

Constitutional Crisis, Security and Democratic Resilience

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JUDGING IN TIMES OF EMERGENCIES: THE ROLE OF THE ITALIAN CONSTITUTIONAL COURT IN MANAGING LEGALITY, LEGITIMACY, AND FUNCTIONAL CRISES

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KEYWORDS: Constitutional Resilience; Judicialized Emergency Governance; Legislative Inertia; Institutional Overexposure; Crisis Constitutionalism.

SUMMARY: 1. Introduction: Constitutional Courts between Stabilization and Crises. – 2. Constitutional Crises as a Structural Category of Constitutionalism. – 3. Ideal Types of Crisis and the Stabilizing Role of the Italian Constitutional Court. – 4. Crises of Legality and the Defense of Constitutional Supremacy. – 5. Crises of Legitimacy and Judicial Authority. – 6. Functional Crises and Constitutional Adaptation. – 7. Constitutional Courts and the Risk of Institutional Overexposure.

1. *Introduction: Constitutional Courts between Stabilization and Crises*

In recent decades, constitutional crisis has re-emerged as a central category in legal scholarship. Mounting institutional tensions across democratic systems – ranging from democratic backsliding to recurring confrontations between political authorities and the courts – have renewed interest in the ways constitutional orders respond to periods of systemic stress.¹

Traditionally, constitutional crises were associated with *coups d'état*, revolutionary ruptures, or the suspension of constitutional legality. On that view, crisis denoted an exceptional breakdown of the legal order.² However, contemporary developments suggest that this conventional understanding is increasingly inadequate. In many democratic systems, constitutional crises no longer take the form of dramatic institutional collapse. They unfold more gradually, through incremental transformations that remain formally embedded within

¹ A growing body of scholarship has documented these transformations, *ex multis*, see Pech Laurent and Scheppele Kim Lane, “Illiberalism within: Rule of law backsliding in the EU,” *Cambridge Yearbook of European Legal Studies*, 1 (2017): 3-47; Tushnet Mark, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); and also Loughlin Martin, “The contemporary crisis of constitutional democracy,” *Oxford Journal of Legal Studies*, 2 (2019): 435-54.

² More broadly, classical constitutional theory tended to conceptualize crises as moments of rupture, in which the ordinary functioning of constitutional norms is suspended or replaced, rather than as processes unfolding within the constitutional framework itself. *Cf.* for example Schmitt Carl, *Le categorie del politico* (1922), it. trans. Gianfranco Miglio and Pierangelo Schiera (Bologna: Il Mulino, 2013); Kelsen Hans, *La dottrina pura del diritto* (1934), it. trans. Mario Losano (Torino: Einaudi, 2021); Romano Santi, *L'ordinamento giuridico* (1918) (Macerata: Quodlibet, 2018).

the legal order itself. The routinization of emergency powers, the erosion of parliamentary centrality, and the growing politicization of judicial institutions often develop without any explicit breach of constitutional rules.³

Comparative scholarship has captured this transformation through concepts such as ‘abusive constitutionalism’, ‘constitutional hardball’, and ‘executive aggrandizement’. In contemporary democracies, constitutional crises are more likely to emerge through the gradual concentration of political power than through overt institutional rupture.⁴ Within this environment, the courts have acquired an increasingly prominent role in the management of political conflict. Modern constitutional systems rely more and more on judicial institutions to stabilize tensions that ordinary political processes prove unable to resolve.⁵ Yet this development carries an inherent paradox: the more courts are called upon to preserve constitutional stability, the more their own legitimacy becomes vulnerable to contestation.⁶

Constitutional courts therefore occupy an inherently ambivalent position within democratic systems. They serve as “guardians” of constitutional legality, but they also operate as institutional actors, whose interventions may reshape the relationship between judicial authority and democratic representation. This article argues that the Italian Constitutional Court (ICC) has evolved well beyond the traditional role of a negative legislator. It has progressively come to function as a structural compensator for the shortcomings of representative institutions. In contemporary systems, courts are often drawn into disputes not because constitutional rules have plainly been violated, but because elected institutions are unable – or unwilling – to address persistent conflicts, legislative deadlock, and recurring emergencies.⁷

The *Corte costituzionale* now performs a stabilizing function that extends well beyond the classic boundaries of judicial review. However, this very success generates a further tension. While constitutional adjudication succeeds in preserving institutional continuity and

³ See *passim* Levitsky Steven and Ziblatt Daniel, *How Democracies Die* (New York: Crown Publishing, 2018); Balkin Jack, “Constitutional Crisis and Constitutional Rot,” *Maryland Law Review*, 1 (2017): 147-60; Landau David, “Populist Constitutions,” *University of Chicago Law Review*, 2 (2018): 521-43.

⁴ Cf. Bermeo Nancy, “On democratic backsliding,” *Journal of Democracy*, 1 (2016): 5-19; Tushnet Mark, *Weak courts, strong rights: Judicial review and social welfare rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008), 52 ff.; Choudhry Sujit, “Will democracy die in darkness? Calling autocracy by its name,” in *Constitutional Democracies in Crisis?*, edited by Mark Graber *et al.* (Oxford: Oxford University Press, 2018), 571-84.

⁵ See *passim* Hirschl Ran, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004); Stone Sweet Alec, *Governing with Judges. Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000); Ackerman Bruce, “The emergency Constitution,” *Yale Law Journal*, 5 (2004): 1029-91.

⁶ Ackerman Bruce, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006); Bickel Alexander, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962); Kumm Mattias, “The cosmopolitan turn in constitutionalism: On the relationship between constitutionalism in and beyond the State,” in *Ruling the World?: Constitutionalism, International Law, and Global Governance*, edited by Jeffrey Dunoff L. and Joel P. Trachtman (Cambridge: Cambridge University Press, 2009), 258-325.

⁷ See Rosenfeld Michel, *The Identity of the Constitutional Subject* (London: Routledge, 2010); Walker Neil, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2015); De Búrca Gráinne, “The EU, the European Court of Justice and the International legal order after Kadi,” *Harvard International Law Journal*, 1 (2010): 1-49.

defusing unresolved disputes, political systems risk becoming dependent on courts as substitutes for ordinary and democratic decision-making.⁸

The Italian experience offers a particularly revealing case study in this regard. Unlike legal systems that have undergone explicit processes of ‘democratic backsliding’ or ‘constitutional capture’, Italy represents a case of institutional resilience under persistent pressure. The Italian legal order is especially instructive because it combines a set of conditions that are rarely found together within the same constitutional order.

First, the Italian political system has long been marked by fragmented political party competition, governmental instability, and recurring difficulties in producing durable parliamentary majorities.⁹ Second, the executive branch has progressively expanded its influence through confidence votes, decree-laws, and broad legislative delegations.¹⁰ Third, the legal order has repeatedly faced acute systemic pressures, without ever experiencing a complete breakdown of constitutional legality.¹¹ Nevertheless, the resilience of the system has often depended on the capacity of the Constitutional Court to compensate for the weaknesses of representative institutions and to manage conflicts that political actors proved unable to manage.

From this perspective, the ICC has not operated in the shadow of authoritarian rupture. Rather, it has acted within a system marked by chronic instability, legislative inertia, executive expansion, and recurring emergencies. The *Corte costituzionale* has operated in an environment increasingly conducive to subsidiary interventions, stepping in where representative institutions proved reluctant to act. At times, however, this growing role has also raised concerns about the gradual blurring of the separation of powers.

2. Constitutional Crises as a Structural Category of Constitutionalism

Every constitutional order, however stable it may appear, contains within itself the possibility of crisis. Constitutional crises should therefore be understood as structural phenomena

⁸ Cf. in Italian constitutional scholarship, Cartabia Marta, *Custodi della democrazia. La Costituzione, le corti e i confini del politico* (Milan: EGEA, 2026); Zagrebelsky Gustavo, *Il diritto mite. Legge, diritti, giustizia* (Turin: Einaudi, 1992); Silvestri Gaetano, *La Corte costituzionale nella svolta di fine secolo*, Id., *Le garanzie della Repubblica* (Turin: Giappichelli, 2009), 127-59.

