgments, the BVerfG ultimately rejected the case, since the fundamental rights that Germans enjoy under the GG are also protected at the European level; as such, any European act enforceable in German territory would necessarily be compliant with those[89]. Another such case is the *Lissabon-Urteil* of 2009, which involved a constitutionality review of the Lisbon Treaty (via its German ratifying law) and of the accompanying law, especially on the matters of the transfer of sovereign power to the EU. While the treaty itself did not violate the GG, its accompanying law did so partly, by violating the principle of democracy, protected by Art. 79(3) and thus, under Art. 23 GG, a counter-limit. While the Treaty was approved and passed the constitutional review, both *Maastricht* and *Lissabon* had extensive consequences on German internal Law: both of them warned against a reduction of the competences of the German Parliament, as that would violate one of the fundamental principles of the GG. Although it can be argued that the BVerfG employed a combative spirit against the European institutions, a different view can be outlined: through the various *Solange* and *Maastricht* judgments, the BVerfG did not declare an enlargement and solidification of the European Institutions unconstitutional under the GG, provided that it had the final say as to whether the fundamental provisions of the GG were under threat of being violated; it reflected more

[89] *Maastricht-Urteil*, *Bundesverfassungsgericht*, 89, 155 (1993).

on the reciprocal constraints between the German Government and the European Institutions. It was with the *Lissabon* verdict that the BVerfG recognized the metaphorical "final station" of the functional integration; going forward, the Court at Karlsruhe seemed to have identified a new *fil rouge* of European solidification: no more at the functional and institutional level, but at the political and constitutional one[90].

For a concluding remark, although the GG might never reach the nominal status of *Verfassung*, it is recognizable as one, *de facto*. It has clear and shared fundamental principles and a clear identity, irreversibly shaped by the ghosts of its past. Probably even more solidly than the 1948 Italian Constitution, the GG is a proof that the fundamental principles of a constitutional charter are intangible, yet necessary. The GG needs not to call itself a "Constitution" to be reliable internally and internationally and to have an intrinsic value. Even if the GG were to lose value due to Art. 146, the new Constitution should have different principles; if it did not, it would be the same exact document, albeit under a different lens.

2.4. Contemporary Limitations to Parties and Art. 21

The comparative study on Italian and German constitutionalism thus composed in this text has reached a necessary crossroads. While, in fact, there are no current proposals for amendments to the GG, as is instead the case for the Italian Constitution, another current constitutional development is worth analysing; it can fit nicely as a conclusion for this chapter. In both the Italian and German systems, political parties are held to a high constitutional status. Both the GG and the Italian Constitution recognize them as helpful tools with which the political will of the citizenry is shaped and contributes to the democratic process. However, this is where the similarity ends. For historical and even legal reasons, the life of parties within Germany and Italy are quite different. For starters, many of the current Italian parties are relatively young or have undergone a significant shift from their past counterparts, while a meaningful chunk of the German parties active now have been so, without any monumental changes, since the 1800s[91]. The GG disciplines the existence of the parties with its Art. 21, which has been translated into statutory law with the so-called "Party Law" (*Parteiengesetz*). This final section will concern itself with a current debate on the public financing of parties, starting with a verdict by the BVerfG and enlarging its scope into the analysis of another critical situation, faced by another famous party. Some conclusions on the relationship between the fundamental principles of a constitution and the political actors and will of the citizenry will also be

[90] Lorenza Violini, 'Tra il vecchio e il nuovo. La sentenza Lissabon alla luce dei suoi più significativi precedenti: Solange, Maastricht, Bananen' [2009], 6 https://www.astrid-online.it/static/upload/protected/Viol/Violini_Relazione_Convegno-21_09_09.pdf accessed 19 april 2024.
[91] Cfr., e.g. the SPD, which was founded in 1863.

drawn.

On the 23rd of January 2024, the BVerfG declared that the right-wing extremist party *Die Heimat* ("The Homeland", formerly known as NPD) was to be suspended from both direct and indirect public funding for six years[92]. The court had reason to believe that, both in its aim and in the behaviour of its adherents, the party was unconstitutional due to a repugnance of the fundamental principles of the German order. This is not the first instance in which this party provoked the scrutiny of the BVerfG; the *Bundesrat*, the upper chamber of Parliament representing the *Länder*, had sued the then NPD for a declaration of unconstitutionality, which the BVerfG ultimately rejected in January 2017. The long verdict, the result of four years of work and counting more than 1000 paragraphs, helped identify some core considerations on Art. 21 and what the provisions contained therein on the "free democratic basic order" (*freieheitliche demokratische Grundordnung*) actually entail.

Before delving into some contemporary consequences of these judgments, it is necessary to present a brief evaluation of the system with which public funds are allocated to parties and the instrument known as the "Party ban" (*Parteienverbot* - PV), which is, in the words of the Court, "the sharpest weapon a State has against an organised enemy"[93]. Public funding of parties in Germany is understood to be part of the financing that these constitutional actors enjoy for the activities imposed upon them by the GG[94]. Various forms of funding are contemplated: directly, the parties can receive payments in proportion to the amount of votes received (with a threshold of 4 million, after which the contribution is reduced to not give an unfair advantage to bigger parties)[95] or lawful donations received (with a limit of 3.300€ per natural person). Indirect public fundings comes primarily through the way of a 50% tax reduction on all the fees related to party membership, with an upper limit of 825€, or 1650€ from the taxable base for higher expenses[96]. In general, although the principle behind the public funding of parties is that of the financing of a public service, both the GG and the BVerfG have been clear on the fact that parties can and should survive on their own, without being dependent on the State for the financial cover of all their activities (*Staatenfreiheit*)[97]. On this topic area, the absolute upper limit of public funding available to all parties to share among themselves is linked to a price index, to cover the hidden costs of

[92] *Bundesverfassungsgericht*, 'The Party *Die Heimat* (Previously NPD) is excluded from state funding for six years' (2024), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2024/bvg24-009.html accessed on 20 Apr 2024.
[93] *NPD-Urteil, Bundesverfassungsgericht,* 2 BvB 1/13 (2017), Headnote 1.
[94] Thomas Schmitz, 'Political parties and their funding in Germany', (2019) 12 JOTULA 86, 88.
[95] 1967 Political party agreement (*Parteiengesetz*) (FRG), Art. 18.
[96] 1934 Income Tax Act (*Einkommensteuergesetz*), Arts. 10 and 34.
[97] n°94 above, 89.

inflation, and in 2021 was set at €200 million[98]. The concept of *Staatenfreiheit*, embodied in the *Parteiengesetz*, entails that no party can receive from the State more than it can raise on its own through membership fees, private donations and "other activities". This means that no more than 50% of the total reveue of the party can come from the state; coupling this with the fact that all parties need to be factored within the division of the total grantable amount and the thresholds of votes and donations, leads the biggest parties not to rely on state funding that much, while it helps the smallest parties not to play at a disadvantage.

Many scandals about party finances rely on matters of private funding, which would be too broad an analysis for this section. Another instrument which falls under the competences of constitutional law is, however, the PV mentioned above. Pursuant to Art. 21(2) GG, the BVerfG can ban any party deemed unconstitutional if it tries to subvert the free democratic basic order. The jurisprudence on this topic is clear, as the PV has only been employed twice, as of 2024. Firstly in 1952, the BVerfG ruled on the unconstitutionality of the Socialist Party of the Reich (*Sozialistiche Reichspartei* – SRP), a political movement of clear nazi inspiration which was starting to get some political momentum at the regional level, gaining a not insignificant number of seats at the State Parliament of Lower Saxony. In general, the judges at Karlsruhe declared the unconstitutionality not only because of the clear aim of the party to re-instate the nazi regime, but on some other legal grounds as well[99]. Firstly, the concrete willingness of the party to abolish the constituted institutional order (*Regierungssystem*); secondly, the judges underscored the lack of a need for the threat to be uniformly spread throughout the national territory for it to be concrete, as the power that the party enjoyed in Lower Saxony was sufficient to have an impact at the federal level. Lastly, and following the criminal law concept known as "abstract danger", the judges employed the past experiences of the leaders of the SRP, its electoral program and its undemocratic internal structure to rule against the constitutionality of the party under its pursued aims[100]. This primordial definition of the free democratic basic order was strengthened in 1956, the last use of the PV against a political formation. The BVerfG ruled on the unconstitutionality of the Communist Party of Germany (*Kommunistische Partei Deutschlands* – KPD) not only because it too was against some fundamental principles such as democracy and freedom of expression, but because It had a behaviour that was "actively riled and aggressive towards the current legal order"[101].

