Prime Minister Berlusconi, the judiciary and the duty of loyal cooperation in a recent decision of the Italian Constitutional Court

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1. Introduction

On 13 January 2011 the Corte Costituzionale – the Italian Constitutional Court – in a much awaited judgment – sentenza n° 23/2011 – has declared the partial unconstitutionality of the Act n° 51 of 7 April 2010. This statute was enacted by Parliament to ensure that the Presidente del Consiglio – Italy’s Prime Minister, currently Mr. Silvio Berlusconi – and the other Ministers of the Italian cabinet would be legally excused from attending the hearings of the criminal trials in which they are accused because of a ‘legitimate impossibility’ to be present due to their commitments as members of the Government. In its opinion – published on 26 January 2011 and written by Justice Sabino Cassese – the Constitutional Court has declared the unlawfulness of key parts of the Act for violating the principle of equality and for introducing a special prerogative for the members of the executive branch with a simple ordinary statute rather than with a constitutional bill.

The purpose of this essay is to comment on the decision of the Constitutional Court, providing some explanations of the setting in which the review of the Court took place, of the legislation that was challenged and of the legal and political effects of the ruling. The latest intervention of the Constitutional Court, in fact, occurred after a series of unsuccessful legislative attempts by the Berlusconi Government to ensure a form of judicial immunity to the Prime Minister which had already pitted the governing majority against the judiciary and forced the Constitutional Court to intervene, in order to re-establish a workable balance between the several branches of government. The political reactions to the ruling, otherwise, raise a number of questions concerning the system of democracy, electoral competition and pluralism of the media in Italy, which ought to be assessed also from a broader European perspective.

To this end, the contribution will be structured as follows. Section 2 outlines the main features of the Constitutional Court and of constitutional
review of legislation in Italy. Section 3 recalls the case law of the Court addressing legislation attempting to grant immunity to the Prime Minister. Section 4 describes the Act n° 51 of 2010 and its problematic content. Sections 5 and 6 analyse the decision of the Corte Costituzionale explaining first the issue of admissibility and the test of review framed by the Court and then the merit and the reasoning of the decision. Section 7 comments upon the ‘duty of loyal cooperation’ heralded by the Court and explains the role that this principle plays in the Court’s assessment of the relationship between the political and the judicial branches of government. Section 8 outlines the political reactions to the decision and concludes with some final remarks on democracy in Italy and the role of the European Union (EU).

2. The Constitutional Court and constitutional review of legislation
The 1948 Italian Constitution introduced for the first time constitutional review of legislation in Italy. Following the Kelsenian model, the Constitution established a centralized Constitutional Court, composed of 15 judges holding office for 9 non-renewable years and appointed on the basis of a compound procedure that ensures their neutrality and independence. Article 134 entrusts to the Court the power to decide “disputes concerning the constitutionality of laws and acts with the force of law adopted by the state or the regions.” The Constitution, otherwise, grants to the Court additional functions among which in particular the power to umpire “conflicts arising over the allocation of powers between branches of government within the state” so that when a branch alleges that its powers have been infringed by another branch, it can vindicate its functions before the Constitutional Court. Since no actio popularis or Verfassungsbeschwerde is in place to allow private individuals to challenge a statute directly, the Court can exercise the power of constitutional review of legislation in two ways. According to Article 127 of the Constitution either the central government or a regional government can challenge before the Court the constitutionality of a statute adopted by the state or by a region within 60 days from its enactment if it claims that the measure infringes upon the competences that the Constitution reserves to the state or to the regions respectively. Although the role of the Constitutional Court in policing the boundaries between the state and the regions has become increasingly relevant in recent years (largely due to the quasi-federal evolution of the Italian constitutional structure) this type of review – known as ‘giudizio in via principale’ – remains almost exclusively focused on competence issues.
the state and the regions as well as reserving the unenumerated competences to the regions).


12. The second technical procedure through which the Constitutional Court can be invested of a constitutional question is not disciplined in the Constitution itself but in the Constitutional Bill n° 1 of February 9, 1948 – adopted almost simultaneously with the Constitution.