⁹ On fragmentation, governmental instability, and the weakness of parliamentary majorities within the Italian political system, see Newell James L., *The Politics of Italy. Governance in a Normal Country* (Cambridge: Cambridge University Press, 2012); Smith Denis Mack, *Modern Italy. A Political History* (New Haven: Yale University Press, 1997); Cotta Maurizio and Verzichelli Luca, *Political Institutions in Italy* (Oxford: Oxford University Press, 2007).

¹⁰ See Lupo Nicola, “Emendamenti, maxi-emendamenti e questione di fiducia nelle legislature del maggioritario,” in *Le regole del diritto parlamentare nella dialettica tra maggioranza e opposizione*, edited by Gianfrancesco Eduardo and Lupo Nicola (Rome: Luiss University Press, 2007), 41-110; Sorrentino Federico, “Spunti sul controllo della Corte costituzionale sui decreti-legge e sulle leggi di conversione,” *Aspetti e tendenze del diritto costituzionale: scritti in onore di Costantino Mortati*, (Milan: Giuffrè, 1977), 737-775; Clementi Francesco, “Tra leggi elettorali e riforme istituzionali: trent’anni di una transizione ancora aperta,” *Rivista di Politica*, 4 (2018): 33-41.

¹¹ On the absence of full constitutional breakdown despite recurring systemic pressures, cf. Elia Leopoldo, *Costituzione, partiti, istituzioni* (Bologna: Il Mulino, 2009); Cassese Sabino, *Dentro la Corte. Diario di un giudice costituzionale* (Bologna: Il Mulino, 2015); Zagrebelsky Gustavo, *Questa Repubblica. Cittadinanza e Costituzione* (Milan: Mondadori, 2009).

that reveal the tensions inherent in modern governance. Moments of crisis expose the limits of legal arrangements but they also illuminate their capacity for adaptation.¹²

Modern systems operate through a complex interaction among constitutional norms, political institutions, and social expectations. When that interaction becomes destabilized – because of polarization, fragmentation, institutional paralysis, or extraordinary pressures – the Constitution may begin to lose its ability to perform its essential coordinating function.¹³

Democratic orders are designed to absorb conflict and to correct themselves over time: individual violations of legality do not necessarily amount to a constitutional crisis so long as the order retains the institutional resources needed to restore equilibrium.¹⁴ A constitutional crisis arises only when those ordinary mechanisms of stabilization begin to weaken. At that point, the problem no longer concerns the legality of a particular measure. It concerns the broader capacity of the constitutional framework to organize, channel, and contain conflicts.¹⁵

Constitutional courts play a decisive, yet deeply ambivalent, role in these dynamics. On the one hand, they may operate as stabilizing institutions, preserving continuity when the ordinary political process comes under strain. On the other hand, the expansion of judicial authority exposes courts to new forms of politicization and legitimacy contestation. They are institutions of legal control, but they are also arenas in which political conflicts are reformulated through constitutional language.¹⁶

This ambivalence is not accidental. Constitutional adjudication is precisely designed to convert political disagreement into juridical controversy. By subjecting political decisions to judicial scrutiny, constitutional courts transform disputes that would otherwise unfold within the political sphere into legal questions governed by constitutional principles, procedural con-

¹² Contributions emphasizing the dynamic and conflictual nature of constitutional order, see *passim* Loughlin Martin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010); Walker Neil, *Intimations of Global Law*, note 7; Christodoulidis Emilios A., *Law and Reflexive Politics* (London: Kluwer Academic Publishers, 1998).

¹³ See Lindseth Peter, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford: Oxford University Press, 2010); MacCormick Neil, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999); and Sunstein Cass R., *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001).

¹⁴ Cf. Fuller Lon, *The Morality of Law* (New Haven: Yale University Press, 1964); Elster Jon, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge: Cambridge University Press, 2000); Holmes Stephen, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995).

¹⁵ See *ex multis* Ioannidis Michael and von Bogdandy Armin, “Systemic deficiency in the rule of law: What it is, what has been done, what can be done,” *Common Market Law Review*, 1 (2014): 61-94; Luhmann Niklas, *Procedimenti giuridici e legittimazione sociale* (1969), it. trans. Alberto Febbrajo (Milano: Giuffrè, 1995); Teubner Gunther, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012). See also Walker Neil, “Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders,” *International Journal of Constitutional Law*, 3-4 (2008): 373-96.

¹⁶ See Fallon Richard, *Law and Legitimacy in the Supreme Court* (Cambridge: Harvard University Press, 2018); Dahl Robert A., “Decision-making in a democracy: The Supreme Court as a national policy-maker,” *Journal of Public Law*, 6 (1957): 279-295, Barak Aharon, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006). For Italian constitutional scholarship, cf. Zagrebelsky Gustavo, *La legge e la sua giustizia* (Bologna: Il Mulino, 2008); Cheli Enzo, *Il giudice delle leggi. La Corte costituzionale nella dinamica dei poteri* (Bologna: Il Mulino, 1999).

straints, and techniques of balancing. In doing so, courts contribute to stabilizing the constitutional order, by ensuring that conflict remains contained within a framework of legality.¹⁷

Nonetheless, this stabilizing role carries unavoidable institutional risks. When constitutional judges intervene more frequently in politically salient matters, their decisions inevitably acquire broader political significance. Judicial reasoning becomes a site at which competing visions of democracy, rights, and institutional authority are articulated and contested.¹⁸ This tension recalls the classic debate between Kelsen and Schmitt over the identity of the so-called ‘guardian of the Constitution’. Although developed in the interwar period, that theoretical debate continues to shape contemporary discussions of constitutional adjudication.¹⁹

Modern constitutional systems have largely embraced the Kelsenian model, by assigning courts the authority to review legislation and to enforce the constitutional boundaries of political and social action. At the same time, Schmitt’s concerns have never entirely disappeared: the expansion of judicial authority in contemporary democracies has revived longstanding questions about the proper limits of constitutional interpretation and the extent to which courts may legitimately shape outcomes that are, in substance, political.²⁰

Contemporary constitutionalism therefore continues to operate within the conceptual space defined by the tension between juridification and politicization, becoming especially visible during periods of constitutional stress.²¹ In times of crisis, constitutional courts are required to intervene more assertively in order to preserve institutional continuity. Yet such interventions may also intensify debates over the proper role of judicial institutions within democratic governance.²²

¹⁷ Cf. Habermas Jürgen, *Fatti e norme. Contributi a una teoria discorsiva del diritto e della democrazia* (1996), it. trans. Ceppa Leonardo, (Rome-Bari: Laterza, 2013). See also Hirschl Ran, *Towards Juristocracy*, note 4; and Grimm Dieter, *The Constitution of European Democracy* (Oxford: Oxford University Press, 2017)

¹⁸ See *ex plurimis* Sunstein Cass R., *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999); Rosenberg Gerald N., *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); Friedman Barry, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009). In Italian constitutional scholarship, see also Zagrebelsky Gustavo, *Principi e voti. La Corte costituzionale e la politica* (Torino: Einaudi, 2005); Zanon Nicolò, “Corte costituzionale, evoluzione della ‘coscienza sociale’, interpretazione della costituzione e diritti fondamentali: Questioni e interrogativi a partire da un caso paradigmatico,” *Rivista AIC*, 4 (2017): 1-16.

¹⁹ On the classical debate concerning the ‘guardian of the Constitution’, see Schmitt Carl, *Der Hüter der Verfassung* (Tübingen: 1931); Kelsen Hans, “Wer soll der Hüter der Verfassung sein?“, *Die Justiz*, 6 (1931): 576-628. For discussion, see also Grimm Dieter, “Types of Constitutions”, in *The Oxford Handbook of Comparative Constitutional Law* edited by Rosenfeld Michel and András Sajó (Oxford: Oxford University Press, 2012), 98-132.

²⁰ See Ginsburg Tim, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003); Issacharoff Samuel, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015). On the persistence of tensions between legal adjudication and political decision-making, see, for example, Waldron Jeremy, “The core of the case against judicial review,” *Yale Law Journal*, 5 (2006): 1346-1406.

²¹ On judicial decisions perceived as substituting political deliberation, see Waldron Jeremy, *Law and Disagreement* (Oxford: Oxford University Press, 1999); Ely John, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980); Bellamy Richard, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).