[98] Nette Nöstlinger, Cornelius Hirsch 'Political party funding in Germany explained' (*Politico*, 29 Jul 2021) https://www.politico.eu/article/political-party-funding-in-germany-explained/ accessed 23 Apr 2024.
[99] *Bundesverfassungsgericht*, 'Statement by the Press Office of the Federal Constitutional Court' (1952) < https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/1952/bvg52-059.html> accessed 24 Apr 2024.
[100] A. Gatti, 'Il PARTEIVERBOT e la nuova incostituzionalità a geometria variabile nell'ordinamento tedesco', (2017) 3 AIC 11.
[101] Ibid.

In the 2017 judgements rejecting the unconstitutionality of the NPD, the BVerfG stated that, for the PV to be used successfully, there must be both a concrete threat to the *Regierungssystem* and an abstract and ideological threat towards one or more of the fundamental principles of the state. With this, since the KPD verdict it has been clear that the PV is not an instrument to crush the individual ideological dissent, nor is it used against mere anti-establishment movements; there must be a concrete element and it must be discernible from an organization's actions or its stated aim[102]. Both verdicts against the NPD/*Die Heimat*, the rejected one in 2017 and the accepted one in 2024, show that the Court has since evolved its stance vis-à-vis the element of concreteness of the PV. As the clear-cut distinction between unconstitutionality and constitutionality did not allow for many degrees of interpretation and, although the ideological opposition was manifest, the NPD's situation in 2017 did not meet the criteria of proportionality for it to be considered a concrete threat to the free basic democratic order. After this judgment, Art. 21(3) was added to the GG, giving the BVerfG a clear instrument with which to differentiate between different shades of unconstitutionality. In fact, not even a mere 7 years after the failed judgment, the NPD was punished for what the court already accused them of in 2017[103].

The evolution of the criteria of proportionality and concreteness is the most interesting from the point of view of the fundamental constitutional principles. In fact, while it is clear that a direct and physical opposition to the basic principles of the constitutional order is to be fought under a system of "militant democracy", the approach towards a mere ideological dissent is trickier. The amendment to art. 21 GG, completed in 2017 and implemented through a modification to Art. 18 of the Political Parties Act, and the shift in the BVerfG's mentality towards the criteria of proportionality have shown that a democracy should transform to avoid its demise[104].

The current scandals that are plaguing the far-right party Alternative for Germany (*Alternative für Deutschland* – AfD) have sparked some debate on whether the BVerfG will impose some degree of unconstitutionality to it as well, especially after having already shown its capability and potential to bar a party of their public funds. However, in light of what has been shown until now and the fact that the AfD is much more popular than the NPD, it is not unreasonable to suppose that a ban on the public financing of the AfD without a concurrent suspension from the political scenario could reinforce the democratic crisis that such parties are causing, rather than ease it[105]. The decision to sue the AfD before the BVerfG will be entirely political, provided that no concrete

[102] n° 100 above, *op. cit.* p.13.
[103] Andrea Gatti, 'Niente soldi ai neonazisti: prima applicazione del blocco dei finanziamenti ai partiti anticostituzionali in Germania' (*Diritti Comparati*, 19 Feb 2024) https://www.dirittocomparati.it/niente-soldi-ai-neonazisti-prima-applicazione-del-blocco-dei-finanziamenti-ai-partiti-anticostituzionali-in-germania/ accessed 23 Apr 2024.
[104] n° 100 above, 22.
[105] n° 103 above.

element is found that can link the party to a clear violation of Art. 21(2) GG or the *Parteiengesetz*. What is not left to politics, however, is the fact that, in a period of inability or crisis of the democratic institutions, the judicial ones need a clear and solid basis with which to assess the situation. The fundamental constitutional principles, therefore, retain their status of supra-constitutional norms especially in such moments and can, arguably, even give the constitutional courts a mandate with which to interfere with politics. All the democratic institutions cooperate in the fight against the enemies of democracy; if some are incapacitated, the burden of maintaining the core values of a state falls necessarily on the others.

Chapter 3 - Constitutional Weaknesses and Democratic Backsliding

3.1. Introduction

After the comparative overviews of the Italian and German constitutional paths presented in the last chapters, this final one will seek to analyse the relationship between the changes to the fundamental principles of a constitution and the resulting metamorphosis of the political system that those charters oversee. However, before delving into the analysis, a brief preamble is necessary. To further its main argument, this chapter will evaluate the legal actions undertaken by two brutal dictatorships in order to legitimize themselves. This chapter will not assume that these regimes did not employ a large scale and, at times, illegal use of armed force, and that the legal actions were used mostly to legitimize situations that were created outside the legal-political sphere. There is a rich literature on the historical circumstances that let these regimes exist and the tools that they used to gain the support of their populations[106]; the law was merely one among many. This chapter will also analyse the current situation of democracies worldwide; it will not, at any rate, imply that any change to the fundamental constitutional principles of nations will inevitably lead to authoritarianism and totalitarianism, because such transitions, as stated above, require an external action as well. What will be implied, and what has already been presented in the previous chapters, is that changing the fundamental principles means changing the essence of the constitution itself; even if another liberal-democratic charter is created, such a transition unavoidably results in another constitutional regime; the prime example of the French transition between the Fourth and Fifth Republics show that, while liberal democracy may not be lost, the governmental and institutional nexus changes in nature.

This chapter will analyse the close relationship between the fundamental principles of democratic constitutions and the "democratic wellbeing", i.e. the strength of the principles of democracy within the constituted system of citizens and institutions, of the countries where they are respected. It will do so by unifying the studies of the last chapters and instead marking the divide on the cleavage between past and present. The first section will entail an analysis of both totalitarianism, specifically the Italian and German experiences, and constitutionalism, specifically the concept described by Costantino Mortati as "Resistance Constitutions", i.e. those European charters born after and in complete rejection of a totalitarian experience. It would be impossible to weigh every detail of the multifaceted concept that is totalitarianism; the focus will be put mostly on the legal side, on the permeability between the "Party" and the "State", as Hannah Arendt posited

[106] Among the scholars cited in this chapter, a particular regard must be paid to Renzo De Felice for his works; English language treatises on Italian history have been composed by Denis Mack Smith.

when describing this phenomenon[107]. In doing so, the second section will delve into the legal moments in which the permeation of the Party into the State was legitimized (as will be shown, the Fascist experience never completed such a step, becoming an incomplete totalitarianism at best and a "common" nationalist dictatorship at worst), both of which happened after the elite grasped power through often extra-parliamentary means. The third section of this chapter will instead give a definition of the contemporary democratic backsliding, not only in the substantial sense, i.e. many democracies turning into authoritarianisms or *de facto* illiberal democracies, but also in a procedural sense, i.e. the loss of the practices derived from the basic tenets of democracy, often embodied by the fundamental principles of democratic constitutions. The fourth and last section of this chapter will argue that modifying the fundamental constitutional principles of democratic constitutions means legitimizing the ongoing democratic backsliding, in the sense of the loss of the democratic wellbeing of the political system and the polity itself.

3.2. The "Resistance Constitutions": Overcoming the Legacy of the Fascist *Ventennio* and the Third *Reich*

It is important to underline that the Italian and German experiences differed in their nature of totalitarian regimes. Although both of them tend to be lumped together as totalitarian regimes, a more useful conceptualization would be to put them on a spectrum, as Fascism in Italy never reached all the necessary steps to be a totalitarianism by definition[108]. In fact, the etymology of the term can be traced back to the Latin term "*totus*", meaning "whole". Totalitarian regimes seek to permeate each power structure in the apparatus of the State and use it to control every aspect of a citizen's life. In general, six characteristics have been highlighted as the necessary drivers of totalitarianism (it could be argued that these are its fundamental principles): a complex ideology, encompassing every fundamental aspect of a person's life and finalized towards a final stage of humanity; a single mass-party led by a single man, consecrated to the ideology; a system of terror, both physical and psychical, used against the enemies of the regime, both internal and external; a technocratic monopoly over communications of whichever nature; a similarly technocratic monopoly over armed force and combat; a centralized control of the entire economy via a complex bureaucratic system[109]. All of these principles have to coexist for a regime to be defined as "organically" totalitarian: even contemporary liberal democracies have a monopoly over armed

[107] Hannah Arendt, *The Origins of Totalitarianism*, (2nd edn., Cleveland and New York: World Publishing Company, 1958), 398-400. See also, p. 370, *op. cit.* 76.
[108] Renzo De Felice, *Mussolini il Fascista: L'Organizzazione dello Stato Fascista. 1925-1929*, (Torino: Einaudi, 1968), 9.
[109] Carl J. Friedrich and Zbigniew K. Brzezinski, *Totalitarian Dictatorship and Autocracy*, (2nd edn., Cambridge: Harvard University Press, 1965), 22.

force, but they cannot be described as totalitarian regimes. Both democracies and totalitarianisms, in order to be actualized as such, have to abide by a complete and intertwining set of fundamental principles: in a latter section of this chapter it will be argued that polities which disregard their democratic wellbeing enough to oversee some of its fundamental principles, but do not complete the transition towards authoritarianism or totalitarianism (known in political science as "hybrid regimes") may, albeit counterintuitively, treat the law as a valuable instrument to legitimize a *de facto* illegal situation, created via extra-parliamentary means.

