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# **Constitutional Revision in Italy: a Marginal Instrument for Constitutional Change**

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## **1. Introduction**

A special procedure for constitutional revision was introduced for the first time in Italy in the 1948 Constitution, enacted by the Constituent Assembly after the fall of the Fascist regime and the end of the Second World War. The Constitution establishes a ‘constitutional democracy’, that is, a form of government where sovereignty belongs to the people, which is governed by a ‘rigid’ constitution, entrenched by an aggravated amending procedure, requiring higher majorities than those requested for the enactment of ordinary legislation.

According to Article 138, “(1) Laws amending the Constitution and other constitutional laws shall be adopted by each Chamber after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each Chamber in the second voting. (2) Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a Chamber, or five hundred thousand voters, or

five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. (3) A referendum shall not be held if the law has been approved in the second voting by each of the Chambers by a majority of two-thirds of the members”.<sup>1</sup>

The following Article, Article 139, establishes the only express limit to constitutional revision: “The republican form of the state shall not be a matter for constitutional amendment”.<sup>2</sup>

Both Articles are included in the part of the Constitution (Title VI, of Part II) dedicated to the “Constitutional Guarantees”, along with provisions on the structure and functions of the Constitutional Court.

Notwithstanding these provisions, one important feature of Italian constitutionalism lies in that constitutional change has largely taken place by means of informal changes – that is, outside of the rules provided for formal amendments – in a variety of forms: ordinary laws with constitutional effects (such as electoral laws or the Standing Orders of each Chamber); decisions of the Constitutional Court; constitutional conventions and practices; European law.

Many reasons concur in explaining this development – as we will try to show in the following pages – and are deeply connected with the specific features of Italy’s constitutional culture and political system.

As for the constitutional culture, the most prominent Italian scholars endorsed since the very beginning a non-formalistic conception of the Constitution: according to these scholars, the meaning of the Constitution was supposed to reach beyond the mere written text, to become the product of the political, social and economic groups that at different historical moments and situations would uphold the written text.<sup>3</sup> This has been the prevailing view throughout the life of the 1948 Italian Constitution<sup>4</sup>, together with a non-positivistic approach to constitutional interpretation,<sup>5</sup> which explains the

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<sup>1</sup> An English version of the Constitution of the Italian Republic is available, on line, at: <[http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)> visited 5 December 2011.

<sup>2</sup> The Constitution of the Italian Republic n.1 *supra*.

<sup>3</sup> The most influential book was C. Mortati, *La Costituzione in senso materiale* (Giuffrè 1939). The author, Costantino Mortati, was later a member of the Constituent Assembly and, later on, a judge of the Constitutional Court. He can be considered as the most influential Italian scholar in Constitutional Law.

<sup>4</sup> See recently A. Barbera, ‘Ordinamento costituzionale e carte costituzionali’, *Quaderni costituzionali* (2010) p. 311.

<sup>5</sup> This approach is well summarized in G. Zagrebelsky, *Il diritto mite* (Einaudi 1992), a book that deeply marked the last two decades of Italian Constitutional Law and has been translated into many language (not in English).

important role played, over the years, by the creative interpretation of the Constitutional Court.

As for the political system, it should be noted that the 1948 Italian Constitution is the product of the political agreement reached between the various anti-fascist parties (the Catholic party – *Democrazia Cristiana* –, the left-wing parties – *Partito comunista* and *Partito socialista* – and some minor centrist parties): the amending formula contained in Article 138 reflects this wide consensus, by requiring a supermajority. However, since May 1947, that is, even before the entry into force of the Constitution, this agreement collapsed, due to the beginning of the Cold War at international level. This event determined two sets of consequences. First of all, many provisions of the Constitution remained without legal implementation, as we will see further *infra*. Secondly, in the absence of a vast consensus, the prevailing opinion was that the constitutional revision procedure could be resorted to only for minor changes: thus, for major changes, other, informal, avenues, were eventually developed.

As a result of the aforementioned lack of legal implementation of several constitutional provisions and of the limited recourse to the formal avenues for constitutional revision, today the “living Constitution” in Italy is very distant from the “written Constitution”: a circumstance determined by the prevailing Italian constitutional culture.

In the paragraphs that follows, I will touch upon the following issues: the history of the amending procedure, including the origin of the current amending formula in the debates of the Constituent Assembly (par. 2); the formal constitutional amending procedure and its interpretation (par. 3); the material limits to constitutional revision (par. 4); the practice of constitutional revision (par. 5); the informal changes (par. 6); the debate on the possibility to amend the amending formula (par. 7). Finally (par. 8), I will present some conclusions, addressing the current status and meaning of the Italian Constitution.

## **2. Historical precedents and origin of constitutional rigidity in Italy**

*2.1. A brief history of the constitutional revision under the previous Italian Constitution (“Statuto albertino”)*

The “*Statuto albertino*” – the previous Italian Constitution, conceded by the King during the monarchic period (1861-1946) – although defining itself in the Preamble as “the Monarchy’s eternal and irrevocable fundamental law”, did not expressly provide any rule for its amendment.<sup>6</sup>

The prevailing interpretation considered it as a “flexible constitution”, since it did not require any special procedure – that is, different from the ordinary legislative procedure – nor any parliamentary supermajority to be amended: in fact, in the absence of any entrenchment, many of its provisions had been derogated by acts of the King and the Parliament.

The reasons behind this interpretation can be found in the central role played by the Law (as an Act of the Parliament) in the 19<sup>th</sup> Century liberal State, together with a very deferential attitude adopted by the judiciary towards the political power, which prevented the development of a judicial review of legislation.<sup>7</sup>

The *Statuto's* inability to resist changes enacted through ordinary laws became even more evident after the advent of Fascism. The rapid succession of derogatory laws led to the emergence of a new authoritarian regime and the *Statuto albertino* soon found itself reduced to the status of “a piece of paper, devoid of authority”<sup>8</sup>.

## 2.2. *The constitutional revision in the debates of the Constituent Assembly*

With only few exceptions, the Constituent Assembly (elected in June 1946 with the purpose to draft and adopt the new democratic Constitution) did not address directly the issue of the opportunity to endorse constitutional rigidity: the need for constitutional supremacy was assumed, and, consequently, also the need to establish a special procedure for constitutional revision.<sup>9</sup>

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<sup>6</sup> The Albertine Statute (“*Statuto Albertino*”) was the Constitution that King Vittorio Emanuele conceded to the Kingdom of Sardinia on March 4, 1848 (it is an example of 19<sup>th</sup> century *octroyé* constitutions). In 1861, the *Statuto* became the Constitution of the now unified Kingdom of Italy and remained formally in force until January 1, 1948.

<sup>7</sup> M. Bignami, *Costituzione flessibile, costituzione rigida e controllo di costituzionalità in Italia (1848-1956)* (Giuffrè 1997) p. 11.