²² Cf. Commaille Jacques, *L’esprit sociologique des lois* (Paris: PUF, 1994); Vauchez Antoine, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge: Cambridge University Press, 2015); Poiares Maduro Miguel, *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998).

3. *Ideal Types of Crisis and the Stabilizing Role of the Italian Constitutional Court*

The Italian constitutional experience offers a particularly revealing perspective on the role of constitutional courts in managing systemic tensions. Unlike legal orders that have experienced forms of ‘constitutional capture’ or ‘democratic backsliding’, Italy has remained formally committed to the liberal-democratic framework established by the 1948 Constitution. At the same time, the political system has long been characterized by governmental instability, fragmented party competition, legislative inertia, executive expansion, and recurring emergencies.²³

Within this context, the ICC has gradually assumed a role that extends far beyond the traditional model of judicial review. Over time, the Court has come to function as an institution of continuity, intervening to preserve constitutional equilibrium under conditions of persistent systemic stress.²⁴

Two long-term features of Italian constitutional adjudication are especially important in explaining this development. The first is the early affirmation of the supremacy of the Constitution over ordinary legislation.²⁵ In Decision no. 1 of 1956, the Court made clear that ordinary legislation could not prevail over constitutional norms and that the rigidity of the Constitution constituted the fundamental precondition for the legality of public power.²⁶ The second is the development of the doctrine of ‘supreme principles’. In Decision no. 1146 of 1988, the Court identified a set of constitutional principles so fundamental that they could not be overturned even through formal constitutional amendment. This line of case law reinforced the idea that certain substantive elements of the constitutional order remain unavailable even to parliamentary majorities.²⁷

Together, these doctrinal foundations strengthened the Italian Constitutional Court’s role as a guardian of constitutional continuity. Over time, the ICC has acted not merely as an interpreter of constitutional provisions, but as an institution capable of absorbing systemic tensions, restoring normative coherence, and compensating for the failures of representative politics.²⁸

From this perspective, three ideal types of constitutional crisis may be distinguished. Crises of legality arise when constitutional rules formally remain in force, yet their substantive function is progressively weakened by practices that distort the constitutional distribution of powers. These crises often emerge through the abuse of decree-laws, the overuse

²³ On the Italian constitutional experience as a case of resilience under persistent systemic strain, cf. Silvestri Gaetano, *Le garanzie della Repubblica* (Torino: 2009); Cassese Sabino, *La nuova costituzione economica* (Rome-Bari: Laterza, 2012); Elia Leopoldo, *Costituzione, partiti, istituzioni*, note 11.

²⁴ Amato Giuliano, *Le istituzioni della democrazia* (Bologna: Il Mulino, 2015), Rodotà Stefano, *Il diritto di avere diritti* (Rome-Bari: Laterza, 2012); Zanon Nicolò, “I rapporti tra la Corte costituzionale e il legislatore alla luce di alcune recenti tendenze giurisprudenziali,” *Federalismi.it*, 3 (2021): 86-98.

²⁵ See, Mortati Costantino, *La costituzione in senso materiale (1940)* (Milan: Giuffrè, 1998); Esposito Carlo, *La Costituzione italiana. Saggi* (Padova: CEDAM, 1954); Modugno Franco, “Ricorso al potere costituente o alla revisione costituzionale?,” *Giurisprudenza italiana*, 1 (1998): 620-24.

²⁶ ICC, 1/1956, conclusions on points of law, section 3.

²⁷ ICC, 1146/1988.

²⁸ See Baldassarre Antonio, *Diritti della persona e valori costituzionali* (Torino: Giappichelli, 1997); Barile Paolo, *Diritti dell'uomo e libertà fondamentali* (Bologna: Il Mulino, 1984); Paladin Livio, *Le fonti del diritto italiano* (Bologna: Il Mulino, 1996) and Luciani Massimo, *Ogni cosa al suo posto* (Milan: Giuffrè, 2023). See also ICC, 406/1989; ICC, 356/1996; ICC, 162/2014; ICC, 269/2017; ICC, 170/2023.

of legislative delegation, emergency lawmaking, or attempts to shield political actors from ordinary forms of legal accountability.²⁹

Crises of legitimacy arise when constitutional institutions begin to lose their capacity to command broad political and social acceptance. In such cases, the issue is not the validity of constitutional rules as such, but the authority of the institutions responsible for interpreting and enforcing them. Constitutional courts may then become objects of political contestation rather than neutral arbiters of constitutional conflict.³⁰

Functional crises emerge when extraordinary events – economic collapse, environmental disaster, public health emergencies, security threats – place exceptional pressure on the constitutional order. Under such conditions, the central problem is how to preserve constitutional guarantees while still allowing public institutions to respond effectively to urgent collective dangers.³¹

Although analytically distinct, these forms of crisis are often interconnected. Crises of legality may trigger legitimacy tensions; legitimacy crises may weaken the ability of institutions to respond effectively to emergencies; functional crises may encourage the expansion of executive discretion and the compression of ordinary democratic procedures. One of the Court's central functions has increasingly been to mediate among these overlapping dimensions of systemic instability.

In all these situations, the ordinary mechanisms of constitutional government often prove inadequate. Political actors resort to exceptional measures that alter the balance between rights and necessity, legality, and expediency. Legislative deliberation is compressed, executive authority expands, and individual freedoms may be restricted in the name of urgent public interests. It is precisely under these conditions that the Italian Court has assumed a broader stabilizing role, seeking to preserve institutional continuity while adapting constitutional principles to changing forms of structural stress.³²

²⁹ See Daly Tom, "Democratic Decay: Conceptualising an Emerging Research Field," *Hague Journal on the Rule of Law*, 2 (2019): 9-36; Raz Joseph, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979); Dyzenhaus David, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2023); Gross Oren and Ni Aolain Fionnuala, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006); and Dixon Rosalind and Landau David, "Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment," *International Journal of Constitutional Law*, 3 (2015): 606-38.

³⁰ See *ex multis* Helfer Laurence and Alter Karen, "Legitimacy and Lawmaking: A Tale of Three International Courts," *Theoretical Inquiries in Law*, 2 (2013): 479-506; Weber Max, *Economia e Società* (1922), it trans. Palma Massimo (Rome: Donzelli, 2022); Weingast Barry, "The political foundations of democracy and the rule of law," *The American Political Science Review*, 2 (1997): 245-63; Brennan Geoffrey and Buchanan James, *The Reason of Rules: Constitutional Political Economy* (Cambridge: Cambridge University Press, 1985); Versteeg Mila and Ginsburg Tom, "Why Do Countries Adopt Constitutional Review?," *Journal of Law, Economics, and Organization*, 3 (2014): 587-622.

³¹ See Offe Claus, *Contradictions of the Welfare State* (Cambridge: MIT Press, 1984); Bobbitt Philip, *Terror and Consent: The Wars for the Twenty-First Century* (New York: Alfred A. Knopf, 2008); Graber Mark, *Constitutional Dysfunction on Trial* (Chicago: Oxford University Press, 2013) and Ackerman Bruce, *Before the Next Attack*, note 6.

³² On the growing tendency of emergencies to distort the ordinary logic of constitutional governance, see, for example, Agamben Giorgio, *Stato di eccezione* (Torino: Bollati Boringhieri, 2003); Ferejohn John and Pasquino Pasquale, "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law*, 2 (2004): 210-239. See also Dyzenhaus David, *The Constitution of Law*, note 29.