Within such a definition of totalitarianism, it is not difficult to recognize why Hitler's regime is often cited as the ideal-type of this governmental system[110]. Not only was the National Socialist propaganda machine extremely well-functioning and far-reaching, but the radicalisation of the ideology deep within the atomized essence of each citizen could be ascertained both by the true faith that Hitler and his elite had in the ideology, emerging both by their written memoirs and by the *Führer*'s public speeches[111], and by the completion of the process known as "*Gleichschaltung*", translating roughly into "equalization" or "standardization"; it encompassed the political, social and cultural lives of each German[112]. Such a singularity did not manifest itself in Italy, not from a procedural nor from a substantial point of view. From the substantial point of view, the Italian State managed to keep some of its traditional power structures: for starters, the King Victor Immanuel III of Savoy was still the Head of State (with Mussolini as Head of Government); at least nominally, the stability of the Fascist Government depended on him as well. Secondly, but maybe more importantly from the perspective of a complete totalitarian regime, wherein the ideology is supreme and superior to every person and everything, the Pope was still the head of the Catholic Church. Thanks to the 1929 Lateran Treaty, the newly established Vatican was granted a monetary compensation and the recognition of its statehood at the international level, which left the Church operate almost indiscriminately. This meant that both the State, headed by the King, and the Church, headed by the Pope, could still influence the Italian people. The procedural point of view is linked to the substantial weaknesses that the Fascist regime had to endure: constitutionally and culturally, due to the immovable presence of both a different Head of State and a different source of culture, the Fascist regime was never able to complete the legal transition in the smooth manner with which Hitler's National Socialists did, marking Mussolini's rule as an "imperfect" totalitarianism[113].

Another aspect of divergence between the Italian and German regimes is their conception of

[110] Cfr. Leonardo Morlino, 'Autoritarismi', in Gianfranco Pasquino (ed.) *Manuale di Scienza della Politica*, (Bologna: Il Mulino, 1986), 142-143.
[111] n° 107 above, *op. cit.* p. 256, *op. cit.* p. 309.
[112] n° 107 above, 407.
[113] Another example is presented by the oath that the soldiers, scholars and eventually all citizens had to swear: in the German Case it was loyalty to the *Führer* alone, in the Italian case it included the King, his successors and even the Albertine Statute.

the world and its relationship with their ideology and its aims. While a totalitarian regime does have a strong focus on its country of origin, with the explicit aim of making it "great" under the ideology and the leader, it must have a solid external action organization as well. In general, historians agree that Hitler's foreign policy was more rooted and decisive than Mussolini's[114]. Hannah Arendt herself, in describing the multifaceted organization of a totalitarian society, posited that a totalitarianism cannot, after having seized power, become strangled by the borders of its former national State[115]. The example set by Hitler is once again predominant: in 1924, almost a full decade before establishing the fullest extent of his rule, he outlined the fundamental principle of a totalitarian state's foreign policy: it should be submitted to the ideology and it should aim at becoming a World Power, for that is the only guarantee upon its survival. As Hitler put it, "a World empire on a national basis"[116]. Mussolini's foreign policy was nowhere near this level of decisiveness. Historians have argued for some time about the extent and the organization of the *Duce*'s foreign policy; most of them agreed that, while some elements of coordination and a political *fil rouge* was present, especially in the later years of the *ventennio* and particularly after the Ethiopian war, it was clear that Mussolini had no definite blueprint and that he subordinated the foreign policy to the successes of the internal and economic ones[117]. In fact, while the *Führer* established his rule and ideology and then proceeded to expand his regime outwardly, the *Duce* used his foreign policy plans as a tool to help complete the Fascistization of Italian society, with often dubious results. The Fascist ideology itself, from its inception, did not have much of an internationalist view. Many members of the Party, in fact, argued that the country needed a "moral" and "institutional" revolution, rather than a *tout court* approach such as the German one, which essentially disregarded any shape of liberal constitutionalism[118]. This did not help Mussolini's case: if the ideology itself does not transcend the nation-state's border, the totalitarian foreign policy, in principle subordinated to it, cannot possibly be as effective a servant as it would be if the ideology had a reason to employ displays of force internationally. In general, the same reasons as to why a totalitarian regime cannot ever take root in a small country, for lack of a mass society and for lack of the military means for outwardly expansion, might apply also to an interpretation as to why Fascism never completed the transition towards becoming a full totalitarianism.

These political and historical notions are useful to understand the relationship that both these polities would have with the legal instruments at their disposal. While Hitler was essentially free to

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[114] Cfr. Renzo De Felice, *Mussolini il Duce: Gli anni del consenso. 1929-1935,* (Torino: Einaudi, 1974), 331-332; Stephen C. Azzi, 'The Historiography of Fascist Foreign Policy' (1993) 36 THJ 187, 202-203.
[115] n° 107 above, 389.
[116] Adolf Hitler, *On the Defence and Expansion of Germany*, [1924]. Available at https://www.thelatinlibrary.com/imperialism/readings/hitler.html accessed 10 may 2024.
[117] n° 114 above.
[118] Renzo De Felice, *Mussolini il Fascista: La conquista del potere. 1921-1925.* (Torino: Einaudi, 1966), 312, 449.

mould his *Reich* into whichever form was necessary to attain his ideology, Mussolini had to avoid the constraints implicitly set by the presence of other parallel power structures to his regime. Both, however, looked at the law with the goal of finding their legitimization. As will be discussed in greater detail in the next section with the analyses of specific legal actions, and although both regimes often legislated after a *fait accompli*, the legal frameworks that they managed to create have been remarkable: not only were they solid enough to justify and enact the foundational precepts of totalitarianism, but they could be considered a whole new system altogether, standing in the middle ground between flexibility and rigidity[119].

The notions of totalitarianism thus presented should suffice in highlighting the true character of the charters that sprouted in Europe in the immediate aftermath of WWII. The "Resistance Constitutions", in open opposition to the regimes that wounded their predecessors and their countries, were designed with a diametrical shift in their values and principles, although the historical backgrounds of their drafting were slightly different, as analysed in the last chapters; in fact, while the Italian Constitution was drafted by the same Italians who had resisted Fascism, the German Basic Law was drafted under a mounting international pressure. Both charters, however, resisted totalitarianism in their aims and principles. While the institutional assets of the States involved in this huge constitutional moment might not have undergone a big political shift, especially vis-à-vis the role of Parliaments[120], the same cannot be argued from the substantial ground upon which these new constitutions were built. Starting with the analysis of both the Italian and German history presented above, there have been at least three identifiable breaking points between the totalitarian practices and the newly rebuilt liberal democracy.

First of all, the new Constitutions were deeply internationalist[121]. They were carefully constructed in order for both polities to engage in International Relations in a peaceful manner, as opposed to their aggressive behaviour in the interwar period. Generally, and including also those states which were not among those which had to rebuild their interiors after the War (chief among these is the U.S.), three models for constitutions to approach international relations and international law have been identified; firstly, there may be a Convergence approach, wherein the Constitution is considered a site for implementation of international norms within the polity, especially concerning the rights of the individual[122]; secondly, constitutional law can move in the opposite direction: a Resistance approach towards external laws and practices has been employed especially towards economic matters and contrasting globalization[123]; lastly, the Engagement model posits that,

[119] n° 107 above, 394.
[120] Costantino Mortati, *Lezioni sulle Forme di Governo*, (Padova: CEDAM, 1973), 222-223.
[121] Vicki C. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 HLR 109, 113.
[122] ibid.
[123] ibid.

without treating them as binding, transnational sources are seen as offering another perspective on one's own constitutional practices and principles and thus are a useful comparison for constitutional lawyers[124]. To mark the divide of the totalitarian principle of prevarication and expansion, among the new fundamental principles of these democratic charter sat a respect-based approach of international jurisprudence[125], irrespectively of the degree of interaction between it and the nation itself.