<sup>8</sup> S. Trentin, ‘Dallo Statuto albertino al fascismo’, in A. Pizzorusso (ed.), *Opere Scelte di Silvio Trentin* (Marsilio Editori 1983) p. 146.

<sup>9</sup> C. Pinelli, ‘Costituzione rigida e costituzione flessibile nel pensiero dei costituenti italiani’, 4 *Iustitia* (1981) p. 335 at p. 338, according to whom we are facing an almost *a priori* assumption of a rigid Constitution. Aldo Bozzi, a member of the Constituent Assembly (C.A.), in one of his first speeches in the Plenary session during a general discussion on the project, on March 4, 1947 underlined that “a discussion whether the Constitution should be rigid or flexible was omitted. It was generally assumed that it should be rigid”: *La Costituzione della Repubblica italiana nei lavori preparatori dell’Assemblea costituente* (Camera dei Deputati 1970), I, p. 148.

The preference for a rigid Constitution was in large part already achieved by the political parties in the period prior to the election of the Constituent Assembly, as testified by their respective electoral manifestos as well as by their statements within the pre-Constituent bodies and activities (like the “Forti Commission”).<sup>10</sup>

The main reason lay in the idea that the flexibility of the *Statuto* had facilitated the rise of fascism,<sup>11</sup> even if it was clearly pointed out by an influent member of the Constituent Assembly that “if, during the period when fascism assaulted the Italian State, a rigid Constitution had been in force, fascism would have assaulted, rather than the legislative Chambers, the Court of guarantee”.<sup>12</sup>

A relevant part of the debate was devoted to the definition of the procedure to be followed in case of amendment, with the purpose to identify an amending formula able to reconcile “the conflicting claims between the certainty and consistency of constitutional law and its adaptability to constantly-changing needs”, as Paolo Rossi, rapporteur on the constitutional revision, explained to the Constituent Assembly.<sup>13</sup>

Following an idea already emerged in the “Forti Commission”, the “Commission of the 75”<sup>14</sup> was initially oriented towards a formula inspired by the Belgian constitutional system, according to which approval of the draft amendment by absolute majority was necessarily followed by the dissolution of the Parliament; after the elections, the first act of the new Parliament should have been to vote, without amendments and by simple majority, on the text of the draft amendment approved by the previous Parliament. This proposal, since the very beginning, shared consideration with another, different proposal, requiring a double reading by each Chamber of the Parliament of the text of the draft amendment and a subsequent referendum.

In the course of the debate, a preference for a confirmative referendum rather than for new elections eventually emerged. It was pointed out that, following the Belgian’s

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<sup>10</sup> The “Forti Commission” was a study commission nominated by the Minister for the Constituent Pietro Nenni in order to analyse the problems related to the re-organization of the State. Ugo Forti was its President.

<sup>11</sup> See the report by M. S. Giannini at the Forti Commission, in G. D’Alessio (eds.), *Alle origini della Costituzione della Repubblica italiana* (Il Mulino 1979) p. 123, or Gaetano Martino’s speech, C.A., November 11, 1947, in *La Costituzione della Repubblica italiana*, *supra* n. 8, V, p. 3785.

<sup>12</sup> See P. Calamandrei, in C.A., Second Section, Second sub-committee, January 14, 1947, in *La Costituzione della Repubblica italiana*, *supra* n. 8, VIII, 2025. See also M. Ruini, C.A., March 12, 1947, I, p. 347: “even if there had been a rigid Constitution, the disaster would not have been avoided”.

<sup>13</sup> In this sense is the intervention in the afternoon section, November 14, 1947, in *La Costituzione italiana*, *supra* n. 8, V, p. 3893.

<sup>14</sup> The “Commission of 75” was a special commission of 75 members, chosen among the members of the Constituent Assembly, with the task to draft a proposal of a new Constitution. In its first period of activity, it worked through Subcommittees. The Second Subcommittee was in charge of constitutional revision.

formula, public concern would not have been focused on the revision, but rather on the election of the new Parliament.<sup>15</sup>

Egidio Tosato was the only member who emphasized that, following the Belgian model, no guarantee for minorities would be provided, since it required approval by simple majority. In his speeches, it is possible to find a direct connection between the constitution-making process and the formula for constitutional revision.<sup>16</sup> When the debate over the quorum required for constitutional amendments began, he pointed out the need to postpone the final decision on the issue, in order to be able to foresee the actual majority that would support the approval of the new Constitution: if it had been a very large one, it might have been possible to think of an amending formula requiring a two-thirds supermajority.<sup>17</sup>

According to this view, Article 130 of the draft Constitution incorporated the formula based on a double reading plus referendum, which eventually converged, with only a few changes, in the current Article 138 of the Constitution.<sup>18</sup>

The debate in the plenary session of the Assembly was limited, assuming a general consensus towards the mechanism developed by the Commission of the 75.

The main speaker on the topic (Mr. Martino) underlined the intention to make the Constitution changeable through a process that, at the same time, would allow only changes sufficiently meditated and would deny political minorities a full-fledged veto power. The double-reading requirement would have helped avoid changes based on demagogic or momentary impulses; in particular, the absolute majority requirement would have helped avoid minority coups and the referendum would have represented a guarantee for minorities.<sup>19</sup>

The provision according to which the referendum cannot be required when the draft amendment is approved by the two legislative Chambers with a two-thirds majority in the second vote is related to the consideration that a proportional electoral representation would have been established, and consequently the political system

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<sup>15</sup> Attilio Piccioni, C.A., Second sub-committee, January 16, 1947, in *La Costituzione italiana*, *supra* n. 8, VIII, p. 1884.

<sup>16</sup> In the sense that the provisions regulating the revision also assume “substantial value, reflecting and reproducing for the future the agreement between different political and social forces that gave rise to the constitutional text”: A. Cerri, ‘Revisione costituzionale’, XXVII, *Enc.giur.*, (Treccani 1991) p. 3; R. Nania, ‘Intervento’, in S.Panunzio (eds.) *I costituzionalisti e le riforme. Una discussione sul progetto della Commissione bicamerale per le riforme costituzionali* (Giuffrè 1998) p. 486; T. Groppi, ‘Art. 138’, in R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario della Costituzione* (UTET 2006) III, p. 2701.

<sup>17</sup> C.A., Second Sub-committee, I Section, January 16, 1947, in *La Costituzione italiana*, *supra* n. 8, VIII, p. 1883.

<sup>18</sup> See C.A., December 3, 1947, in *La Costituzione della Repubblica italiana*, *supra*, n. 8V, p. 4328.

<sup>19</sup> See C.A., November 14, 1947, in *La Costituzione della Repubblica italiana*, *supra* n. 8, V, p. 3892.

would have been fragmented. Thus, the Constituent Assembly assumed that the two-thirds majority in Parliament undoubtedly reflected the same or even a larger majority in the country.