4. *Crises of Legality and the Defense of Constitutional Supremacy*

Unlike Poland or Hungary, Italy has never experienced explicit forms of ‘constitutional capture’, capable of systematically undermining judicial independence from within. This does not mean, however, that the Italian constitutional order has been free from legality crises. Significant tensions emerged during the ‘Berlusconi era’, and have resurfaced more recently under various forms of ‘executive populism’, aimed at weakening the normative guarantees that protect judicial autonomy and constitutional accountability.³³

a) Immunities and the Insulation of Political Power

Crises of legality often emerge when political office is used not purely as an instrument of governance, but as a means of seeking insulation from ordinary legal responsibility. Constitutional provisions formally remain in force, yet their stabilizing function is progressively weakened or selectively distorted in order to shield high-ranking office holders from judicial scrutiny.³⁴

Faced with political narratives asserting the unqualified supremacy of popular sovereignty over constitutional limits and European obligations, the Italian Constitutional Court has repeatedly reaffirmed the centrality of the supreme principles of the constitutional order. Above all, it has insisted on the primacy of fundamental rights, judicial accountability, and respect for international and European commitments.³⁵

The Court opposed these efforts on several occasions. In judgment no. 24 of 2004, it invalidated the so-called ‘lodo Schifani’, holding that the temporary suspension of criminal proceedings for a broad category of institutional office holders violated both the principle of equality and the right to judicial protection.³⁶ The same logic informed decision no. 262 of 2009, which struck down the subsequent ‘lodo Alfano’.³⁷

These decisions reaffirmed a broader constitutional principle: democratic legitimacy cannot replace legal accountability. Public authority, even when supported by broad electoral consent, remains subject to constitutional limits and judicial review.³⁸ Limited forms of immunity may be justified where necessary to protect the independence of constitutional functions, but they cannot be extended so far as to create privileged zones of impunity within the political system.³⁹

³³ On ‘constitutional capture’ and the systematic erosion of judicial independence, see *ex multis* Sadurski Wojciech, *Poland’s Constitutional Breakdown* (Oxford: Oxford University Press, 2019) and Sajó András and Uitz Renáta, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press, 2017). On the Italian case, see Pinelli Cesare, “The populist challenge to constitutional democracy,” *European Constitutional Law Review*, 1 (2011).

³⁴ Proponents of such measures justified them on the grounds of institutional functionality arguing that the effective exercise of high governmental responsibilities required protection from judicial interference. Cf. Law no. 140 of June 20, 2003, “*Disposizioni per l’attuazione dell’articolo 68 della Costituzione nonché in materia di processi penali nei confronti delle alte cariche dello Stato*,” and Law no. 124 of July 23, 2008, “*Disposizioni in materia di sospensione del processo penale nei confronti delle alte cariche dello Stato*”.

³⁵ Cf. Manetti Michela, “Costituzione, partecipazione democratica, populismo,” *Rivista AIC*, 3 (2018): 375-401.

³⁶ ICC, 24/2004, conclusions on points of law, sections 4 and 6.

³⁷ ICC, 262/2009, conclusions on points of law, section 7.

³⁸ See Luciani Massimo, “Questioni generali della forma di governo italiana,” *Rivista AIC*, 1 (2024): 1-25; Mezzanotte Carlo, *Il giudizio sulle leggi. Le ideologie del Costituente* (Milan: 1979); Silvestri Gaetano, *Lo Stato senza principe. La sovranità dei valori nelle democrazie pluraliste* (Turin: Giappichelli, 2005).

³⁹ Ferrajoli Luigi, *Poteri selvaggi. La crisi della democrazia italiana* (Rome-Bari: Laterza, 2011); Luciani

b) Emergency Lawmaking and the Abuse of Decree-Laws

Similarly, crises of legality arise when emergency lawmaking becomes a routine substitute for ordinary legislative mediation. Legal instruments originally designed to address extraordinary and temporary situations may gradually become ordinary techniques of governance, allowing the executive to bypass parliamentary deliberation and compress the legislative process.

The Italian Court responded to the abuse of decree-laws by transforming the constitutional requirements of extraordinariness, necessity, and urgency into substantive standards of review. In judgment no. 29 of 1995, the ICC held that recourse to decree-laws must be justified by genuine and properly documented emergency circumstances. In judgment no. 360 of 1996, the Court further ruled that the systematic reiteration of expired decree-laws, absent «*new and autonomous circumstances of necessity and urgency*» was unconstitutional.⁴⁰

This line of reasoning was consolidated in decision no. 171 of 2007, where the Constitutional Court clarified that the manifest absence of the required conditions may lead to the invalidation not only of the decree-law itself, but also of the subsequent conversion statute.⁴¹ Later decisions extended this scrutiny to the material homogeneity of decree-laws and to amendments introduced during the conversion process, thereby preventing emergency sources of law from becoming omnibus legislative instruments.⁴²

c) Legislative Delegation and Democratic Responsibility

A further legality crisis arises when delegated legislation begins to displace parliamentary control over fundamental policy choices. Legislative delegation was originally conceived as a pragmatic instrument that would allow the Chambers to rely on governmental expertise in technically complex fields. Yet when enabling statutes become excessively broad or vague, the distinction between delegated legislation and ordinary legislative authority begins to blur.⁴³

The Constitutional Court has consistently intervened to prevent such distortions. Its case law treats the limits imposed by Article 76 of the Constitution not as merely formal requirements, but as substantive guarantees designed to preserve the constitutional distribution of normative power.⁴⁴ In particular, the ICC has consistently emphasized that the Government re-

Massimo, “Costituzionalismo irenico e costituzionalismo polemico,” *Giurisprudenza costituzionale*, 4 (2006): 1643-68; Palombella Gianluigi, “The rule of law as an institutional ideal,” in *The Rule of Law and Democracy. Internal and External Issues*, edited by Morlino Leonardo and Palombella Gianluigi (Leiden: Brill, 2010), 3-37.

⁴⁰ ICC, 29/1995; and ICC, 360/1996, conclusions on points of law, sections 5 and 6.

⁴¹ ICC, 171/2007, conclusions on points of law, section 5. See also ICC, 128/2008.

⁴² ICC, 22/2012, conclusions on points of law, section 4.1; ICC, 32/2014, conclusions on points of law, sections 4 and 5. Cf. ICC, 247/2019. Among the scholars see Lupo Nicola, “L’omogeneità del decreto-legge (e delle leggi di conversione): un nodo difficile, ma ineludibile per limitare le patologie della produzione normativa,” in *Scritti in memoria di Alessandra Concaro*, edited by Giuseppe D’Elia *et al.* (Milan: 2012), 419-58; Celotto Alfonso, *L’abuso del decreto-legge* (Padova: CEDAM, 1997); Luciani Massimo, “Questioni generali della forma di governo italiana,” note 38.

⁴³ Cf. Pizzorusso Alessandro, “Problemi metodologici in tema di studio delle fonti del diritto,” in *Scritti in memoria di Livio Paladin* (Naples: Jovene, 2004), 1687-1719. According to the author the risk is not merely procedural: when delegation is formulated in excessively broad or indeterminate terms, the Government may effectively acquire wide discretion in shaping substantive legislative policy.

⁴⁴ See Di Cosimo Giovanni, “Tutto ha un limite (la Corte e il Governo legislatore),” in *I mutamenti della forma di governo tra modificazioni tacite e progetti di riforma*, edited by Siclari Massimo (Rome: Aracne, 2008), 89-102; Dal Canto Francesco, “La qualità della normazione e i suoi custodi,” in *La tecnica normativa tra legislatore e giudici*, edited by Massimo Cavino and Conte Lucilla (Naples: Edizioni Scientifiche Italiane, 2014),

mains strictly bound by the principles and criteria established in the enabling statute and cannot introduce regulatory solutions that depart substantially from the legislative mandate. Judgments no. 98 of 1965, no. 426 of 1995, no. 80 of 2012, and no. 5 of 2014 all reflect this approach.⁴⁵

The constitutional significance of Article 76 extends beyond the formal protection of parliamentary competence. It safeguards Parliament's democratic responsibility for the fundamental policy choices underlying the legislative framework. Delegation is constitutionally permissible only insofar as the Chambers retain control over the essential normative orientation of the delegated discipline.⁴⁶

5. *Crises of Legitimacy and Judicial Authority*

A second, subtler, form of constitutional crisis concerns legitimacy. Legitimacy crises arise when constitutional adjudication, while remaining formally valid, progressively loses its ability to command broad social acceptance. Under these conditions, the courts continue to operate within the legal framework, yet their decisions increasingly become objects of political contestation.⁴⁷

Such tensions may originate both inside and outside the constitutional system. Internally, they often stem from a growing disconnect between the formal and the material Constitution. Courts may interpret constitutional principles in ways that appear increasingly detached from prevailing political expectations, institutional practices, or social conventions. When this occurs, judicial authority may come to be perceived as insufficiently responsive to democratic preferences.⁴⁸

Externally, legitimacy crises may emerge from the gradual relocation of political authority beyond the traditional sphere of representative decision-making. In contemporary systems of governance, important policy choices are increasingly shaped by supranational institutions, markets, technocratic bodies, and international obligations. Constitutional courts are then called upon to mediate between domestic principles and external constraints, often becoming focal points of contestation over decisions that are only partially within the control of national democratic institutions.⁴⁹

53-102; Carnevale Paolo, "La legge di delega come strumento per la semplificazione normativa e la qualità della normazione: il caso del meccanismo del c.d. 'taglia-leggi'," *Federalismi.it*, 12 (2009): 1-28.