Another point of contempt between the post-1945 regimes and their predecessors is the formers' deeply rooted respect for human and individual rights. This phenomenon has a clear explanation: as stated above, a totalitarian state does not consider single citizens, rather a mass of atomized individuals. Therefore, these dictatorships did prevaricate the individual and human rights of their populace, especially when upholding them meant redirecting effort and resources that would otherwise have gone towards the preservation and advancement of the ideology. Apart from this conceptual note, the drafters of the new documents had a clear memory of the practical atrocities that were committed during the war in the countries occupied by the Axis powers; while a totalitarianism actively disparages and counteracts the rights of the individuals, these new constitutions, with the shining example of the 1949 German Basic Law, made it a fundamental mission to preserve the re-acquired individual rights of their citizens.

A third and final cleavage between the two regimes is the approach towards the rule of law. Although it may seem paradoxical, as the first two sections of this chapter set to analyse the legal effects and actions of two brutal totalitarian leaders, the rule of law was not given prevalence, but it was crafted with care. Public lawyers of both regimes realized that they had given origin not to a new legal order, but to a "totalitarisation" of the old one; as such, the initial jurisprudence was meticulously crafted to be as accommodating to the regime and its ideology[126]. In general, however, the law was not held in the high regard it currently enjoys, as totalitarian regimes find part of their legitimacy by rallying the mass against an internal enemy chosen almost arbitrarily: this essentially creates two classes of citizens, i.e. those who possess the undesirable trait that the ideology wishes to suppress (the prime example is the campaign against Jews brought forward during the Third *Reich*) and the "model" citizens who do not. Modern rule of law, enshrined in the concept of the hierarchy among the sources of law and in many fundamental constitutional principles, behaves radically differently. Not only is every citizen treated according to the same standards, but nothing is left to the whims of an ideology and the laws stem out of a cooperative endeavour among different groups of citizens with different interests, so that the resulting law is as broad and

[124] n° 120 above, 114.
[125] Chief example is Art. 11 of the Italian 1948 Constitution, cited in Chapter 1 of this dissertation, p. 16.
[126] n° 107 above, *op. cit.* p. 398.

universal as possible. Between totalitarianisms and democracies, the cause-effect nexus between a statute and its resulting norm is inverted. Democracies create norms from existing laws, totalitarianisms legitimize existing norms by creating new laws.

3.3. The *Leggi Fascistissime* (esp. L 2693/28) and the August 1934 Referendum

For temporal reasons and by the *Führer*'s own admission, the Fascist regime was an inspiration for its German ally, when the latter was still in its embryonal stage[127]. While some of the differences in their nature have already been explored, it is interesting to notice how they reflected in the political praxis that both these new systems generated. In fact, since consolidating their power and up to 1938, the number of public consultations that the regimes employed (as will be explored later, the lines between "elections" and "plebiscite" were blurred) were different for a variety of reasons. In Italy, only two election-plebiscites (March 1929 and March 1934) were held after the one which conventionally saw the end of the liberal regime of the Albertine Statute in 1924; moreover, they were held not in response to a *fait accompli* or a particular political event, but at the end of the normal five-year term of the legislature. Hitler, on the other hand, called Germans to the urns approximately once per year in the span from 1933 to 1938. The reasons for this difference in public engagement are various, but it can be argued that the nature of the totalitarianisms in Germany and Italy played no small part in these choices. While Hitler needed a continuous and unwavering mass mobilization and a co-dependent support for his regime, in line with his *Gleichschaltung* policies, Mussolini had to make amends with various strata of the Italian population and State machine in administrating his territory. He was not as free as Hitler in calling Italians to the polls, knowing that both the Pope and the King could have potentially swayed public opinion, if they felt threatened by any Fascist policy or ideal[128].

This section will concern the stabilization of the Italian and German totalitarianisms through legal means. It will weigh their legal actions at the end of their struggle for control, arguably the "point of no return" for both Italy and Germany. According to what was argued in the last section and considering that both the Albertine Statute and the WRV were nominally still enforced during these dark years, it is logical to deduce that the Fascists' and the National Socialists' struggles for control ended when they became the apex of the constitutional systems of their respective states. In Italy, this happened on the 9th of December 1928; in Germany, it happened on the 19th of August

[127] Above all, Hitler was captivated by the March on Rome of 1922, which inspired the failed 1923 Beer Hall Putsch in Munich, and by the Roman Salute, which Hitler then morphed into the more famous Nazi Salute. Alan Axelrod, *Benito Mussolini* (Indianapolis: Alpha Books, 2002), 8.

[128] This proved to be true, as noted by the request by the Holy See to add 26 candidates to the list of the 1929 elections. N°108 above, *op. cit.* p. 474.

1934. These legal actions were the epitome of a series of past laws and extra-parliamentary actions, which ensured that the social and political machinery was already in place for the leadership to use once ascended to the rank of highest constitutional office. Those laws will not be ignored, but for reasons of conciseness will not be given the same space as the legal acts which are object of this section.

The event known in the Fascist doctrine as the "Revolution" happened in Rome, on the 28th of October 1922. A group of supporters of Mussolini, coming from various social strata, marched on the streets of the Italian Capital and, as a consequence, King Victor Immanuel III nominated Mussolini as President of the Council of Ministers. As early as 1923 the political manoeuvres of the Fascist Party (*Partito Nazionale Fascista* – PNF) became evident: to each state organ, there existed a shadow organ inside the ranks of the PNF[129]: e.g. for the Council of Ministers there was the Grand Council of Fascism (*Gran Consiglio del Fascismo* – GCF), for each local governor there was a political commissioner from the PNF. While at first these organs remained contained within the organization of the PNF, after the elections of 1924 a series of laws aptly called "*leggi fascistissime*" (literally: "most Fascist laws") proceeded to legitimize them into the institutional tapestry of the Italian State. Especially worthy of note from a constitutional standpoint are L. 2263/25 and L. 100/26, the former of which forced the Italian State to be hyper-reliant on the Executive power, embodied in the *Duce*, which saw its competences increase and its counterbalances disappear. In fact, while the President of the Council became the sole responsible of the political direction of the Council of Ministers, leaving the position of a *primus inter pares* and ascending to a superior rank, he also gained the power to control the discussions and deliberations in Parliament and removed the latter's faculty to withdraw its confidence in the government, answering thus only to the King alone. With the latter law, the Executive branch arrogated to itself the power to emanate judicial norms, bypassing the need for a Parliament altogether[130].

L. 2693/28 was a natural continuation of the path taken by Fascist jurisprudence. This law legitimized the position of the GCF, making it the highest constitutional organ and heavily changing the already defaced Albertine Statute for good. In its pre-legal existence, from 1922 to 1928, the GCF was nominally just a private association within a single political party; this facet of its existence was quickly followed by an initial "public" function, as the first Fascist Ministers and politicians which were starting to occupy key positions in the Italian government still had to attend

[129] Rocco D'Alfonso, 'Un'ambiguità istituzionale: il Gran Consiglio del Fascismo (1923-1928). Problemi e Prospettive Storiografiche' (1991) 3 S&P 89, *op. cit.* p.93.
[130] n° 108 above, 162-163.

the GCF's meetings[131]. This ambiguity helped the GCF to become the focal point of the (incomplete) permeability between the PNF and the Italian State; it is then clear to see why, fully in line with the Fascist tradition to legislate *ex post*, this organ was "constitutionalized" to manage the same tasks that it managed "unconstitutionally"[132]. The aspect that sets apart the constitutionalizing of the GCF from all the other organs of the PNF is that the entrance of the GCF into the Italian Constitutional order meant that the whole party was officially represented at the highest levels of governance. The *Duce* himself admitted that the PNF was not and could not ever have been a "State organ"; however, since the Party was a fundamental portion of the social and civil lives of Italians, it had to be legally recognised; the GCF proved a great representative for the Party into the legal life of the country. Its apical position among the sources of Italian law meant that, through it, the PNF was free to contest the lower public organs in case of non-compliance. While the March on Rome might have introduced Fascism into the minds of the Italians, L. 2693/28 was the step that brought the regime as close to being a true totalitarianism as it ever would be. The various contradictions, inherent to many prominent members of the PNF, surfaced not only at the inception of the power, but also at its demise[133].