At any rate, in the course of the debate, someone raised the doubt that “in a country with a single-member electoral college system or where political trends are polarized around two political parties only, a two-thirds supermajority could possibly not necessarily reflect the country’s real majority”.<sup>20</sup>

As we shall see later, this statement has become true in Italy in more recent years, when the proportional electoral system, that is not included in the text of the Constitution, was modified.

### **3. The formal constitutional revision procedure**

The amending formula draws from the structure of the ordinary legislative procedure, introducing, at the same time, several additional requirements, consisting in some necessary and one optional procedural aggravations.

The necessary additional requirements are: a) the double reading (with a mandatory waiting period of three months between the readings) by each Chamber of the Parliament (for a total of four parliamentary approvals); b) the mandatory requirement of approval by (at least) absolute majority, in the second voting.<sup>21</sup>

The optional requirement is the possibility for a constitutional referendum to be held, if in the second voting of each Chamber a two-thirds majority is not reached.

Procedural aggravations play a safeguarding role: they are designed to ensure that the Parliament, which is vested with the competence of constitutional revision, will resort to constitutional changes consciously, and only when there is a substantial political agreement. Minorities are not allowed to exercise a veto power, but are granted the possibility to request a referendum, an opportunity which plays a safeguarding function as well.<sup>22</sup>

Although early commentators noted that “the rules on the constitutional revision process (...) appear to be formulated in a clear and precise way and therefore no

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<sup>20</sup> Rossi, *supra*, n. 8, V, p. 3894.

<sup>21</sup> Conversely, in the first voting of each Chamber, approval can be by (at least) simple majority.

<sup>22</sup> U. De Siervo, ‘Origini e significato della rigidità della nostra Costituzione’, in E. Ripete and R. Romboli (eds.), *Cambiare Costituzione o modificare la Costituzione?* (Giappichelli 1995) p. 5.

interpretive doubts can rise”,<sup>23</sup> experience has shown the emergence of several interpretive problems, on which we shall focus our attention analytically, devoting some consideration to, beyond the constitutional rules, also ordinary legislation, parliamentary rules of procedure and constitutional practice.

The phase of the initiative for the constitutional amending procedure is not different from the one provided for the ordinary legislative procedure, as the Constitutional Court has repeatedly underlined.<sup>24</sup> In fact, Articles 71, 99 and 121 of the Constitution find application also in case of initiative for constitutional laws. Thus, the Government, each member of the Parliament, the National Economic and Labor Council (CNEL) and each Regional Council on regional issues are entitled to introduce constitutional law bills.

The legitimacy of a regional initiative has been recognized by the Constitutional Court since decision No. 256/1989 and later confirmed, in a clearer and more thoroughly motivated manner, with decision No. 470/1992. More precisely, it is with the latter decision (and with the following decision No. 496/2000), that the Court held, against a Governmental denial of the regional initiative based on a reading of Article 121 Const., that Regions can regulate with a regional law the process (considered to be a regional internal affair) for the formalization of the initiative. However, the Court continued, Regions are not allowed to submit regional proposals of constitutional revision for regional referendum, because the people – considered in its national entirety – can be called upon only as an ultimate source of decision within the revision process. Endorsing a different interpretation, would lead to conclude that a regional electorate would be given the opportunity to express itself twice on the same question: firstly, in advance, during the consultative phase at the regional level, and secondly, subsequently, as part of the national electorate, in the final optional part of the constitutional revision process.

The first “aggravation” consists, as previously mentioned, in a double deliberation by each Chamber of the Parliament, within a waiting period of no less than three months.

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<sup>23</sup> C. Mortati, *Concetto, limiti, procedimento della revisione costituzionale (1952)*, republished in *Note introduttive ad uno studio sui partiti politici nell'ordinamento italiano. Raccolta di scritti* (Giuffrè 1972) p. 58.

<sup>24</sup> Constitutional Court, Decisions No. 256/1989, 470/1992 e 496/2000.

During the first deliberation, in both Chambers, the ordinary legislative procedure is followed<sup>25</sup>. The vote is always public<sup>26</sup>.

The first deliberation identifies a “complete legislative cycle”, in which the two Chambers must approve the draft constitutional amendment in the same text. In case the second Chamber approves an amendment to the draft, the new text must be reapproved by the first House: it may therefore happen that the Chambers vote on the draft several times, until an agreement on the same text (“double conformity”) is reached<sup>27</sup>.

The second voting, according to Article 138, is designed as a mere approval requiring at least an absolute majority, that is, the supporting vote of the majority of the members of each Chamber. The second vote must take place after a waiting period of no less than three months from the first vote by the same Chamber: this rule, according to some commentators, would imply the possibility for each Chamber to start the procedure with the analysis in the legislative Committee even before the period of three months has passed, as long as the vote takes place after three months from the first deliberation<sup>28</sup>.

If in the second deliberation the draft constitutional amendment does not reach the absolute majority in both Chambers, it is considered rejected.

The draft is approved if it is supported by at least the absolute majority of the members of each Chamber. In the case in which the majority of two-thirds is reached, the approved constitutional amendment can then be promulgated and published, and enters into force according to Articles 73 and 74 of the Constitution.

Whenever this ‘supermajority’ is not reached in any one (or both) of the two Chambers, but only the (necessary) absolute majority, a three-month period starts running within which a constitutional referendum can be requested. In this latter case, promulgation of the approved draft constitutional amendment will follow either the expiration of the three-month term or, in case a referendum is requested, the positive vote expressed by the citizens in favor of the constitutional amendment.

The main issue regarding the promulgation’s phase includes the possibility for the President of the Republic to use his veto power to send the draft constitutional law back to the Parliament, pursuant to Article 74 of the Constitution.

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<sup>25</sup> In this sense are Article 97 paragraph 1 of the Standing Orders (S.O.) of the Chamber of Deputies and Article 121, paragraph 1 of the S.O. of the Senate.

<sup>26</sup> As inferred by Article 49 S.O. of the Chamber of Deputies and Article 113 S.O. of the Senate.

<sup>27</sup> Italy’s bicameral system is defined as “perfect”: this means that both Chambers of the Parliament (Camera dei Deputati e Senato) must both approve the text of every draft statute in order for this to become legislation.

<sup>28</sup> S. M. Cicconetti, *La revisione della Costituzione* (Cedam 1972) p. 136.

In the absence of any constitutional practice, scholars hold differing views on this possibility. Most of the authors deny the possibility to exercise the presidential veto on constitutional amendments altogether, relying on several arguments, among which the need for a double approval<sup>29</sup>. Conversely, others support the existence of a presidential veto power, linked to the presidential role of “guardian of the Constitution”, even if in the case of constitutional amendments this would need to be adapted to the peculiarities of the procedure under analysis.<sup>30</sup>

As mentioned, if in the second vote the draft constitutional amendment has been approved only by absolute majority, the avenue to the optional referendum is open.