⁴⁵ ICC, 98/1965; ICC, 426/1995, conclusions on points of law, section 6; ICC, 80/2012, conclusions on points of law, section 4.1; ICC, 5/2014, conclusions on points of law, section 3.1.

⁴⁶ ICC, 3/1957, conclusions on points of law, section 2; ICC, 60/1957; ICC, 293/2010, conclusions on points of law, section 8.4; ICC, 250/2016, conclusions on points of law, section 5; and ICC, 10/2023, conclusions on points of law, section 7

⁴⁷ Fallon Richard, *Law and Legitimacy*; Tyler Tom, *Why People Obey*; Cheli Enzo, *Il giudice delle leggi*, note 16.

⁴⁸ See Loughlin Martin, *Political Jurisprudence* (Oxford: Oxford University Press, 2017); Rosanvallon Pierre, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge: Cambridge University Press, 2008); Dyzenhaus David, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge: Cambridge University Press, 2022) and Mortati Costantino, *La costituzione in senso materiale*, note 25.

⁴⁹ On the relocation of political and normative authority beyond the traditional sphere of democratic decision-making, see *ex plurimis* Cassese Sabino, *Oltre lo Stato*, (Rome-Bari: Laterza, 2006); Slaughter Anne-Marie, *A New World Order* (Princeton: Princeton University Press, 2004); Sassen Saskia, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006).

These crises are therefore best understood as meta-constitutional phenomena. They do not concern the validity of rules themselves, but rather the broader transformation of the institutional environment within which constitutional adjudication operates. Such tensions are fueled both by the social salience of judicial decisions – particularly in areas such as end-of-life regulation, migration, reproductive rights, family law, and privacy – and by the increasing visibility of courts in an era marked by declining trust in representative institutions.⁵⁰

a) Judicial Substitution and Institutional Displacement

Within the Italian order, legitimacy tensions have become increasingly visible as a result of legislative inertia. Parliament has often proved unwilling to regulate politically contentious issues involving fundamental rights, leaving the Constitutional Court to intervene in order to address unresolved conflicts.⁵¹ The ICC has therefore systematically entered fields such as assisted suicide, prison law, migration, reproductive rights, family law, and the relationship between transparency and personal data protection. In these areas, constitutional adjudication has become one of the few institutional arenas capable of producing authoritative decisions.⁵²

This development creates a deeper institutional tension. As the Court intervenes more frequently to compensate for the failures of representative institutions, judicial review becomes increasingly vulnerable to the charge of political intrusion. It no longer appears simply as a mechanism for correcting unconstitutional legislation. Instead, the ICC begins to function as a substitute for political decision-making itself.⁵³ The central issue, hence, is not simply judicial activism. Constitutional courts do not intervene only because they disagree with legislative choices but, more often, they intervene because representative institutions fail to make those choices in the first place.⁵⁴

⁵⁰ Cf. Azzariti Gaetano, *Critica della democrazia identitaria*, (Rome-Bari: Laterza, 2005); Stone Sweet Alec, “Constitutional Courts and Parliamentary Democracy,” *West European Politics*, 1 (2002): 77-100, and Waldron Jeremy, *The core of the case against judicial review*, note 20

⁵¹ On the growing reliance on constitutional courts to resolve politically divisive questions, see Gardbaum Steven, *The New Commonwealth Model of Constitutionalism* (Cambridge: Cambridge University Press, 2013); Devins Neal and Fisher Louis, *The Democratic Constitution* (Oxford: Oxford University Press, 2004); Stone Sweet Alec, *Governing with Judges*, note 4. For Italian legal scholarship, Mezzanotte Carlo, *Corte costituzionale e legittimazione politica* (Rome: Tipografia Veneziana, 1984); Gallo Franco, *Il futuro non è un vicolo cieco. Democrazia, economia, Costituzione* (Palermo: Sellerio, 2019); Zagrebelsky Gustavo, *Principi e voti*, note 18.

⁵² See *ex multis* Loiodice Aldo, “La Corte costituzionale tra tecnica giuridica e contatti con la politica,” in *Corte costituzionale e processi di decisione politica. Atti del seminario di Otranto-Lecce, svoltosi il 4-5 giugno 2004*, edited by Vincenzo Tondi Della Mura *et al.*, (Turin: Giappichelli, 2005), 3-16; Morrone Andrea, “Suprematismo giudiziario. Spunti su sconfinamenti e legittimazione della Corte costituzionale,” *Quaderni costituzionali*, 2 (2019): 251-90; Basile Roberto, “Le decisioni di manifesta inammissibilità e infondatezza per rispetto della discrezionalità del legislatore,” in *La ridefinizione della forma di governo attraverso la giurisprudenza costituzionale*, edited by Antonio Ruggeri (Napoli: Edizioni Scientifiche Italiane, 2006), 437-78.

⁵³ Cf. for example Zanon Nicolò, “La Corte, il legislatore ordinario e quello di revisione, ovvero del diritto all’‘ultima parola’ al cospetto delle decisioni d’incostituzionalità,” *Giurisprudenza costituzionale*, 5 (1998): 3169-83; Ruotolo Marco, “Corte, giustizia e politica,” in *Corte costituzionale e processi di decisione politica. Atti del seminario di Otranto-Lecce, svoltosi il 4-5 giugno 2004*, edited by Vincenzo Tondi Della Mura *et al.* (Turin: Giappichelli, 2005), 319-42; and Massa Pinto Ilenia, “La discrezionalità politica del legislatore tra tutela costituzionale del contenuto essenziale e tutela ordinaria caso per caso dei diritti nella più recente giurisprudenza costituzionale,” *Giurisprudenza costituzionale*, 2 (1998): 1309-23.

⁵⁴ See for example Morrone Andrea, “Suprematismo giudiziario II. Sul pangiuridicismo costituzionale e sul lato politico della Costituzione,” *Federalismi.it*, 12 (2021): 170-212; and Elia Leopoldo, “La Corte nel

Three forms of judicial intervention may be distinguished. The first is judicial correction. Here, the courts only invalidate unconstitutional measures while leaving the underlying political choices to Parliament. The second is judicial compensation. In such cases, the courts intervene in order to fill temporary gaps created by legislative inertia, while still preserving room for future political action. The third is judicial substitution. This occurs when constitutional judgment becomes the ordinary mechanism through which divisive policy questions are resolved. At that point, courts cease to function merely as corrective institutions and become structurally integrated into the political process.⁵⁵ This form of intervention does not itself constitute a legitimacy crisis. It becomes a source of such a crisis when the Court's compensatory role ceases to appear exceptional and begins to be perceived as a normal substitute for representative decision-making.

Judicial substitution also alters the incentives of the political system itself. The strategic avoidance of politically costly decisions, legislative inertia, and executive reliance on emergency governance may all be reinforced by the expectation that constitutional adjudication will ultimately provide a solution. A legal system becomes fragile when Parliament no longer legislates on controversial issues, when courts are repeatedly required to construct detailed normative frameworks that would ordinarily belong to the political sphere, and when institutional dialogue becomes effectively unilateral.⁵⁶

b) Self-Legitimizing Strategies

Faced with these tensions, the Italian Constitutional Court has gradually developed a series of self-legitimizing strategies designed to preserve its authority, while maintaining a cooperative relationship with the political branches.