14. Note that the original version of Article 68, paragraph II, Const. It. provided that no member of Parliament could be subjected to criminal prosecution without the previous authorization of the Chamber of Parliament to which he belonged. Since in the Italian parliamentary system of government *de facto* Prime Ministers and Ministers are usually also parliamentarians, this constitutional provision effectively ensured to the members of the executive a form of immunity – as no judicial proceedings could be activated against them without the approval of Parliament, and

Of greater relevance for the protection of the fundamental rights and principles enshrined in the Constitution is the second mechanism of constitutional review existing in the Italian legal system – the so called ‘*giudizio in via incidentale*’. When an ordinary judge, in the course of a civil, criminal or administrative proceeding shall apply a statute that is relevant in the case pending before her and when she (or the parties of the case) has a not-manifestly groundless claim that the measure is unconstitutional, the judge can refer a question to the Constitutional Court and stay the proceeding to wait for an answer. If the Court upholds the constitutionality of the statute, the proceeding can restart after the referring judge and she can regularly apply the statute in the case. If, instead, the Court declares the unconstitutionality of the statute, this is annulled with *erga omnes* effect and the judge can restart the proceedings without considering the contested measure.

3. The Constitutional Court and legislation granting immunity to the Prime Minister

Prior to the decision under review, the Constitutional Court had already been called twice to rule on the constitutionality of statutory measures adopted by Parliament under the lead of the Berlusconi Government to ensure various forms of immunity to the Prime Minister. Indeed, after being successfully appointed *Presidente del Consiglio* in 2001 and again (after two years of centre-left Government lead by Mr. Romano Prodi) in 2008, Mr. Berlusconi was facing a series of troubling judicial proceedings. His Government and parliamentary majority then pressed forward a legislative agenda which largely aimed at ensuring him immunity from prosecution. All the immunity laws adopted by Parliament, however, were referred to the *Corte Costituzionale* by the judges in charge of the criminal proceedings against Mr. Berlusconi (several criminal divisions of the Tribunal of Milan).

On 20 June 2003, Parliament enacted Act n° 140 of 2003 (usually referred to as the ‘*Lodo Schifani*’) which suspended all criminal proceedings pending against the five high Officers of the state (i.e. the President of the Republic, the Presidents of the two Chambers of Parliament, the President of the Constitutional Court and the Prime Minister) for the period they hold office, with no distinction with regard to the nature of the alleged crime and the time when it had supposedly occurred. With its decision of 20 January 2004 – *sentenza* n° 24/2004 – the Constitutional Court declared the statute unconstitutional, holding that it violated the principle of equality as well as the right to access to court, whose effectiveness was trumped by the impossibility to activate judicial proceedings
against the five high Officers and by the fact that the statute of limitations was not suspended during the time in which the Prime Minister was holding his office.

On 23 July 2008, however, Parliament enacted Act n° 124 of 2008 (usually called the ‘Lodo Alfano’) which again was designed to ensure the suspension of the criminal proceedings against the Prime Minister (and the other four high Officers of the state) while also attempting to address the caveats of the Constitutional Court. Hence, inter alia, the Act provided that the statute of limitations would be suspended and that immunity could always be renounced. Nonetheless, with its decision of 7 October 2009 – sentenza n° 262/2009 – the Constitutional Court declared also this Act unconstitutional,\(^17\) arguing that any legal measure ensuring special privileges for the Prime Minister had to be adopted through a constitutional bill rather than with an ordinary statute and that therefore there had been a violation of the procedural guarantees of the Italian Constitution.\(^18\) Unhappy with the result, the Berlusconi Government pressed forward another legal measure.

4. Act n° 51 of 2010: impossibility to attend one’s own trial or immunity again?

The expressed purpose of Act n° 51 of 2010 was to discipline the way in which the Prime Minister and the other Ministers could invoke the so-called ‘legittimo impedimento’, i.e. assert a ‘legitimate impossibility’ excusing them from attending the hearings of the criminal trials in which they are summoned as accused persons, and to which they have a right to participate. The Italian Code of criminal procedure already disciplines – in a general statutory language, applicable to any accused person – the legal institute of the ‘legittimo impedimento’. According to Article 420 ter, if the judge presiding a criminal trial ascertains in concreto that the accused person has an absolute impossibility to attend the hearing scheduled on a specific date for reasons of “fortuitous event, force majeure or other legitimate impossibility”, she can postpone the hearing to a new day. By building on this legal framework, the Act n° 51 of 2010 introduced several ad hoc provisions specifically tailored for the members of the Government.