The Constitution prescribes that the request for a referendum must be filed within three months “after the publication”; subjects allowed to file the request include one-fifth of the members of a Chamber, five hundred thousand voters and five Regional Councils; the text subjected to referendum shall not be promulgated if not approved by a majority of valid votes.

Further profiles of the referendum procedure are governed by Law no. 352/1970: up to that year, in the absence of rules regulating the practice of the constitutional referendum, all constitutional laws had necessarily been approved by two-thirds majority, making the procedure even more rigid.<sup>31</sup>

Once the optional referendum is requested and a majority of the voters approve the draft amendment, the President will then promulgate the constitutional law; conversely, if the amendment is rejected by the voters, the outcome is published in the Official Journal and the constitutional law is not promulgated.

Given the complexity of the procedure, several issues remain open, especially with regard to the general role played by the constitutional referendum within the framework described by Article 138.

The Constitutional Court addressed this issue in the aforementioned decision on the possibility for regional governments to submit an initiative of revision at a regional referendum; as mentioned, this possibility was denied by the Court.

The Court stated that “in our system, fundamental choices concerning the national community and inherent in the “constitutional agreement”, are reserved to

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<sup>29</sup> According to these scholars, the second vote, required by Article 74 in order to overcome the presidential veto in the ordinary legislative process, would have already taken place. A. Pizzorusso, ‘Art. 138’, in *Comm. Cost. Branca* (Zanichelli 1981) p. 717.

<sup>30</sup> P. Barile and U. De Siervo, ‘Revisione della Costituzione’, in *XV Noviss. dig. it.* (UTET 1968) p. 7; V. Angiolini, ‘Revisione costituzionale’, in *XIII Dig.disc.pubbl.* (UTET 1997) p. 312.

<sup>31</sup> See C. Fusaro, ‘Italy’, in C. Fusaro and D. Oliver (eds.), *How Constitutions Change. A Comparative Study* (Hart Publisher 2011) p. 218.

political representation, on whose decisions people cannot intervene unless pursuant to the procedure indicated in Article 138”. In the Court’s view,

“Article 138, second paragraph, of the Constitution not only provides a referendum on constitutional law only as an optional hypothesis, but ..., in preventing a popular intervention separated from the parliamentary procedure ..., circumscribes within strict time limits the exercise of the power of initiative ... In the third paragraph, the same Article 138 entirely preclude the possibility of popular intervention when it determines that “the referendum does not take place when the law has been approved in the second vote by a two-thirds majority of its members”, thereby confirming that the power of constitutional revision belongs, first and foremost, to the Parliament. This does not mean that the debate over the most important rules for the life of the national community should be confined to political and institutional venues only. On the contrary, the diffusion [of the debate] in the public sphere is appropriate, with the parliamentary debate providing the cultural venue necessary to accommodate the revision process.

However, there is no doubt that Article 138 puts the decision [on the constitutional amendments] primarily in the hands of the political and parliamentary representation. In fact, within the amending procedure, the people will act either only as a “check”, with conservatory and safeguarding functions, or as a confirmatory force, with regard to an already perfected parliamentary will that, in the absence of a popular pronouncement, is nonetheless able to consolidate its legal effects”.<sup>32</sup>

The different relationship between the Parliament and the popular intervention within the constitutional amendment process, lies at the basis of the different qualification given to the constitutional referendum.

Over time, the constitutional referendum has been variously defined as a referendum of “guarantee”, allowing minorities to verify the correspondence between the will of the Parliament and that of the people; as an “opposing” referendum, which can be promoted to bring to a halt a constitutional amendment endorsed only by the Parliament’s majority; as a referendum of “control”, with a preventive nature, against the possible malfunctioning of the constitutional legislation; as a “confirmative” or

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<sup>32</sup>Constitutional Court, Decision No. 496/2000

“validating” referendum, which could be asked by the same majority that supported the reform, in order to strengthen its own legitimacy.<sup>33</sup>

#### 4. Material limits to constitutional revision

The only explicit limit to constitutional revision is provided by Article 139, according to which “The republican form of the state shall not be a matter for constitutional amendment”. This is the sole “eternity clause” included in the Italian Constitution.

The Italian doctrine, however, has traditionally pointed out the existence of implicit limits to constitutional amendments, referring to the presence of some principles that cannot be changed through the procedure described by Article 138. These principles would represent the “core” of the Constitution and would qualify the form of the State: thus they fall within the purview of the “constituent power” (it means, the constitution-making power) , rather than within the competence of the “constituted” one (it means, the constitution-amending power). According to this – absolutely dominant – point of view, a total revision of the Constitution is not allowed in the Italian legal system.<sup>34</sup>

This common view is supported with different arguments by different scholars.

On one hand, some scholars considered that the explicit limit to constitutional amendment provided by Article 139 should be interpreted in a systematic way, together with Article 1 Const.: the concept of the “republican form of state” excluded from revision would refer not only to the selection of the Head of State (a President of Republic rather than a King) but to the entire form of the State, namely democratic and social, as defined in Article 1 (according to which “Italy is a democratic Republic founded on work”). On the other hand, the existence of a “core” of unamendable principles was linked to the existence of a difference between the power to establish a new constitution and the power to amend it. In this respect, the revision procedure could only be used to enact minor changes to the Constitution, not affecting the fundamental features of the system, while any legal avenue to change this fundamental document in its entirety would be excluded.

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<sup>33</sup> G. Ferri, *Il referendum nella revisione costituzionale* (Cedam, 2001) p. 153.

<sup>34</sup> See E. Grosso, ‘Art.139’, in R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario della Costituzione* (UTET 2006), III, p.2731 ss.

With Decision No. 1146/1988, the Italian Constitutional Court explicitly dealt with the problem of the existence, within the Italian legal system, of supreme principles excluded from constitutional revision, qualifying such principles as implicit limits to constitutional amendments. In order to do so, the Court first had to recognize – against the text of Art. 134 Const. which lists the acts subject to the Court’s power of judicial review – its competence to review the constitutionality of constitutional laws, a typology of acts not included in the list.

The aforementioned decision stated that “The Italian Constitution contains some supreme principles that cannot be subverted or changed in their essential content neither by constitutional laws of revision nor by constitutional laws. These principles are explicitly provided by the Constitution as absolute limits to the power of constitutional revision, as the republican form of government (Article 139 of the Constitution) as well as the principles which, although not expressly mentioned among those not subject to the constitutional revision process, belong to the essence of the supreme values upon which the Italian Constitution is founded”.

These quite abstract statements are difficult to apply in the reality of cases: the Court has neither taken a position nor further elaborated on the constitutional foundation of the immutability of these supreme principles, nor has provided an interpretative key for their precise identification, merely stating that those principles “belong to the essence of the supreme values upon which the Italian Constitution is founded”.