The law attributes the particular constitutional status of "supreme organ" to the GCF in its first article. Subsequently, the competences of this organ are detailed in Arts. 11, 12 and 13. Art. 11 specifies the deliberative functions of the GCF, which approves the political direction of the Party, its leadership, and the names of the deputies of the lower Chamber of Parliament; Arts. 12 and 13 detail the advisory functions of the GCF as a constitutional organ: its advice had to be requested obligatorily on each matter of a constitutional nature. This was a gigantic leap forward in the Fascist jurisprudence; essentially, what had merely been left to a Parliamentary convention since the promulgation of the Statute in 1848 was codified into positive law: the difference between a constitutional law and an ordinary law, plus the creation of the concept of the "matter of constitutional character"[134]. The Fascist doctrine has been uniform in acknowledging the newfound strength of the GCF, but also in recognising that the role of this organ was to be reconciled with the idea of the "Third Phase" of the Revolution that the *Duce* had in mind: the creation of a new, Fascist constitutional charter[135]. The GCF was therefore seen as the organ which more than any other would be able to channel the spirit of the fascist constituent power and transmit it into a coherent document, which would have reigned over Fascist Italy better than the Albertine Statute ever could.

[131] n° 129 above, 98.
[132] n° 129 above, 99.
[133] n° 129 above, 100.
[134] Nicola Macedonio, *Il Gran Consiglio del Fascismo: Organo della Costituzione*, (Roma: Angelo Signorelli, 1937), 46.
[135] n° 134 above, 99.

This law was enacted to give the fundamental principles of Fascism an adequate system into which all the necessary institutions and laws would have found their place[136]. In general, the GFC had a full competence into each matter of constitutional nature; differently than socialist and liberal-democratic states, the Fascist state was corporativist in nature. This principle, coupled with the fact that every reform had as its centre the Head of Government[137], would have emerged in the new charter as a fundamental aspect of the regime. The case of the GCF is exemplary in demonstrating both the split between the liberal-democratic regimes and Fascism and the main thesis of this dissertation in two different ways. Firstly, as per what concerns the legal split between the two regimes, it all lies, as stated above, on the relative succession between the action and the jurisprudence: both ordinarily and constitutionally, a liberal-democratic state employing the rule of law legislates *ex ante*, setting a principle or a norm via a statute. Under Fascism these roles are reversed: the law, and, had the GCF had enough time, a constitution, would have been built on the basis of actual practices and principles[138]. As to what concerns the thesis of this dissertation, the case still stands: a polity that does not have a clear set of fundamental principles, or does not respect them, is unable to stand and last long. This is true for liberal democracies, yet this small excursus into Fascist jurisprudence has proven how it is true for non-democratic or totalitarian regimes as well. Irrespective of the form of government or state, a nation which does not respect its fundamental principles will meet its demise. For the Italian case, the mere fact that the singularity of totalitarianism was never reached (this peculiar situation was recognised also by the law analysed above, especially with the subordinateness to the King and the cultural influence of the Vatican) meant that the Italian Fascist State could never have functioned as a totalitarianism.

The case of Germany is dissimilar in means to the Italian one, but it aimed at the same result and, lacking the substantial and procedural limitations that the Italian totalitarian experience had, it actually achieved its goal. On the 19th of August 1934, mere days after the death of the President of the *Reich* Paul von Hindenburg, a confirmative referendum was held, asking the German people if they agreed with the contents of a law merging the powers of President and Chancellor into the person of Adolf Hitler. Predictably, the question was approved. With this law and the subsequent approval of his beloved *Volk*, Hitler became the closest manifestation of the definition of totalitarianism cited above. Within himself and himself only, rested not only the leadership of the Party, but also that of the State, with him being the highest constitutional office recognized by the still nominally enforced Weimar Constitution. The procedures with which the referendum was held

[136] n° 134 above, 9.
[137] n° 134 above, 37.
[138] This is actually a notion that was treasured by the *Duce*: in his opinion, "life" should have always preceded the "law". N° 133 above, 101.

were completely legal. In fact, the practice of the referendum was regulated through a law passed on the 14th of July 1933, in the early days of Hitler's chancellorship. This law sanctioned that every act or law passed by the government could be put to a confirmative referendum to gain the direct approval of the German people[139]. It is ironic that on the same day, July 14th, another law was passed: namely, the one which contained only two short articles and banned the creation and the existence of any other political party in Germany[140]. Coupling these laws with the earlier *Reichstag* Fire Decree (1933) and the Enabling Act (1933), which gave the Chancellor the power to emanate laws without consulting the President, Hitler had not only the power to create and sanction any law he wished, but also to execute it in an environment not far from one of martial law. The legal groundwork of Hitler's rule had thus been set in a much shorter timeframe than Mussolini's: yet another indication of the fact that the legal constrains that Fascism had ultimately meant that the exercise of the executive power, characterised by swift and, in the totalitarian case, unchecked actions, could not have been as effective as the leadership wished.

Therefore, while the August 1934 referendum had a solid legal basis, it is impossible to thoroughly evaluate its impact on the National Socialist machine without mentioning the political sphere. From a liberal viewpoint, the referendum had amazing result, with roughly 88% of Germans agreeing with the provisions therein. However, while the results were celebrated outwardly as a triumphant success, no one within the Nazi leadership thought that the outcome of the referendum was anything but a failure[141]. In these popular mobilisations, a totalitarian leader should aim at figures of roughly 99%[142]: this indicates that all citizens agree with the Leader and the ideology, minus the small quota of "undesirables", which concomitantly proves that the ideology is right in targeting them and advocating for their annihilation, as they are not part of the People. In general, more than any other, it was the urban-rural cleavage that showed the most consistency[143]. The results in big cities, probably due to the concentration of communities opposing the referendum (Jews or Poles, *inter alia*) was worse than in smaller rural centres. It has been shown that, as the Nazi culture could not have spread in the almost year and a half between the *Reichstag* Fire Decree and the August 1934 Referendum, the economic undertakings of the Nazi government were an enormous source of legitimacy and reason for Germans to vote for them; they were more prevalent

[139] 1933 Referendum Act (*Gesetz über Volkabstimmungen*), Art. 1.
[140] 1933 Act Against the New Formation of Parties (*Gesetz Gegen die Neubildung von Parteien*), Arts. 1 and 2.
[141] Otmar Jung, *Plebiszit und Diktatur: Die Volkabstimmungen Der NationalSozialisten*, (Tübingen: JCB Mohr Siebeck, 1995), 74.
[142] Karl Dietrich Bracher, *Die deutsche Diktatur. Entstehung, Struktur, Folgen des Nationalsozialismus*, (Köln and Berlin: Kiepenheuer & Witsch, 1969), 325.
[143] For the detailed tables on the result of the vote, n° 142 above, 69.

in the countryside[144]. Nevertheless, the negative results of the referendum (including a loss of 5% of the votes cast compared to the amount of the November 1933 referendum) convinced Hitler to contradict himself and to stop believing that he would have held one public consultation a year to legitimise his rule within the people[145]: he, however, still called Germans to the polls approximately once a year to consult them on matters of political relevance. Contrary to his wishes, the institution of the referendum was ultimately discarded at the outbreak of the Second World War. The last time that German citizens casted their votes was to approve the *Anschluss* of Austria in 1938[146].

In general, the distinction between elections, plebiscites and hybrid mobilisations was not clear during the totalitarian years of Italy and Germany. The doctrine has analysed the effects of these elections and plebiscites with negative prejudice: they were considered as rituals, helpful only in showing a consensus obtained mostly by coercion[147]. However, this concept can be reevaluated under a different light. In fact, these staunchly antidemocratic regimes resorted to a quintessential democratic institution, the vote, to mobilise and control the masses[148]. While it would make sense to distinguish between elections and referenda on a procedural basis, substantially the distinction becomes more difficult to find. In both countries the legislative bodies had lost their representative functions, becoming celebratory bodies for the regime and being stuffed with unelected party bureaucrats. Therefore, the argument can be made that even the legislative elections could be considered referenda as they lacked the component of the free pluralistic choice, being reduced down to agreeing or disagreeing with the Party line[149]. This is especially true for the Italian 1929 and 1934 and the German 1936 elections: the electorate could only choose between "YES" or "NO" to approve or oppose the single blocked list of people chosen by the party. Procedurally, they were the same as a referendum in which the only choices are only the affirmative and the negative, but focussed on people instead of laws.