Firstly, Articles 1(1) and 1(2) of the Act, specified that the Prime Minister and the Ministers had a ‘legitimate impossibility’ which justified them from appearing in court if they were simultaneously involved in any activity that is “co-essential to the governmental functions” (including all activities which are “preparatory and consequential” to these). To this end Article 1(1) referred to several statutes and regulations, which detail the it was unlikely that a parliamentary majority would authorize judicial proceedings against its own Government. After the corruption scandals that cracked the Italian political system in the early 1990s, however, a huge popular pressure emerged to repeal the system of quasi-immutability for members of Parliament (and, by reflex, of Government) and lead to the adoption of Constitutional Revision Bill n° 3 of October 29, 1993 amending Article 68, paragraph II, Const. It. The absence since 1993 of any constitutional shield against prosecution for parliamentarians and members of the executive, however, is at the roots of the complex tensions which have characterized the relationship between politics and the judiciary in Italy in the following decades culminating in the repeated attempts by the Berlusconi Government to introduce new forms of immunities for the members of the executive. For an assessment of this story cf. C. Guarnieri & P. Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, Oxford: Oxford University Press 2002, ch. 3.

\(^15\) Cf. Article 3, Const. It. (providing that all citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions and that it is the duty of the Republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country).

\(^16\) Cf. Article 24, Const. It. (providing that everyone may bring cases before a court of law in order to protect their rights under civil and administrative law and that the right of defence is an inviolable right at every stage and instance of legal proceedings).
activities proper of the Government. Secondly, Article 1(3) provided that, upon request of the accused person and when the conditions set in the previous paragraphs occurred, the judge presiding the criminal trial had to "postpone the hearing to a new day". Thirdly, Article 1(4) introduced the possibility for the Office of the Prime Minister to certify that the Prime Minister himself had a "continuous impossibility, due to the exercise of his functions, of attending his own trial" for up to a maximum of 6 months.

The Act n° 51 of 2010 therefore raised the question whether its true rationale was to discipline the application of the ‘legittimo impedimento’ to the Chief executive or rather to ensure for him, again, a form of immunity conflicting with the precedents of the Constitutional Court. Article 1(5), indeed, included a warrantee that the invocation of a legitimate impossibility to attend one’s own trial by the members of the Government would suspend the statute of limitations. Article 2, however, introduced a sunset clause, providing that the Act (which was made applicable to the pending cases by Article 1(6)) would expire after a maximum period of 18 months, within which Parliament would adopt a constitutional bill establishing the organic regulation of the constitutional prerogatives of the Prime Minister. Hence, in the Government’s intention, Act n° 51 of 2010 had the goal of delaying judicial proceedings for a time span that was considered sufficient to enact the bill complying with the requirements set by the Constitutional Court in its sentenza n° 262/2009. Less than 2 weeks after its enactment, Act n° 51 of 2010 was challenged before the Constitutional Court.

5. The decision of the Constitutional Court (part I)

The judges referring the question to the Constitutional Court – i.e. the judges of the I and X criminal division of the Tribunal of Milan and the judge for the preliminary investigations of the same Tribunal – alleged that the entire Act n° 51 of 2010 introduced a special prerogative for the members of the Government with an ordinary law in violation of Articles 3 and 138 of the Constitution as interpreted by the sentenza n° 262/2009 of the Constitutional Court. The Government, as well as the Prime Minister in his individual capacity as party in the case a quo, intervened before the Constitutional Court and asked for the rejection of the constitutional complaint. The Court delivered a compound decision, declaring inadmissible the challenges against Articles 1(2), 1(5), 1(6) and 2 of Act n° 51 of 2010, upholding Article 1(1) under a corrective construction of it and declaring the unconstitutionality tout court of Article 1(4) as well as the
partial unconstitutionality of Art. 1(3), to the extent to which the provision lacked a key element.\textsuperscript{22}