An extensive debate is still open among scholars on the identification of these “supreme principles”. A debate that is strictly connected to the possibility to introduce a federal form of State; the direct election of the President of the Republic or the Prime minister; and even the possibility to amend the provisions contained in some parts of the Constitution (like the Part on “Fundamental Principles” or Part I).

In this regard, it should be noted that the 1948 Constitution includes 12 Articles under the heading of “Fundamental Principles”, followed by Part I of the Constitution titled “Rights and Duties of Citizens” (Art.13-54); Part II of the Constitution addresses the “Organization of the Republic” (Art.55-139), while also some provisional and transitional dispositions (I-XVIII) can be deemed relevant to the debate on the identification of the “supreme principles”.

Furthermore, scholars also debate whether it may be possible to amend the second Part of the Constitution, if the amendments would impact indirectly on the first

Part (as it would be the case for those changes in the organization of the Judiciary, regulated in the second Part, that would indirectly impact on the right to defense, regulated in Art. 24 Const. of the first Part).

Finally, uncertainties also exist with regard to the possibility to amend even the amending formula entrenched in Art. 138: in this case, the majority of scholars supports the view that the text of the Article (and the amending procedure outlined therein) can indeed be amended, cautioning, however, that the principle of rigidity would be excluded from this possibility. In other words, according to them, the procedure regulated by Art. 138 could indeed be revised, with the only limit represented by a revision that would make the Constitution less rigid, as it would be the case for a revision that would lower the majorities required by the original text of Art.138.<sup>35</sup>

Since its 1988 pivotal decision, the Constitutional Court has not further specified the content of the category of the “supreme principles”. The only other relevant decision is represented by a case in which the Court was asked to raise *ex officio* the issue of constitutionality regarding a constitutional provision, Article 126, on the form of the regional government, claimed to be in contrast “with the supreme principle of parliamentarism”. The Court, in the decision, expressed the view that “the parliamentary form of government does not seem as such an unchangeable organizing principle of the constitutional system of government”.<sup>36</sup>

## **5. The practice of formal constitutional changes**

### *5.1. General considerations*

Since 1 January, 1948 (a period covering 16 legislatures) the procedure established by Article 138 has been used to approve 34 constitutional laws,<sup>37</sup> only 14 of which are constitutional amendments.<sup>38</sup>

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<sup>35</sup> A. Pace, *Potere costituente, rigidità costituzionale, autovincoli legislativi* (Cedam 1997) p. 38.

<sup>36</sup> Constitutional Court, Decision No. 27/ 2004.

<sup>37</sup> The count does not include D.P.R. no. 670/1972, the consolidated text of constitutional laws concerning the special statute for the Trentino-Alto Adige Region.

<sup>38</sup> They are: Constitutional Law No. 2/1963 “Amendment of Articles 56, 57 and 60 of the Constitution”; Constitutional Law No. 3/1963 “Amendment of Articles 131 and 57 of the Constitution and Institution of the Molise Region”; Constitutional Law. No. 2/1967 “Amendment of Article 135 of the Constitution and provisions on the Constitutional Court”; Constitutional Law No. 1/1989 “Amendment of Articles 96, 134 and 135 of the Constitution and of Constitutional Law of March 11, 1953, No.1, and provisions on crimes provided by Article 96 of the Constitution”; Constitutional Law No. 1/1991 “Amendment of Article 88, par. 2 of the Constitution”; Constitutional Law No. 1/1992 “Revision of Article 79 of the Constitution on the granting of amnesty”; Constitutional Law No. 3/1993 “Amendment of Article 68 of the Constitution”;

The remaining 20 constitutional laws have been adopted mainly to regulate matters reserved by the Constitution for implementation by constitutional law, usually dealing with the autonomy of some Regions, although some constitutional laws may have an indirect impact on the text of constitutional provisions, as we will see later<sup>39</sup>.

Constitutional laws which modify Articles of the Constitution usually contain an express indication of this function in their title, which refers to the law as a “revision” or an “amendment”. However, Constitutional Law No. 1/1999 explicitly modifies several provisions of Title V (Part II of the Constitution), without including any specific indication of its function of revision in the title, limiting the indication to “Provisions regarding the direct election of the regional president and regional statutory autonomy”.

Limiting the analysis to the 14 constitutional laws self-qualified as “amending constitutional laws” (including No. 1/1999), it should be noted that – if the revision of Title V, Part II of the Constitution (completely rewritten through Constitutional Laws No. 1/1999 and No. 3/2001) is not taken into account – the number of revised provisions is limited to 14 out of 139 (to which the 18 Articles of Title V amended or repealed should be added).

Normally, with the only exception of the two constitutional laws last cited, each amending law has effects only on a few (not more than three) and homogeneous Articles. This last remark, on homogeneity, also finds application with regard to the two constitutional laws wielding their effects on Title V of the Constitution; indeed, while modifying several provisions, they both present clearly identified thematic cores.

Most of the constitutional revisions enacted over the years affect provisions included in Part II of the Constitution.

Only three constitutional laws amend Articles contained in Part I of the Constitution: Constitutional Law No. 1/2000, on the right to vote of Italian citizens residing abroad, which added a paragraph to Article 48; Constitutional Law No. 1/2003, which introduced in Article 51, paragraph 1 of the Constitution, a new sentence on

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Constitutional Law No. 1/1999 “Provisions regarding the direct election of the President of the Region and the regional statutory autonomy”; Constitutional Law No. 2/1999 “Inclusion of fair trial principles in Article 111 of the Constitution”; Constitutional Law No. 1/2000 “Amendment of Article 48 of the Constitution regarding the institution of the “Abroad” district for the exercise of the right to vote of Italian citizens resident abroad”; Constitutional Law No. 1/2001 “Amendment to Articles 56 and 57 of the Constitution on the number of Deputies and Senators representing Italian citizens abroad”; Constitutional Law No. 3/2001 “Amendment to Title V of Part II of the Constitution”; Constitutional Law 1/2003 “Amendment of Article 51 of the Constitution”; Constitutional Law No. 1/2007 “Amendment of Article 27 of the Constitution, concerning abolition of the death penalty”.

<sup>39</sup> See *infra*, par. 6.

equal opportunities between women and men; Constitutional Law No. 1/2007, which abolished the death penalty from the laws of war, amending the Article 27.

As for the procedure, all the constitutional laws with the sole exclusion of No. 3/2001, which was the result of a governmental bill, were introduced by members of the Parliament.

Only in two cases a constitutional referendum was required (on this latter constitutional law and on a draft approved by the Parliament in 2005 and eventually rejected by the people in the 2006 referendum).

The following paragraphs will address the content of the laws of constitutional revision, the majorities reached and, more generally, the context of the revisions.