The first strategy is a form of selective deference toward Parliament. In politically sensitive areas, the Court has often attempted to preserve the primacy of legislative decision-making before intervening directly. This approach is especially visible in order no. 207 of 2018 and judgment no. 242 of 2019 on assisted suicide. The Court initially postponed its ruling in order to give Parliament time to legislate. Only after legislative inaction did it intervene, partially decriminalizing the relevant offence under limited conditions.⁵⁷ A similar pattern appears in the case law on life imprisonment without parole (*ergastolo ostativo*). In judgment no. 253 of 2019, order no. 97 of 2021, and judgment no. 20 of 2022, the ICC declared aspects of the statutory regime incompatible with constitutional principles while simultaneously delaying the effects of its decisions in order to encourage legislative reform.⁵⁸

quadro dei poteri costituzionali," in *Corte costituzionale e sviluppo della forma di governo in Italia*, edited by Barile Paolo *et al.*, (Bologna: Il Mulino, 1988), 515-527; Bartole Sergio, *Interpretazioni e trasformazioni della Costituzione repubblicana* (Bologna: Il Mulino, 2004).

⁵⁵ See Ruggeri Antonio, "Gli 'effetti politici' delle sentenze della Corte costituzionale emesse in occasione dei giudizi sulle leggi," *Consulta online*, 1 (2014): 1-23; Zagrebelsky Gustavo, "La Corte costituzionale e il legislatore," in *Corte costituzionale e sviluppo della forma di governo in Italia*, edited by Paolo Barile *et al.* (Bologna: Il Mulino, 1988), 103-158; Morrone Andrea, "Corte costituzionale: fattore condizionante o elemento strutturale?," *Rivista AIC*, 3 (2024): 186-273.

⁵⁶ Hirschl Ran, "The judicialization of mega-politics and the rise of political courts," *Annual Review of Political Science*, 1 (2008): 93-118; Shapiro Martin, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981); Whittington Keith, *Political Foundations of Judicial Supremacy* (Princeton: Princeton University Press, 2007); and Bickel Alexander, *The Least Dangerous Branch*, note 6.

⁵⁷ ICC, order no. 207/2018, and ICC, 242/2019.

⁵⁸ ICC, 253/2019; ICC, order no. 97/2021; ICC, 20/2022, and ICC, 227/2022.

A second strategy is persuasive reasoning. The Court increasingly devotes attention not only to the outcome of its decisions, but also to the broader methodological principles that justify constitutional adjudication. This tendency can be seen in decision no. 10 of 2015 on the temporal effects of constitutional rulings, judgment no. 269 of 2017 on the relationship between constitutional review and EU law, and decision no. 20 of 2019 on the balance between transparency and personal data protection.⁵⁹ Persuasive reasoning becomes a source of legitimacy not because it eliminates conflict, but because it frames judicial intervention as publicly justifiable rather than simply institutionally binding.⁶⁰

A third strategy concerns institutional communication. The Court has progressively expanded the visibility of its activities through public hearings, educational initiatives, official press releases, a more accessible use of its website, annual reports, and conferences.⁶¹ Such initiatives reflect a growing awareness that the legitimacy of constitutional adjudication depends not only on the formal authority of judicial decisions, but also on their capacity to be understood and accepted by the broader political community.⁶²

Institutional communication thus complements judicial reasoning by expanding the range of audiences to whom constitutional review must now explain itself. These strategies do not eliminate legitimacy tensions, rather they manage them by transforming authority into a function of justification and dialogue. As President Marta Cartabia observed in 2020, the authority of the Constitutional Court depends not only on the force of its decisions, but also on its capacity to be understood and accepted within the wider political community.⁶³

Ultimately, legitimacy tensions in Italy appear less as episodic anomalies than as structural features of contemporary constitutionalism. The more representative institutions fail to perform their integrative function, the more the ICC is called upon to stabilize the system through adjudication. Yet this very success generates a further paradox. Judicial authority is strengthened by the Court's ability to manage unresolved conflicts, but it is also exposed to new forms of contestation, precisely because it becomes increasingly central to the functioning of the political system. The question hence is not whether the Italian Court should intervene at all. In many cases, intervention is unavoidable. What remains at stake is whether constitutional judgment can continue to stabilize democratic order without gradually becoming a structural substitute for representative politics.⁶⁴

⁵⁹ ICC, 10/2015, conclusions on points of law, sections 7 and 8; ICC, 269/2017, conclusions on points of law, sections 5.1-5.3; ICC, 20/2019, conclusions on points of law, sections 3-5.

⁶⁰ On the idea that the authority of constitutional courts depends on the persuasive quality and public accessibility of their reasoning, cf. Sperti Angioletta, "Corte costituzionale e opinione pubblica," *Diritto e Società*, 4 (2019): 735-90; Pasquino Pasquale, "Constitutional adjudication and democracy. Comparative perspectives: USA, France, Italy," *Ratio Juris*, 1 (1998), 38-50; Kumm Mattias, "The idea of Socratic contestation and the right to justification: The point of rights-based proportionality review," *Law and Ethics of Human Rights*, 2 (2010): 141-75.

⁶¹ Viganò Francesco, "La Corte costituzionale e la sua comunicazione," *Quaderni costituzionali*, 1 (2023): 45-72; Tega Diletta, *La Corte nel contesto* (Bologna: Il Mulino, 2020); Azzariti Gaetano, "La Corte costituzionale nella società," *Costituzionalismo.it*, 1 (2024): 1-7.

⁶² See Conti Gian Luca, "La Corte costituzionale si apre (non solo) alla società civile," *Osservatorio sulle fonti*, 1 (2020), 1-37; Romboli Roberto, "Corte costituzionale e opinione pubblica. Genesi, forme, finalità," *Quaderni costituzionali*, 1 (2023): 45-72; Olivito Elisa, "Invito a Corte, con cautela. Il processo costituzionale si apre alla società civile," *Rivista italiana per le scienze giuridiche*, 2 (2020): 485-98.

⁶³ Cartabia Marta, *Relazione sull'attività della Corte costituzionale nel 2019*, in *Cortecostituzionale.it* (April 28, 2020).

⁶⁴ On the structural tension between constitutional adjudication and democratic representation, see Cap-

6. *Functional Crises and Constitutional Adaptation*

Functional crises arise when extraordinary circumstances place the legal order under severe strain, testing the ability of institutions to respond effectively without abandoning the constitutional framework itself. Unlike crises of legality or legitimacy, functional crises do not primarily concern the validity of constitutional rules or the authority of constitutional institutions. Their central question is operational: whether constitutional systems can preserve institutional equilibrium under conditions of acute stress.⁶⁵

Economic collapse, environmental disaster, public health emergencies, and major security threats all generate situations in which ordinary procedures may appear too slow or inadequate to address urgent collective dangers. Constitutional systems are therefore confronted with a recurring dilemma: how to reconcile the need for rapid governmental action with the protection of fundamental rights, democratic accountability, and the separation of powers.⁶⁶

The ICC has had to confront these tensions across several fields. Although the substantive contexts vary, its case law reveals a common analytical structure. The Italian Court has not suspended constitutional guarantees during emergencies. Instead, it has sought to adapt constitutional principles in order to preserve their effectiveness under changing circumstances.⁶⁷

Across different forms of functional crisis, three doctrinal pillars recur: proportionality, which ensures that emergency measures do not impose excessive restrictions on rights; temporality, which prevents exceptional measures from becoming permanent instruments of governance; and minimum core protection, which preserves the essential content of fundamental rights, even under emergency conditions.⁶⁸

pelletti Mauro, *Giudici legislatori?* (Milan: Giuffrè, 1984); Baldassare Antonio, “Costituzione e teoria dei valori,” *Politica del diritto*, 2 (1991): 639-64; Mezzanotte Carlo, *Corte costituzionale e legittimazione politica*, note 51. See also Silvestri Gaetano, *Dal potere ai principi. Libertà ed eguaglianza nel costituzionalismo contemporaneo* (Rome-Bari: Laterza, 2009).

⁶⁵ Scheppele Kim, “Small emergencies,” *Georgia Law Review*, 4 (2006): 835-62; Ramraj Victor, *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, 2008); Rosenfeld Michel, “Judicial balancing in times of stress: Comparing the American, British, and Israeli approaches to the war on terror,” *Cardozo Law Review*, 5 (2006): 2079-2101.

⁶⁶ Sunstein Cass, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005); Barak Aharon, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015); Holmes Stephen, “In case of emergency: Misunderstanding tradeoffs in the war on terror,” *California Law Review*, 2 (2009): 301-355; Vermeule Adrian, *The Constitution of Risk* (Cambridge: 2014); and Ackerman Bruce, *The emergency Constitution*, note 5.