The Court declared the challenges against several provision of Act n° 51 of 2010 inadmissible for lack of relevance. It then recapitulated its case law on the immunity for the High Officers of the state and framed the test to review the lawfulness of the other contested provisions of the statute, clarifying that it was necessary to “ascertain whether the Act, its temporary nature notwithstanding, represents a derogation from the ordinary procedural regime set up by Article 420 ter of the Code of criminal procedure”.\textsuperscript{23} Since, indeed, the precedents of the Court made clear that no special prerogative could be introduced for the Chief executive with a simple ordinary law, the Court stated that “the challenged Act will be considered unconstitutional [for violating Articles 3 and 138 of the Constitution] if, and to the extent to which, it alters the essential features of [Article 420 ter]”\textsuperscript{24}, including the powers that this provision grants to the judiciary to evaluate, in concreto, the legitimate impossibility of an accused person to attend his own trial.

On the basis of this test, the Court upheld the constitutionality of Article 1(1) of Act n° 51 of 2010 with a sort of \textit{réserve d’interprétation}.\textsuperscript{25} The Court, in fact, affirmed that the contested provision had to be interpreted in conformity with Article 420 ter of the Code of criminal procedure so that its meaning was just clarifying what ought be considered a ‘governmental function’ producing a ‘legitimate impossibility’ for the Prime Minister to attend his trial. For the Court the provision allowed the judge to reject the assertion of a ‘legitimate impossibility’ by the Prime Minister when his political commitments were not linked with the essential governmental function specified in the Act;\textsuperscript{26} and, on the other hand, it formalized the typical tasks of members of the executive so that the judiciary could not contest them \textit{in abstracto} when invoked by the Prime Minister and his peers.

6. The decision of the Constitutional Court (part II)

The Constitutional Court, however, declared unconstitutional Article 1(3) of the Act since it failed to provide a crucial element, which was thus ‘added’ by the Court itself.\textsuperscript{27} The Court accepted the position defended by the Government that the provision still allowed the judge to ascertain whether both the ‘legitimate impossibility’ for the Prime Minister to attend his own trial existed \textit{de facto} and the impossibility could be linked to the exercise of an essential governmental function. However, the Court emphasized how the general discipline of Article 420 ter of the Code of criminal procedure granted to the trial judge an additional power that was the Court upholds the constitutionality of a provision (thus rejecting the constitutional challenge) as long as the provision is interpreted in conformity with the Constitution: the Court offers a construction of the provision that is compatible with the Constitution and that ordinary courts are encouraged to follow. Cf. Groppi 2008, p. 107.

\textsuperscript{26} In Italian legal scholarship this kind of decision is called ‘\textit{sentenza additiva}’. The Court declares a provision unconstitutional to the extent to which it lacks an element which is essential for it to survive scrutiny and at the same time it clearly specifies what the missing part of the provision is. As a consequence, the provision can still be applied by ordinary judges, but only with the \textit{addition} introduced by the Court to make it constitutional.

To a certain extent, with this kind of judgment the Constitutional Court ‘wears the dress’ of the legislature, inserting new rules in the legal system which can not be found in the statutory text. Cf. Groppi 2008, p. 108.

\textsuperscript{27} Sentenza n° 23/2011, cons. dir. § 5.2.

\textsuperscript{28} Cf text accompanying notes 22 and 23.

\textsuperscript{29} Cf infra next paragraph.

\textsuperscript{30} Sentenza n° 23/2011, cons. dir. § 5.2.

\textsuperscript{31} In Italian legal scholarship this kind of decision is called ‘\textit{sentenza di accoglimento semplice}’: The Court tout court declares the unconstitutionality of a provision (thus accepting the constitutional challenge) with the consequence that the provision simply can not be applied any more by ordinary judges – being erased with \textit{erga omnes} effects from the legal system. Cf. Groppi (supra note 7), 108.

\textsuperscript{32} Sentenza n° 23/2011, cons. dir. § 5.3.