## *5.2. The different historical phases of the constitutional revision in Italy*

### *5.2.1. 1948-1993: minor formal changes*

Despite the difficulties implied in any periodization, it is possible to identify a first, long period in which Article 138 Const., although rarely used, provided the framework for all formal revisions of the Constitution, and in which its formulation was never brought into question.

This phase was characterized by the approval of seven constitutional laws of revision.

In the absence of a law regulating the constitutional referendum, the two-thirds majority for constitutional revision was deemed necessary until 1970, when the implementing law on the constitutional referendum was enacted. This interpretation found application to all the four constitutional laws approved by the Chambers before that year.

From that date onward, of the other four constitutional laws of revision enacted, two have been approved by absolute majority (No. 1/1989 and No. 1/1992) and two have reached the broader consensus of two-thirds (No. 1/1991 and No. 3/1993).

In neither of these cases, however, the constitutional referendum was requested. The achievement of one or the other majority depended on totally random elements, mainly connected to the political moment that could either promote or discourage support from the opposing parties.

Moreover, the eight constitutional laws of revision brought only minor adjustments to the text of the Constitution, with a limited political momentum, and mostly prompted by compelling reasons.<sup>40</sup>

This is mainly true for the first three constitutional laws, enacted in the Sixties. These were devoted to address some minor issues as: a) the establishment of a new Region, namely, Molise<sup>41</sup>; b) the reduction of the Senate's term from six to five years and the establishment of a fixed numbers of members of Parliament<sup>42</sup>; c) the reduction of the term of the judges of the Constitutional Court from twelve to nine years and the establishment of new rules concerning their immunity<sup>43</sup>.

Considerations regarding a “moderate” use of Article 138 proposed by scholars – which found that the original constitutional system remained basically unchanged, at least from a formal point of view – appropriately describe this first historical period.

Indeed, if changes were enacted, they were unobtrusive ; they occurred, as we shall see further, due to the absence of implementation of many of the institutions established by the Constitution as well as through practices derogatory of the written constitutional provisions.<sup>44</sup>

What happened afterwards was a long period without any constitutional reform. Paradoxically, it was at that point, in the Seventies, that an extensive debate on the need to reform the form of government began, and continued through the following decade, without bringing, however, any practical result.

At any rate, at the end of this period and since 1989, some constitutional laws were enacted. Three of them were related, directly or indirectly, to the subject of parliamentary immunity: they were enacted in a moment when the Italian political system had started to change, also due to the investigation conducted on the widespread corruption practices known as “*Mani pulite*” (“Clean Hands”). It is the case of the constitutional amendments which allowed prosecution and trial of the members of the Government before ordinary courts<sup>45</sup>; which introduced the requirement of a 2/3 majority in both Chambers to approve an amnesty law<sup>46</sup>; which allowed public prosecutors to proceed against Members of the Parliament without any previous

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<sup>40</sup> S. Panizza, R. Romboli, *L'attuazione della costituzione* (Edizioni Plus 2002) p. 8.

<sup>41</sup> Constitutional Law No. 3/1963.

<sup>42</sup> Constitutional Law No. 2/1963.

<sup>43</sup> Constitutional Law No. 2/1967.

<sup>44</sup> R. Tarchi, ‘Leggi costituzionali e di revisione costituzionale (1948-1993)’, in *Comm. Cost. Branca* (Zanichelli 1995) p.303.

<sup>45</sup> Constitutional Law No. 1/1989.

<sup>46</sup> Constitutional Law No. 1/1992.

authorization<sup>47</sup>. The fourth revision approved in this period was devoted to detail the power of the President of the Republic to dissolve the Chambers in the last six months in office<sup>48</sup>.

### 5.2.2. 1993-1997: Attempts of constitutional revision through procedures derogating Article 138

The need for “a great constitutional reform” emerged during the 1980s and became stronger in the 1990s, in coincidence with the collapse of the party system that had characterized the entire life of the so called “I Republic”.

This system was based on coalition governments consistently lead by the Catholic Party, that, since the 1960s, had included also the Socialist Party. The opposition was in the hands of the Communist Party, which, due to the particular international situation, was unlikely to be elected to the Government. Italian scholars defined this situation as a “*conventio ad excludendum*”, referring to the practical impossibility of change in the Government due to the distrust towards the Communist Party.<sup>49</sup> In this context, the proportional electoral system was considered an untouchable guarantee. The fragmented political system resulting thereof determined a consociationalist or power-sharing government, in which even the opposition party was participating – though marginally – to the exercise of power. The electoral consensus was based on the increase of public budget and debt. Governments were unstable and short-termed, and political crises frequent.

This system was considered inefficient and many proposals to change it were presented since the 1980s, but an extensive revision became politically viable only after 1993. As a consequence of the fall of the communist regimes, in few years all the political parties existing since 1948 disappeared and a new political system began to develop. A new majoritarian electoral law was enacted in 1993 in Italy and the political system began to act in a more bipolar manner.<sup>50</sup>

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<sup>47</sup> Constitutional Law No. 3/1993.

<sup>48</sup> Constitutional Law No. 1/1991.

<sup>49</sup> L. Elia, ‘Governo (forme di)’, XIX, *Enciclopedia del diritto* (Giuffrè 1970) pp. 634-675; G. Sartori, *Parties and Party Systems: A Framework for Analysis* (Cambridge 1976).

<sup>50</sup> A. Pizzorusso, ‘Disposizioni transitorie e finali I-XVIII. Leggi costituzionali e di revisione costituzionale (1948-1993)’, in *Comm. Cost. Branca*.(Zanichelli 1995) p. XLII.

At any rate, the idea that the procedure outlined by Article 138 could not be used, for several reasons, to promote a “major reform” prevailed in the political class.<sup>51</sup> It was indeed common opinion that through this avenue, only limited and specific revisions could be achieved; Article 138’s procedure was considered responsible for the difficulties met in enacting a major reform mainly due to the broad consensus required for change, which, if not reached, would have opened the way to a possible opposing referendum. Furthermore, in light of the far-reaching effects of the reform, it was generally felt that it would have been necessary to enhance popular participation in the process beyond the level provided by this provision.<sup>52</sup>

During the 1990s proposals aimed at derogating from the procedure outlined by Article 138 multiplied and the idea of creating a new Constituent Assembly was proposed: these proposals are recognized in the message sent to the Chambers on June 26, 1991 by then-President of the Republic Francesco Cossiga who, stressing the need to initiate a reform process as soon as possible, advocated for a bypassing of Article 138 itself.<sup>53</sup>

Moving from these considerations, Constitutional Law No. 1/1993 and Constitutional Law No. 1/1997 were enacted, in order to derogate Art.138, providing for:

a) the creation of a bicameral commission that would unify the referral phase of the two Chambers; b) the drafting of an organic reform project of Part II; c) a limited time for the Commission’s activities; d) the confirmation of the need of a double deliberation by each Chamber, even if with a highly simplified procedure (peremptory deadlines, prohibition of preliminary questions, open vote); e) the approval in second deliberation with an absolute majority; f) a mandatory referendum on the entire project, regardless of the extent of the majority reached in the Parliament’s second vote.