The 1934 Referendum was, however, successful in its aims. Hitler did manage to become the central constitutional organ; apart from some covert struggles with other members of the Party and of the Church[150], which, contrary to Mussolini, he solved swiftly, discretely and violently, his

[144] Highway construction especially has been the object of a solid study, demonstrating that the closer a German was to a construction site, the better their perception of the Nazi and as such the more likely they were to not abstain from Referenda. Nico Voigtländer, Hans-Joachim Voth, 'Highway to Hitler' (2014) NBER Working Paper Series, Working Paper 20150. Available at https://www.nber.org/papers/w20150 accessed 21 May 2024.
[145] Markus Urban, 'The Self-Staging of a Plebiscitary Dictatorship', in Ralph Jessen, Hedwin Richter (eds.), *Voting for Hitler and Stalin: Elections under 20th Century Dictatorships*, (Frankfurt and New York: Campus Verlag, 2011), 43.
[146] n° 145 above, 56.
[147] Enzo Fimiani, 'Elections, Plebiscitary Elections and Plebiscites', in Ralph Jessen, Hedwin Richter (eds.), *Voting for Hitler and Stalin: Elections under 20th Century Dictatorships*, (Frankfurt and New York: Campus Verlag, 2011), 232.
[148] n° 147 above, 233.
[149] n° 145 above, 46.
[150] Famous are Hitler's efforts to rid Germany of Christianity and of Christian Churches (*Kirchenkampf*) and the night of the 30th of June 1934, where Hitler had many of his internal opponents brutally killed.

rule was uncontested. The effect of the law on totalitarian movements and States must not be underestimated. No state can be created totalitarian, as the six characteristics delineated by Friedrich and Brzezinski are typical of organized and developed societies. While there are many other extra-Parliamentary steps that such movements have to take to manifest, the final entrenchment must happen via legal means; that is what distinguishes a totalitarianism from a self-absorbed autocracy[151]. Modern democratic states are among the most developed nations of the world. Their principles therefore are fundamental not only in maintaining the rule of law, but also to ensure that these wretched governmental systems do not attack the democratic wellbeing of these nations again. Some fundamental provisions need to be protected no matter the cost and no matter the circumstances: it is far too easy to bend norms to advantage a certain fraction of society and disadvantage everyone else. The past has shown that, for a society to be functional, some constitutional amendments must be classified as unconstitutional. Abandoning this worldview can be a senseless risk and, in an ever more globalised world, a further threat to the already damaged democratic wellbeing of countries. There is always time to stop an extra-Parliamentary threat if the constitutional system is healthy. The reverse is much harder.

3.4. Contemporary Democratic Backsliding

The democracies which established themselves in the aftermath of WWII are part of what was defined by Samuel Huntington as the "second wave" of democratisation, the first one being a "long" wave going from the American and French Revolutions until the aftermath of WWI. The decades going from 1970 until the latter half of the 1990s saw what Huntington called the "third wave" of democratisation, chiefly in countries in South America, post-dictatorship Southern Europe, post-communist Eastern Europe and Eastern Asia; a combination of political and economic factors led democracy to develop in these countries[152]. "Democratic backsliding" is generally understood as the process due to which any political regime loses democratic characteristics. For consolidated democracies, this means losing some of the ethical or political aspects that make them such, e.g. the independence of the judicial system or the disenfranchisement of a certain class of people from the vote. For authoritarian regimes, it means losing some democratic qualities of their governance[153]. Huntington himself recognised that any "wave" of democratisation brings also a

[151] n° 107 above, 353.
[152] Samuel P. Huntington, *The Third Wave: Democratization in the Twentieth Century*, (Norman and London: University of Oklahoma Press, 1991), 16, 21-26.
[153] David Waldner and Ellen Lust, 'An Unwelcome Change: Coming to Terms with Democratic Backsliding', (2018) 21 ARPS 93, 95.

"counter-wave" of countries which backslide[154]. At any rate, if a country experiences a democratic backslide, the quality of its democracy lowers, and with it its general democratic wellbeing. This said, democratic backsliding is not an irreversible process: as there are countries which lose some democratic characteristics, others may gain some. However, the balance between the former category and the latter has often been negative: for this reason, as per the 2023 Freedom House report, the wellbeing of democracies worldwide has worsened for 17 continuous years, which is why it is possible to consider a global trend when discussing democratic backsliding[155]. The scope of this dissertation is not wide enough to encompass a thorough analysis of democratic backsliding as a whole. As mentioned in the introduction, only the side of this phenomenon that involves already established constitutional democracies will be weighed.

Democratic backsliding can be described using both quantitative and qualitative measures. For the formers, indicators weighing electoral competitiveness, participation and accountability are often overlapped with others measuring the type of the regime of a certain polity and whether or not the regime has changed significantly in the timespan considered[156]. While it is a fascinating process (often critiqued, as different reports produce different results), the object of this dissertation will be the qualitative descriptors of democratic backsliding. Conceptualisations of this phenomenon exist and have been discussed at length, eventually having been subdivided into six broad categories: descriptions of democratic backsliding may cite cases of political agency, culture, institutions, economy, social structures, and international actors[157]. Each of these may be used individually to describe the regression of a single country: after all, there is a substantial difference between a democracy losing its strength because of an ill-made decision of a single person (political agency) or because of the coercion of another country (international actors). However, when evaluating the reasons why some well-rooted democracies are experiencing a worsening of their wellbeing from a constitutional point of view, some of them are more useful than others. In general, the useful theories and notions reside in the realms of political culture and political institutions, as these are the closest causes and effects, respectively, of constitution-making; as such, they are the most responsible factors of the creation of the fundamental principles and the initial victims of their eventual demise.

Classifications of democracy based on political culture go as far back as Classical Greece. In fact, it was playwright Aeschylus who first classified Eastern regimes as "despotic" and Western regimes as "democratic", within the restricted geographical and socio-political knowledge available

[154] n° 152 above, 316.
[155] Freedom House, 'Freedom in the World 2023', (FH 2023).
[156] n° 153 above, 96.
[157] n° 153 above, 97.

at his time[158]. The general liberal-democratic principles which are still enforced today, however, trace their roots back to the Enlightenment, especially to political philosophers such as Hobbes, Locke and Montesquieu[159]. Their practical roots are younger, with the earliest examples being set in the late 18th and early 19th centuries, with the experiences of the French Revolution and the drafting of the Austrian and Belgian Constitutions. While political culture is not regarded as a strong cause of democratic backsliding, it nevertheless is worth analysing, as it presents the points from which democracies actually backslide. In fact, the "model" liberal democracy, often used as a yardstick in measuring the distance of the "backslided" regimes from the ideal-type of such a form of government[160], is the centre point of seminal works on the topic, such as Robert Dahl's, Arend Lijphart's and Samuel Huntington's[161]. From these works, it is clear that democracies have a clear set of characteristics of principles that define them; lacking them, they lose their essence of full democracies and revert back to a primordial, incomplete state. From the point of view of the causes that spark the creation of the fundamental principles of any given polity, the link between a violation of their norms and democratic backsliding is clear. Not unlike a person which refutes their past and actively counteracts it, any country which willingly acts in open defiance of its fundamental principles, or tries to dispose of them via constitutional amendment, loses part of its political culture; coupling this with the fact that most liberal constitutions are embedded with democratic principles, it is then clear why a country which distances itself from its constitutional principles is at a substantive risk of a democratic backslide.