\textsuperscript{33} Cf. among others, the decisions that the Constitutional Courts has rendered in the field of conflict of allocation of powers...
between branches of government: sentenza n° 225/2001 (holding that the judiciary had violated the constitutional prerogatives of a parliamentarian in refusing to postpone the hearing of a criminal trial when the accused person had a simultaneous duty to be present in Parliament to vote); sentenza n° 200/2006 (holding that the Ministry of Justice had violated the constitutional prerogatives of the President of the Republic in refusing to give execution to a decision of the President to grant a pardon); sentenza n° 1150/1988 (holding that the judiciary can raise a conflict of allocation of powers whenever it claims that Parliament has inappropriately invoked the constitutional provision stating that parliamentarians can not be called to answer for the opinion expressed in the exercise of their office).


According to the Court, Article 1(3) of the Act introduced a privileged regime for the Prime Minister which was unconstitutional (on the basis of the test the Court had framed above) to the extent to which it derogated from the procedure set up by Article 420 ter of the Code of criminal procedure. With its decision, thus, the Court re-introduced the missing element, empowering the judiciary once again to evaluate in concreto the nature of the impossibility to attend one’s own trial alleged by the Prime Minister. The Court clarified that granting this role to the judiciary would not infringe the principle of separation of powers. Indeed, judges exercising the powers already granted to them by the Code of criminal procedure would remain within the framework of the judicial function. Moreover, judges had – in compliance with the principle of loyal cooperation – a “duty to minimize” the potential harm that the scheduling of criminal hearings could create on the Chief executive.

Finally, the Constitutional Court also declared tout court unconstitutional Article 1(4) of Act n° 51 of 2010. The contested provision allowed the Office of the Prime Minister to certify that the Presidente del Consiglio had, because of his activities as Chief executive, a continuous, general impossibility to attend his own trial for up to 6 months. This clearly derogated from the regime of Article 420 ter of the Code of criminal procedure, which only provides for specific, punctual impossibilities to appear in a given hearing before a judge. In addition, the certification of ‘continuous impossibility’ by the Office of the Prime Minister produced an automatic effect that could not be subject to any judicial review. As such, it was straightforward for the Court to conclude that Article 1(4) of Act n° 51 of 2010 “produced effects equivalent to a temporary suspension of the criminal trial” and was hence unconstitutional in light of the precedents of the Court.

7. The ‘duty of loyal cooperation’ between the Prime Minister and the judiciary

The centrepiece of the decision of the Constitutional Court – and the legal rationale that inspires the entire ruling – is represented by the principle or duty of ‘loyal cooperation’. This principle, which is not textually codified in the Italian Constitution but which the Court has incrementally
8. The political reactions to the decision of the Court and democracy in Italy: concluding remarks

With its attention for the institutional dynamics and with its emphasis on the duty of loyal cooperation, the decision of the Constitutional Court represents a remarkable attempt to establish a workable balance between the political and the judicial branches of government in Italy, whose
The Opinion of AG Maduro was largely followed by the EU Court of Justice, Case C-380/05, Centro Europa 7 v. Ministero delle Comunicazioni [2008] ECR I-349 (concluding that EU law precludes in TV broadcasting matters, national legislation, like the Italian one, the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria).

Cf. among others the decisions that the Constitutional Court has rendered in a time span of almost 25 years concerning the need for pluralism of the TV broadcasting sector: sentenza n° 826/1988 (holding that monopolies in the TV broadcasting sector are admissible only on a provisional basis and calling the legislature to immediately enact a legal framework to ensure pluralism in the media); sentenza n° 420/1994 (holding the legislative framework for the TV broadcasting sector violated anti-trust provisions and the principle of pluralism in the media and calling the legislature to promptly enact a bill compatible with the Constitution); sentenza n° 466/2002 (holding the legislative framework for the TV broadcasting sector unconstitutional to the extent to which it did not provide a deadline within which concentration exceeding the anti-trust rules had to be broken and calling the legislature to enact legislation which would ensure pluralism in the media).

Ceteris paribus cf. Article IV, sec. 4, US Const. which affirms that “the United States shall guarantee to every State in this Union a Republican Form of Government.”