These laws were highly criticized<sup>54</sup>, mainly due to the weakening of the rigidity of the Constitution that they allegedly determined. In fact, an absolute majority approval would have been sufficient for the revision to be approved, although followed by the

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<sup>51</sup> S. Panunzio, ‘Le vie e le forme per l’innovazione costituzionale in Italia: procedura ordinaria di revisione, procedure speciali per le riforme costituzionali, percorsi alternativi’, in A.A. Cervati et al., *Studi sulla riforma costituzionale* (Giappichelli 2001) p.84.

<sup>52</sup> C. De Fiores, ‘La commissione bicamerale per le riforme istituzionali e l’Art.138 Cost.: i paradossi di una riforma’, in *Giur.cost.* 1993 p. 1547.

<sup>53</sup> See the message and the debate among constitutional scholars that followed in *Giur.cost.*, 1991 p. 3343. It has been described as “a textbook case-study on the violation of the Constitution”: G.U. Rescigno, *Intervento*, *ivi*, p. 3317.

<sup>54</sup> See F. Modugno, ‘Ricorso al potere costituente o alla revisione costituzionale?’, in *Giur. It.* 1998 p. 620 at p. 624; S. Panunzio, n. 49 *supra*, p. 163; G. Ferrara, ‘La revisione costituzionale come sfigurazione’, in *Politica del diritto* 1998 p. 93 at p. 96.

mandatory referendum: in the eyes of the critics, this procedure would have surrendered the constitutional revision in the hands of the political majority, and, therefore, in the hands of the Government. An even more problematic situation, if one considers the majoritarian electoral reform of 1993.

In any case, due to the political context, these attempts of revision “in derogation” of Art. 138 eventually failed, notwithstanding the new electoral system: indeed, for the “major reform” to be enacted a large political consensus was still necessary, and that was not reached.

### *5.2.3. Since 1997: back to Article 138*

The failure of the attempts of revision “in derogation” of Article 138 Const., prompted a return to the ordinary procedure of Article 138. Between 1997 and 2007, seven laws of constitutional revision have been approved, four of them by absolute majority<sup>55</sup>.

New features emerged.

First, even when the laws introduce specific changes, they enjoy great relevance and do not constitute mere improvement of the already existing text.

Furthermore, Part I of the Constitution has been changed for the first time, with the amendment of Article 27 Const., on the death penalty, as well as with the revision involving Article 48 Const., dealing with the vote of those Italian citizens residing abroad, and Article 51 Const., with the introduction of equal opportunities for men and women. In the case of these two latter provisions, their enactment is part of a specific constitutional policy, furthering an innovative concept of citizenship and equality.

Similar considerations can be made with reference to Article 111, concerning the right to a fair trial, whose amendment produced some effects on Article 24, on the right of defense, and to the law that brought an end to the efficacy of the XIII final and transitional provision providing restrictions affecting members of the house of Savoy: we mention it, although it could not properly be qualified as a “constitutional revision law”, as determined the end, in a formal way, of an entire historical era.<sup>56</sup>

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<sup>55</sup> Only Constitutional Laws No. 1 and No. 2/1999 and Constitutional Law No. 1/2007 reached the 2/3 majority.

<sup>56</sup> The XIII final and transitional provision provided that “The members and descendants of the House of Savoy shall not be voters and may not hold public office or elected offices. Access and sojourn in the national territory shall be forbidden to the ex-kings of the House of Savoy, their spouses and their male descendants.

Second, new reasons for the amendments are related to the ever-evolving area of international and European law. The revision of Art. 111 Const. appears a consequence of the case-law of the European Court of Human Rights, frequently finding Italy in violation of the Convention for the length of trials. The definitive abolition of the death penalty, even in case of war, which took place in 2007, appears to be the only case in which the reasons behind the reform find their justification in European law, in particular the Charter of Nice.

In addition, in the most recent amendments, for the first time in Italian history, emerges the tendency to resort to constitutional revision to follow up to Constitutional Court's decision, in order to modify the parameter used by the Court in constitutional review: while this is a well-known and resorted to practice in other jurisdictions, it has been considered a "risk" in the Italian legal system since the Constituent Assembly period.<sup>57</sup> This is the case of the amendment to Article 51 Const., which was enacted after a decision in which the Court struck down an electoral law establishing quotas for women in the electoral lists, finding a violation of the principle of equality. The revision, providing the possibility to enact specific measures "in order to promote equal opportunities for men and women" in the access to public offices and elective positions, paved the way to the introduction of "affirmative actions" also in the electoral field.<sup>58</sup>

Thirdly, the quality of the norms introduced changed compared to the previous phases: Article 111 Const. (but also some other provisions included in Constitutional Laws No. 1/1999 and No. 3/2001) shows a tendency to verbosity and the constitutionalization of detailed rules, a practice clearly falling outside of the Italian tradition of a "Constitution of principles"; a circumstance that can be traced back to some of the most recent development and trends which, at the comparative level, have emerged with regard to the recent constitutions enacted in new democracies.

Fourth, for the first time two extensive and articulated reforms were introduced, which changed the whole Title V of Part II (excluding Article 133 Const.). Constitutional Laws No. 1/1999 and No. 3/2001 appear to show that Article 138 perfectly complements the implementation of major reforms, when a political will in

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The assets, existing on national territory, of the former kings of the House of Savoy, their spouses and their male descendants shall be transferred to the State. Transfers and the establishment of royal rights on said properties which took place after 2 June 1946, shall be null and void".

Constitutional Law no. 1 of 23 October 2002 established that the first and second paragraphs of this provision ceased to be applicable as of the date of the entry into force of said Constitutional Law (November 10, 2002).

<sup>57</sup> In these sense see the intervention of Gaetano Martino: C.A., November 11, 1947, in *La Costituzione della Repubblica italiana*, *supra* n. 8, V, p. 3780 ss.

<sup>58</sup> Reference is to Constitutional Court's Decision No. 422/1995.

this sense is clear. It is worth to underline that the second, extensive reform (No. 3/2001), aimed at introducing federalism by changing the previous regional system, was enacted by mere absolute majority, and not by a two-thirds one. The approval of Constitutional Law No. 3/2001 represented, according to some commentators, a break with a constitutional convention requiring large political agreements for the enactment of a major revision, differently from specific amendments<sup>59</sup>.

Finally, the constitutional referendum took place for the first time: the 2001 revision was confirmed by the electorate, receiving 64.4% of positive votes, but that, at the same time, witnessed a very low participation (only 33.9% of the whole electorate).