⁶⁷ See Luciani Massimo, “Il sistema delle fonti del diritto alla prova dell’emergenza,” *Rivista AIC*, 2 (2020): 1-33; Morrone Andrea, *Il custode della ragionevolezza* (Milan: Giuffrè, 2001); Cartabia Marta, “I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana. Relazione alla Conferenza trilaterale delle Corti costituzionali italiana, portoghese e spagnola, Rome, Palazzo della Consulta,” in *Cortecostituzionale.it* (October 24-26, 2013).

⁶⁸ Cf. *ex multis* Serges Giuliano, “L’emergenza: fattore esogeno di condizionamento della produzione normativa in tempo di crisi?,” in *Modello costituzionale e trasformazione del sistema delle fonti nelle crisi economica e pandemica. Emergenza e persistenza*, edited by Cardone Andrea (Naples: Edizioni Scientifiche Italiane, 2023), 225-70; Baldini Vincenzo, “L’emergenza sanitaria: tra stato di eccezione, trasformazione della Costituzione e garanzie del pluralismo democratico,” *Dirittifondamentali.it*, 1 (2023): 390-415; and Zagrebelsky Gustavo, *Il diritto mite*, note 8.

a) Economic Crisis and Social Rights

The financial crisis that followed the global downturn of 2008 generated significant tensions between fiscal sustainability and the constitutional protection of social rights. Faced with mounting pressure on public finances, the legislature adopted austerity measures affecting pensions, public sector salaries, and welfare programmes.

The Italian Constitutional Court acknowledged that exceptional fiscal circumstances may justify temporary limitations on welfare provisions and it recognized that financial emergencies may require extraordinary budgetary interventions. At the same time, however, the Court insisted that such measures must remain temporary, exceptional, and proportionate. In judgment no. 223 of 2012, the Corte costituzionale held that emergency measures affecting public-sector remuneration could be justified only if they remained limited in duration and proportionate to the exceptional situations that had prompted them.⁶⁹

In decision no. 264 of 2012, the ICC warned against the indefinite repetition of temporary fiscal measures, emphasizing that the constant renewal of emergency interventions risks transforming exceptional austerity policies into ordinary techniques of governance, and it emphasized that proportionality requires careful consideration of the impact of fiscal policies on vested rights and legitimate expectations.⁷⁰

Later decisions refined the constitutional limits of austerity policies. Decision no. 310 of 2013 stressed that proportionality requires careful consideration of the impact of fiscal measures on vested rights and legitimate expectations. Decision no. 70 of 2015 further clarified that financial constraints cannot operate as an absolute criterion of economic policy. Budgetary discipline must instead be balanced against the constitutional protection of social rights. The Court made this point explicit when it stated that «it is the guarantee of inviolable rights that determines the allocation of resources, and not the other way around».⁷¹

Subsequent decisions extended the same logic to the protection of the so-called ‘essential levels of assistance’ (livelli essenziali delle prestazioni), emphasizing that public spending cuts remain constitutionally acceptable only if minimum standards of protection are preserved.⁷²

b) Environmental and Industrial Crises

A second category of functional crisis concerns conflicts among public health, environmental protection, and economic activity.⁷³ These tensions emerged with particular intensity in the litigation surrounding the steel plant in Taranto, commonly known as the ‘Ilva case’, which has generated one of the most important lines of constitutional jurisprudence in recent years.⁷⁴

⁶⁹ ICC, 223/2012, conclusions on points of law, section 11.

⁷⁰ ICC, 264/2012, conclusions on points of law, section 5.3. See also ICC, 275/2016.

⁷¹ ICC, 310/2013; ICC, 70/2015, conclusions on points of law, section 10.

⁷² ICC, 5/2018; ICC, 40/2019; ICC, 63/2020; and ICC, 168/2022. Carosi Aldo, “La Corte costituzionale tra autonomie territoriali, coordinamento finanziario e garanzia dei diritti,” *Rivista AIC*, 4 (2017): 1-33; Morrone Andrea, “Crisi economica e diritti. Appunti per lo stato costituzionale in Europa,” *Quaderni costituzionali*, 1 (2014): 79-108; Ruggeri Antonio, “Crisi economica, dialogo tra le Corti e salvaguardia dei diritti fondamentali (con specifico riguardo alla materia pensionistica),” *Dirittifondamentali.it*, 1 (2017): 1-25.

⁷³ Teubner Gunther, *Constitutional Fragments*, note 15; Choudhry Sujit, “Resisting democratic backsliding: An essay on Weimar, self-enforcing Constitutions, and the Frankfurt School,” *Global Constitutionalism*, 1 (2018): 54–81; and Tushnet Mark, *Constitutional hardball*.

⁷⁴ ICC, 85/2013, conclusions on points of law, sections 8-10.

In judgment no. 85 of 2013, the Italian Court rejected the idea that one constitutional value could automatically prevail over all others. Instead, it held that health, environmental protection, and employment must be balanced within a framework capable of preserving the essential core of each interest.⁷⁵

This approach was further refined in judgment no. 58 of 2018. There, the Corte costituzionale invalidated a legislative provision that effectively shielded certain forms of industrial conduct from criminal liability, reaffirming that economic continuity cannot justify the suspension of fundamental guarantees protecting health and environmental integrity.⁷⁶

At the same time, however, the Court avoided framing the issue in terms of an absolute hierarchy among constitutional values. Rather than forcing the immediate closure of the industrial facility, it reiterated the need for legislative and administrative solutions, capable of reconciling environmental remediation with economic continuity.⁷⁷

Functional crises do not necessarily require the suspension of constitutional guarantees. They require adaptive forms of balancing capable of structuring conflicts among competing constitutional values without eliminating them altogether.

c) Pandemic Crisis and Fundamental Freedoms

The Covid-19 pandemic posed even sharper challenges, combining rapid executive action, scientific uncertainty, and pervasive restrictions on fundamental freedoms. Unlike economic crises, which primarily affect distributive policies, the pandemic required immediate limitations on rights such as freedom of movement, freedom of assembly, religious liberty, economic initiative, and the right to work.

Faced with this unprecedented situation, the Italian Constitutional Court adopted a balanced and relatively deferential approach. It acknowledged the exceptional nature of the emergency, but rejected the idea that the Constitution could be suspended in the name of public necessity. In decision no. 37 of 2021, the ICC reaffirmed that the Constitution continues to govern public action even under emergency conditions. Public-health urgency does not create a constitutional vacuum. Rather, it requires a reconfiguration of constitutional priorities within the existing legal framework.⁷⁸

The Court further emphasized that restrictions on fundamental freedoms may be justified only when they are supported by scientific evidence, limited, and subject to continuous review. The protection of public health is both a constitutional right and a duty of solidarity, but it cannot justify indefinite or unreviewable restrictions on individual liberty.⁷⁹

Three factors proved decisive: justification, duration, and reviewability. Emergency measures were constitutionally acceptable only insofar as they remained linked to the persistence of the health risk and open to constant reassessment.⁸⁰ The emergency – in the Court's words – does not constitute a constitutional 'no man's land', but rather a domain in which the Constitution continues to operate thereby excluding any general suspension of rights.⁸¹

⁷⁵ See especially, ICC, 85/2013; and ICC, 121/2022, conclusions on points of law, section 5.

⁷⁶ ICC, 58/2018, conclusions on points of law, sections 7 and 8.

⁷⁷ ICC, 10/2016; ICC, 71/2023; ICC, 105/2024.

⁷⁸ ICC, 37/2021, conclusions on points of law, sections 7-9. See also ICC, 54/2022.

⁷⁹ ICC, 15/2023, conclusions on points of law, sections 8 and 9.

⁸⁰ ICC, 198/2021; ICC, 127/2022; ICC, 185/2022.

⁸¹ ICC, 14/2023, conclusions on points of law, sections 7 and 8. Cf. ICC, 171/2022.