The theories on democratic backsliding which are of an institutional nature often face issues from a methodological standpoint, especially in the delicate balance between indicating an event as a cause or as an effect of democratic backsliding. All of them, however, broadly agree on the three main purposes that political institutions have in serving democracy. Firstly, functioning institutions have an intense effect on vertical accountability and representativeness, so that citizens feel heard by their governments; this can help diminish any antidemocratic sentiment that may form. Secondly, functioning political institutions serve also as checks of horizontal accountability, so that it would be difficult for a singular political agency to act in an undemocratic way and subvert the constituted order from within. Lastly, the efficiency of institutions is a direct result of the efficiency of government: a highly performant democracy is less likely to cause crises and stalemates which

[158] n° 153 above, 98.
[159] Hans Keman, *Democracies in Peril?: Waves of Backsliding,* (New York: Routledge, 2024), 45.
[160] n° 159 above, 145.
[161] All of them, based on the premise on "what" a liberal democracy should deliver and "how" it should behave, formulated solid theoretical frameworks still valid nowadays. Cfr. Robert Dahl, *Polyarchy: Participation and Opposition* (New Haven and London: Yale University Press, 1971), 3; Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, (Yale University Press, 1977); Samuel P. Huntington, *The Clash of Civilizations and the remaking of world order*, (New York: Simon&Schuster, 1996).

could justify autocratic turns[162]. While this is all true when it comes to governmental authorities and offices, it is even more the case when discussing political parties. Coupling theories coming also from other "families" cited above, political parties have undergone a period deep stress after the end of the Cold War and the beginning of the development of the globalised world. In fact, the deep interconnection, both *intra* the developed world and *inter* developed and developing nations, has eroded the traditional social structure in many countries, leaving many people with worse economic security than they had in the latter half of 20th century and leaving many countries economically and sometimes even politically dependent on others for their own wellbeing. Both governmental institutions and political parties have not had a smooth transition from the traditional left-right split of politics to the national-global axis, with many of the more traditional parties in the global North becoming victims of internal quarrels over international issues[163], without the clear dogmatic division that reigned over the Cold War period. This has been fertile grounds for populism to rise; populist parties are in governing coalitions or are a strong opposition voice in many constitutional democracies.

Among the various drivers of democratic backsliding, all of whom affect constitutional democracies as whole systems, these two particular causes are the closest to the constitutional charters themselves. It has been argued that, for stable democracies which have not significantly altered their core institutions, Constitutions are seen as mere sets of guiding principles[164]. This line of reasoning appears coherent: once the institutional practice is set and is given time to stabilise without meaningful changes, constitutional institutions absorb the procedural norms into their own actions, often devising internal rules of procedure which, in compliance with the constitution, translate its abstract articles into practices. Constitutions therefore keep their status of "fundamental laws" by being a list of legitimate principles following which decisions are taken. However, as has been shown in the last two chapters, often the values enshrined in constitutional charters do not contain all the fundamental principles upon which the system rests. In fact, two unwritten norms are necessary for the functioning of democracy: without these, even the most carefully engineered constitutions cannot defend themselves from backsliding into autocracy. These norms are mutual toleration and forbearance[165]. The former norm entails that all the political formations reciprocally recognise themselves as real and legitimate adversaries; the latter entails that the governing faction restrains their power and does not employ it to the fullest legal limit to dismantle the opposition.

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[162] n° 109 above, 99.
[163] Kim Lane Scheppele, 'The Party's Over', in Mark A. Graber, Stanford Levinson, Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018), 496.
[164] Gabriel L. Negretto, *Making Constitutions: Presidents, Parties and Institutional Choice in Latin America* (Cambridge: Cambridge University Press, 2013), 1.
[165] Sujit Choudhry, 'Will Democracy Die in Darkness?', in Mark A. Graber, Stanford Levinson, Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018), 572.

These norms are of such a general character and so necessary for the functioning of even the most basic forms of democracy that no Constitution contains them in a written form; they are, however, experiencing a period of unprecedented stress.

While it has been extensively studied, the contemporary democratic backsliding does not go without its critics. In fact, it has been questioned whether the whole construct of democratic backsliding is just a fake theory, devised by scholars and academics, largely on the left side of the political spectrum, who see their views on key policy areas (immigration, environment, globalisation) not shared by a majority of their compatriots[166]. This, however, seems to be a stretch. Even if it were the case, it would signal an enormous cleavage between two distinct sections of society, one that democratic debate should be able to bridge and ignore. If the discourse and the legitimate concerns of one of the sides of a debate is discounted as mere "intellectual play", it would be the same as one political formation not recognising the legitimacy of an opponent: a textbook example of a democratic backslide. There are many factors that have let all democracies in the world, whether old or young, to be in peril. Those which have solid constitutions can and must uphold them. When practices contradict principles, it is not too late to correct them and restore the balance. When the opposite happens, i.e. when the principles themselves are overturned, there is almost nothing that the standing legal practice can do, as that action would then result in unconstitutionality.

3.5. Constitutional Backbones

The picture thus presented of democratic backsliding may seem insurmountable, but constitutional democracies are not defenceless in the face of it. Although the liberal-democratic worldview is constantly described as being "in peril" or "under an existential threat", there are substantial changes that democracies can exert upon themselves that would both uphold their fundamental constitutional principles and maintain their democratic wellbeing. This concluding section will attempt to present some of the most relevant strategies in key areas, with the hopes of concluding all the arguments brought forward until now.

As a starting point, it may be interesting to notice that the juxtaposition between politics and law has been brought to an extreme with regards to democratic backsliding. If a constitutional democracy needs to defend itself, i.e. if constitutionalism in general must be upheld, then it might not be wise to attempt to solve the largely political problems presented in the previous section (especially those concerning culture, institutional efficiency and populism) with legal means. A

[166] Mark A. Graber et al., 'Introduction', in Mark A. Graber, Stanford Levinson, Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018), 7.

political problem, in this case all the issues that globalisation has brought to national systems, cannot be defended legally, rather needing to be "sold" politically in order for it to be accepted[167]. What democratic backsliding is essentially addressing, from a constitutional standpoint, is the loss of the commercial prosperity that is both a precursor to the upholding of the fundamental principles and a fundamental principle itself[168]. The two democratic institutions which best represent the tension between legal and political means are, respectively, Courts with constitutional jurisdiction and Parliaments. Throughout the following arguments, it will be implied that a "political" solution is brought forward by Parliaments, while a "legal" solution by Courts.

The biggest symptom of democratic backsliding, and a potential driver of a loss of democratic wellbeing, is the rising tide of populist parties on both sides of the political spectrum. Through their ways and declared aims, populists may subvert the two principles of a functioning democratic system stated in the last section (mutual toleration and forbearance), especially if they have a high degree of distrust in the constituted order, i.e. depending on how anti-establishment they are. Democracy rests on a choice cycle: once a majority forms, it must accept both that it has an opposition whose views have to be somehow considered, and that it may lose its position of power if challenged. Populists can, and often have, challenged this view. The delegitimization of parliamentary opposition has happened in many democracies worldwide, under the guise of: "We are in power now, we make the rules"; akin cases have manifested as a blatant refusal of the outcome of an election and the subsequent reluctance in relinquishing power[169]. While these extreme cases may make a compelling case to resort to legal instruments, it has been noted that legal tools which keep populists out of power are often the same ones which keep populists in power once they obtain it[170]. Constitutional history has shown that political formations which manage to obtain and keep power for a long period of time, eventually manage to overcome even the strongest legal barriers: Courts are bulwarks only until they are captured[171]. People committed to maintaining the post-war democratic constitutional principles must find ways to challenge populists politically, by reducing their number or assimilating them into the constitutional system under a shared set of principles. Although the institutional form of the state can be discussed, what should be the prerequisite of any fruitful political interaction is a clear understanding of the

[167] Mark A. Graber, 'What's in Crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy', in Mark A. Graber, Stanford Levinson, Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018), 686.
[168] After all, a society whose citizens do not see their basic needs met, such as food, health or education, is very unlikely to care for the preservation of fundamental democratic values such as inclusiveness or secularism. A list of general constitutional principles is available at n° 167 above, 666.
[169] Recent political events that manifested the refusal to accept the outcome of an election were the attempted coup in the United States on the 6th of January 2021 and the attempted coup in Brazil on the 8th of January 2023.
[170] n° 167 above, 680.
[171] n° 167 above, 681.

underlying principles on which the discussion rests. Some populist parties are toxic choices that people are confronted with at elections. Rather than shifting the burden of ridding the system of those toxins to the electorate, which is a manoeuvre that may work just once, preventing the choice of toxicity is something that should be ensured *ex ante*[172]. If the legal means are not effective, the political ones must keep the democratic cycle running.