Compared with the jurisprudence of other constitutional courts, the Italian approach appears relatively deferential. Unlike the German Federal Constitutional Court, which subjected specific restrictions to more intensive rights-based scrutiny, or the Spanish *Tribunal Constitucional*, which questioned the constitutional basis of certain emergency measures, the Italian Court largely adopted a procedural approach. The ICC did not impose rigid substantive limits. Instead, it concentrated on the existence of adequate parliamentary and judicial oversight, the quality of justification, and the proportionality of restrictions.⁸²

This comparative difference is significant because it confirms a broader feature of the Italian model of constitutional resilience. The Court does not generally respond to emergencies through categorical assertions of rights absolutism. Instead, it seeks to preserve constitutional continuity by subjecting emergency governance to principles of proportionality, temporality, scientific justification, and reviewability.

Across these different contexts, the Italian experience reveals a common logic. The Court does not suspend the Constitution in times of crisis. It adapts constitutional principles in order to preserve their effectiveness under exceptional conditions. Constitutional resilience, therefore, depends not on the absence of conflict, but on the capacity of legal institutions to transform systemic tensions into legally structured processes of balancing and adjustment.⁸³

7. Constitutional Courts and the Risk of Institutional Overexposure

The expanding role of constitutional courts in the management of crises inevitably raises a broader question about the limits of judicial intervention within democratic systems. As courts become more deeply involved in politically salient disputes – particularly those concerning fundamental rights, social policy, emergency governance, and the separation of powers – their decisions inevitably acquire wider political significance.⁸⁴

Judicial intervention may strengthen constitutional guarantees, but it also exposes the courts to legitimacy tensions whenever judicial reasoning is perceived as displacing choices that would ordinarily belong to democratically accountable institutions. The issue, then, is not confined to the traditional counter-majoritarian difficulty. Constitutional courts do not simply invalidate legislation enacted by elected representatives. Increasingly, they participate in redefining the boundaries of political discretion itself.⁸⁵

⁸² King Jeff and Ferraz Octávio (eds.), *Comparing Covid Laws: A Critical Global Survey* (Oxford: Oxford University Press, 2026).

⁸³ See, for example, Romboli Roberto, “L’incidenza della pandemia da Coronavirus nel sistema costituzionale italiano,” *Revista Brasileira de Estudos Políticos*, 1 (2021): 517-596; Viceconte Nicola, “Ragioni logiche, prima che giuridiche. La gestione della pandemia da SARS-CoV-2 alla prova della Corte costituzionale,” *Italian Papers on Federalism*, 1 (2023): 73-105; Algotino Alessandra, “Costituzionalismo e distopia nella pandemia di Covid-19 tra fonti dell’emergenza e (s)bilanciamento dei diritti,” *Costituzionalismo.it*, 1 (2021): 1-81; Piergigli Valeria, “Corti costituzionali e diritti ovvero l’onda lunga della risposta istituzionale all’emergenza sanitaria. Quali prospettive per il post-pandemia?,” *DPCE online*, 1 (2023): 693-729.

⁸⁴ See Friedman Barry, *The Will of the People: How Public Opinion Has Influenced the Supreme Court*, note 18; Whittington Keith, *Political Foundations of Judicial Supremacy*, note 56; and Dixon Rosalind, “Weak-Form Judicial Review and the Right to Equality,” *Supreme Court Law Review*, 1 (2009): 31-62.

⁸⁵ Grimm Dieter, *The Constitution of European Democracy*, note 17; Pildes Richard, “The constitution-

For this reason, the central question is no longer whether courts have become excessively visible or politically exposed. In many contemporary democracies, constitutional judges have become structurally indispensable institutions. They are repeatedly called upon to resolve conflicts that political actors either cannot or will not address through ordinary democratic processes.

This dynamic may be understood through the distinction already introduced between judicial correction, judicial compensation, and judicial substitution. Judicial correction occurs when courts merely invalidate unconstitutional measures, while leaving the substantive political choices to representative institutions. Judicial compensation occurs when courts intervene in order to address temporary failures of the political process, while still preserving room for subsequent legislative action. Judicial substitution, by contrast, occurs when constitutional adjudication becomes the default institutional channel through which unresolved political conflicts are managed. Under these conditions, courts no longer compensate for the deficiencies of representative institutions; they begin to replace them functionally.⁸⁶

Such judicial substitution alters the incentives of the political system itself. Executive reliance on emergency governance, legislative inertia, and the strategic avoidance of politically costly decisions may all be reinforced by the expectation that constitutional adjudication will eventually provide a solution. Judicial intervention then ceases to be exceptional, and instead becomes part of the ordinary operation of the political system.

Several indicators suggest when judicial stabilization begins to turn into institutional displacement. The first is persistent legislative inertia in areas involving politically controversial issues, especially where Parliament persistently avoids legislating because it expects the Court to intervene. The second is the growing tendency of courts to construct detailed normative frameworks that go beyond the correction of constitutional defects and begin to resemble primary political decision-making. The third is the transformation of institutional dialogue into a largely unilateral process. Constitutional negotiation presupposes reciprocal interaction between representative institutions and courts. When Parliament systematically fails to respond, judicial dialogue becomes difficult to distinguish from judicial replacement.⁸⁷

This is the deeper paradox of constitutional resilience. The Italian Constitutional Court has often preserved institutional continuity precisely because it has been willing to intervene where political institutions were unable or unwilling to act. Nevertheless, the same centrality that strengthens the capacity for self-correction of the constitutional order may gradually weaken the autonomy of the political process.⁸⁸

The ICC therefore offers a particularly revealing example of the ways in which con-

alization of democratic politics,” *Harvard Law Review*, 1 (2004): 29-154; Tushnet Mark, “The Possibility of Illiberal Constitutionalism?,” *Florida Law Review*, 6 (2017): 1366-84; and Shapiro Mark, *Courts*, note 56.

⁸⁶ Groppi Tania, “La Corte e ‘la gente’: uno sguardo ‘dal basso’ all’accesso incidentale alla giustizia costituzionale,” *Rivista AIC*, 2 (2019): 408-77. See also Mezzanotte Carlo, *Il giudizio sulle leggi*; Baldassare Antonio, *Costituzione e teoria dei valori*, note 64; Gallo Franco, *Il futuro non è un vicolo cieco*, note 51.

⁸⁷ On the tendency of courts to elaborate increasingly detailed normative frameworks, see Roach Kent, “Dialogic judicial review and its critics,” *Supreme Court Law Review*, 1 (2004): 49-104; Brewer-Carías Allan, *Constitutional Courts as Positive Legislators* (Cambridge: Cambridge University Press, 2011); Schauer Frederick, “Judicial supremacy and the modest Constitution,” *California Law Review*, 4 (2004): 1045-67.

⁸⁸ Among Italian scholars Bin Roberto, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale* (Milan: Giuffrè, 1992); Luciani Massimo, *Ogni cosa al suo posto*, note 28; Zanon Nicolò, “Corte costituzionale, evoluzione della ‘coscienza sociale’,” note 18; Morrone Andrea, *Suprematismo giudiziario*, note 52.

stitutional courts may function as institutions of crisis management within contemporary democracies. Across crises of legality, legitimacy, and functionality, the Italian Court has increasingly acted as an institution of continuity, transforming unresolved political conflicts into legally structured processes of adjudication, balancing, and institutional adjustment.⁸⁹

For this reason, constitutional resilience cannot be measured simply by the capacity of courts to solve every crisis. It must also be assessed by asking whether judicial stabilization preserves, rather than replaces, the autonomy of democratic politics.

The success of judicial review becomes constitutionally sustainable only so long as it remains a mechanism of correction and compensation, rather than a permanent substitute for representative government.⁹⁰

⁸⁹ On the risk that constitutional courts may become structurally integrated into the political process as a consequence of their effectiveness, see Barak Aharon, *The Judge in a Democracy*, note 16; Cappelletti Mauro, *Giudici legislatori?*, note 64; Stone Sweet Alec, *Constitutional Courts and Parliamentary Democracy*, note 50.

⁹⁰ On the idea that the boundary between adjudication and governance is continuously renegotiated through institutional practice, Choudhry Sujit, "The Lochner era and comparative constitutionalism," *International Journal of Constitutional Law*, 2 (2004): 1-55; Tushnet Mark, *Weak courts, strong rights*, note 4; and Waldron Jeremy, *Law and Disagreement*, note 21.