The challenge of the efficiency of governmental institutions is not distant in nature to the challenge of tackling the rising populist tide. In fact, some have even posited that the lack of results of democratic institutions has left fertile grounds for the seeds of populism and autocracy to sprout[173]. This matter is, however, much more complex to face, as the over-reliance on the Executive powers and a weakening of the Legislative ones are among the symptoms of backsliding and an overall loss of democratic wellbeing. The totalitarian regimes cited in the beginning of this chapter modified their own constitutional structure to retain power. A repeat of such situation must not happen again. Given that populists often challenge the functioning of traditional institutions for the sake of the "common" people, a political solution to the perceived inefficacy of democracy, and thus a rejecting of it in the face of a promised "efficiency and modernisation" could be for the more established parties to outperform the populists while in government. Political expertise, although not considered a merit, rather a flaw, in the populist narrative, is helpful in achieving the redistributive and social goals that democratic constitutional principles often prescribe. Populists are young, politically speaking. Whether they seek a dismantling of the institutional network due to incompetence or malice, it is the role of the most experienced figures to stop the tide of populism and to preserve the conditions under which the democratic principles can be preserved[174].

Apart from its practical consequences, the preservation of the fundamental constitutional principles via their unamendability is paramount to preserve the theoretical integrity of the democratic wellbeing of any constitutional democracy. Rather than being a principle itself, democracy is an instrument; chief example of this concept is what has been described in the last chapter as the German "militant democracy", i.e. a system which is equipped to defend itself and its principles[175]. As any instrument, it has its goals and its flaws. Democracies should not behave as oligarchies do, institutionalising abuses of power when they happen illegally[176]. This can pave the way for an even faster backsliding, not to mention that it is also the *modus operandi* of those

[172] n° 163 above.
[173] Jennifer Hochschild, 'What's New? What's Next? Threats to the American Constitutional Order', in Mark A. Graber, Stanford Levinson, Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018), 91.
[174] Franklin Foer, *L'Ultimo Dei Politici: Perché con Joe Biden Finisce un'Era*, (Milano: Longanesi, 2023), 397.
[175] It has, however, been noted that unamendable clauses may often serve just aspirational clauses, while the "heavy work" of actually protecting the system is left to institutions such as the judicial ones. Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism*, (Oxford: Oxford University Press, 2021), 49.
[176] David Spitz, *Democracy and the Challenge of Power*, (New York: Columbia University Press, 1958), vii.

regimes from which the post-war constitutional order tried to distance itself, setting a robust set of principles. Sartori has defined democracy as both an ethical and political system, wherein the majority's power is entrusted to the insurance of concurrent minorities that guarantee its survival[177]. From this definition, and from the fact that often the institutional structure of a state (political system) can be amended while its guiding principles (ethical system) cannot, it can be possible to argue that preserving the democratic wellbeing of a country necessarily entails preserving its one, inherent, unchangeable attribute. Amending a fundamental principle equates to not respecting it due to the following logic: a statutory principle generates a practical norm. If the principle is changed, the norm changes: thus, the whole system is different. Starting the deviation from the norm and not from the principle, but then amending the law to reflect the existing practice, reaches the same conclusion from a different beginning. As such, to maintain the democratic wellbeing of constitutional democracies, their principles must not be amended in any way.

Constitutions are nothing without a solid set of norms. If these norms are reduced, democratic backsliding will always be lurking[178]. Francis Fukuyama might have been wrong in declaring the "End of history" and in sanctioning a victory for liberal-democratic constitutionalism: *de facto*, democracy is not the only governmental system in the world[179], yet there is still a strong stigma against those countries which openly declare themselves as "undemocratic", not to mention that the word "democratic" itself as an adjective has many positive connotations. Democracies do not need any other word to describe themselves, yet many other regimes refer to themselves as "democratic". For established democracies, self-preservation comes from recognising their history and principles, without ever letting go of them. This does not mean stagnation; rather, it means stability.

[177] Giovanni Sartori, *Democrazia e Definizioni*, (Bologna: Il Mulino, 1969).
[178] n° 159 above, 171.
[179] Francis Fukuyama, *The End of History and the Last Man*, (New York: The Free Press, 1992), 339.

Conclusion - Change for the Better

C.1. New Societies, Old Principles

The last chapters have shown that infringing on a constitution's foundations can have tremendous effects. The post-war constitutional charters of Italy and Germany analysed in the last chapters have overseen a violent shift in the societies upon which they reign, without reflecting that change in their provisions. The sudden change in the values and the actions of societies, contrasting with the relative immobility of the principles and institutions of the governmental systems, are probably the strongest reason as per why populist political formations have gained such momentum in the last decade.

The roots of the liberal post-war constitutions trace their origins in the utopian ideological movements that dotted the first half of the twentieth century, which consolidated themselves into totalitarian regimes. The right-wing totalitarianisms, centred on the utopian ideals of the "people" as an identitarian bloc and the "land" that they inhabited, died with the Second World War; their deaths were sanctioned by the restoration of the pre-war liberal regimes and their resurgence was prevented, at least in principle, by the constitutional charters created in their opposition. Left-wing totalitarianisms, centred on the "people" as a class of oppressed and on a political struggle aiming towards equality, died much later, in the last decades of the century. What remained of the countries of the world, then, was little more than a mass of economic actors, moving in the largely non-political realms of individual rights, markets, and technological development[180]. The revolution of the so-called anti-politics let Western liberal democracies believe that their values, rooted in their local historical and cultural principles, were in the process of being acquired by every individual of the world, thus rejecting the two fundamental blocs of democracy: the *demos* and the *kratos*. These Greek words encompass, respectively, the concept of the "people" as a civil society and the concept of "power", in the hands of those same people. The individualistic revolution has led to a dissolution of the former, as the newly founded "Global individual" does not need to congregate in a *demos*, and to a severe weakening of the latter, as the *kratos* needs to be as reduced as possible, since it is bound to national authorities that the Global individual has overcome[181]. Liberty and utopia cannot be easily combined, as the former is contextual (there needs to be a freedom "from" something and a freedom "to do" something) while the latter is universal. This narration has shown its defects while facing the economical and international crises of the twenty-first century: the ideal-type of the Global individual, able to construct their own identity and livelihood, has proven false for many people who believed this narrative and did not see their efforts met with rewards. Within

[180] Giovanni Orsina, 'Ascesa e declino dell'antipolitica', [2021] Luiss School of Government Policy Brief n° 16, 2.
[181] Ibid.

this framework, a demand for politics has resurfaced, embodied by the various populist movements worldwide[182].

C.2. Who Has the Final Say on Constitutional Amendments?

This enormous societal shift has probably put the fundamental principles which have governed liberal constitutions and liberal societies under extreme stress. For a brief concluding remark, it will be concisely argued whether any amendment to those provisions should be contrasted or not. While, in fact, the human rights-centred society has no need for a collective utopia urging for a societal struggle, the same cannot be said for the fundamental constitutional principles of the charters that were drafted before the 1970s and 1980s. Constitutional law, in this sense, was laden with the utopian ideals that would have, in the mind of the constitutional legislators, guided the newfound democracies in open opposition to the dystopias of the totalitarian experiences of the interwar period. This is the focal point of friction between the political formations which perceive the constitutional order as inadequate and the constitutional order itself. It is evident that politics has resurfaced with a new face and is responding to different issues than what was the main concerns of the legislators of the late 1940s[183].

Rebus sic stantibus, improper constitutional amendments aiming at radically changing the fundamental principles can still and should be stopped by legal means, i.e. by Courts with constitutional jurisdiction. The danger of legislating *ex post* has been explored in the first two sections of the third chapter and such a procedure is overall inadequate for contemporary States observing the rule of law. Legal solutions are, however, almost useless in innovating a system; they are fundamental in preserving what already exists. If the existing system needs to be replaced, it must be replaced via political means. Changing the fundamental principles of any constitution means replacing the constitution itself. If the basic principles of democracy need to be rethought in a manner that is not overburdened by utopias and that is still aiming towards a more global politics, it would probably be wise to resort to the constituent power and rebuild the whole democratic system from its foundations[184]. In the constituted framework, the final decision on the viability of any constitutional amendment rests with the judicial power. In a constitutional moment, the final say on the constitution as a whole rests on the sovereign, i.e. on "We, the People".

[182] n° 180 above, 4.
[183] On the end of the "moral" utopia and the resurgence of politics, cfr. especially Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge and London: Harvard University Press, 2010), 227.
[184] n° 175 above, 266.

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