A second referendum was held in 2006, on a draft constitutional revision previously approved by the majority in Parliament (and introduced by a governmental bill: the second example in the Italian history), aimed at amending 50 Articles included in Part II of the Constitution, in the presence of a very oppositional climate: the opposition did not participate to the second deliberation and immediately rushed to request a constitutional referendum. The referendum, for the first time in the history of the Republic, prompted the rejection by the electorate of the draft revision (with 61.4% of negative votes), with a far higher turnover than the one reached in 2001 (53.6%).

#### *5.2.4. A few considerations on formal revisions*

It should be noted at the outset that, in Italy, the subject of constitutional revision has been exclusively in the hands of the political parties and that the corresponding debate has taken place almost exclusively within the Parliament.

Public opinion has played a role only in the two circumstances when a constitutional referendum was held<sup>60</sup> and especially in the second case when, as we shall see further *infra*, the vote was perceived not only as a vote on the proposed constitutional revision, but also on the modernity and suitability of the whole Italian Constitution. A modernity and suitability confirmed by the citizens through the vote.

In this process, scholars have undoubtedly played an important role, suggesting to the political parties the constitutional amendments to be enacted and providing constant support to their activity, especially in the case of the two bicameral commissions established in 1993 and 1997.

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<sup>59</sup> On this convention see C. Fusaro, *supra* n. 30 p. 219.

<sup>60</sup> On the contrary, C. Fusaro, *supra* n.30 p. 219, emphasizes the role of public opinion also in the process that led to the enactment of the 1989-1993 amendments.

However, it should be pointed out that mixed bodies – composed by members of parliament and scholars – have never been created, nor committee formed exclusively by experts: even in the case of the two aforementioned commissions, which had been vested with the task to modify the whole second Part of the Constitution, were composed only by members of Parliament. The experts, therefore, have always performed an advisory function towards the political parties and parliamentary groups which ended up raising some doubts on the expert's neutrality: scholars are usually associated with either one or the other political party. The Italian doctrine ended up losing an important part of its legitimacy due to this close connection with the politics.

What can be considered a paradox, it is that while amending the text of the Constitution was proving extremely difficult, the “living Constitution” was intensely evolving through informal avenues.

## **6. Informal Methods of Constitutional Change**

Most of constitutional changes in Italy have taken place without the enactment of constitutional amendment, that is, through informal changes, which did not modify the text of the Constitution.<sup>61</sup>

Some of them, however, developed “within” the legal framework of the written Constitution, due to the fact that the Constitution does not regulate all the “constitutional matter” and, in any case, contains general principles and not detailed rules. The “open texture” of the Constitution<sup>62</sup> leaves room for other sources (such as electoral laws or Standing Orders of the Chambers) to step in and integrate the Constitution. The same could be said for constitutional conventions and mere common practices. This is especially the case for those constitutional norms dealing with the form of government, which allowed, through the amendment of the electoral laws, the development after 1993 of a majoritarian parliamentary form of government which has eventually taken the place of the previous consociationalist or power-sharing form of government.

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<sup>61</sup> See S. Bartole, *Interpretazioni e trasformazioni della Costituzione repubblicana* (Il Mulino 2004).

<sup>62</sup> According to the words of R. Bin, ‘Che cos’è la Costituzione?’, *Quaderni costituzionali* (2007) p. 11 ss. In the tradition of the Italian scholarship this feature of the constitutional text is qualified as “elasticity”.

These constitutional development will not be addressed in this contribution, since, while belonging to the area of “constitutional changes”, they do not influence the effectiveness of the written constitutional provisions.<sup>63</sup>

Conversely, other constitutional changes developed “outside” of the text of the Constitution, in the sense that they affected the constitutional matter regulated by the written Constitution by *changing the meaning* of those written provisions.

The first, important way of informal change was determined by the lack of implementation of the written Constitution.

After the entry into force of the Constitution, on January 1st, 1948, many important laws were necessary to implement the Constitution, in order to establish both the new bodies of guarantee and the various other instruments designed to limit the political majorities, and also, and more generally, to favour the adaptation of the whole legal system to the new principles.

The April 18, 1948 elections witnessed the electoral success of the Catholic party which, for several decades, ruled the country, showing little interest in the implementation of the Constitution. It took several years to establish the Constitutional Court (1956), the Superior Council of the Judiciary (1958), the ordinary Regions (1970) and the provide a discipline for the referendum (1970).

In the absence of these bodies, the institutional system designed by the Constitution was not effective, lacking several checks on the political majorities. This circumstance could be described as an attempt to modify the Constitution by making it an “empty shell”. Furthermore, the very same political parties attempted to formally amend the Constitution, by means of an electoral law which would have awarded to the coalition obtaining 50% of the valid votes in a national election, 64% of the available parliamentary seats, that is, a majority of seats very close to the two-thirds supermajority needed to revise the Constitution.<sup>64</sup> This electoral law – termed “bribery law”– was fiercely contrasted by the opposition parties. Since the 50% threshold was not reached in the 1953 national election, the law was then abrogated, prompting a return to the proportional system. From that moment onward, the majority abandoned the idea to re-write the Constitution and initiated the long process of implementation.

The main avenue of informal change has been the jurisprudence of the Constitutional Court: indeed, this played an important role not only in the implementation of the Constitution (striking down and expelling from the legal system

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<sup>63</sup> On the contrary, see C. Fusaro, *supra* n. 30 p. 221.

<sup>64</sup> See L. Lanzalaco, *Le politiche istituzionali* (Il Mulino 2009) p. 102.

all those statutory laws enacted before 1948 which were inconsistent with the new Republican Constitution), but also in the adaptation of the Constitution to the demands of the changing Italian society.

In many circumstances the Constitutional Court, through constitutional interpretation, has gone far beyond the written text: an attitude which has generally been considered positively by the scholars and the political parties, but that has also raised concerns about the risks of arbitrariness and juristocracy. In a few cases, the Court itself has shown a certain degree of self-restraint, explicitly stating to be bound by the black letter of the Constitution: this has been the case, for example, of the decision declaring the unconstitutionality of the system of reserved quota in the electoral lists (subsequently overcome, as mentioned, by a formal constitutional amendment)<sup>65</sup> and of the decision on same-sex marriage, where the Court indicated that the text of the Constitution and the original intent of the Italian Founding Fathers precluded an evolving interpretation of marriage to accommodate same-sex couples.<sup>66</sup>

A few examples of this activist jurisprudence include:

a) decisions which recognized that the rights guaranteed by the Constitution are not only those entrenched in the text, and that Art. 2 Const. can be interpreted to promote the identification of new rights (right to housing, right to sexual identity, right to privacy, right to honor, right to marry...)<sup>67</sup>;

b) decisions which recognized that constitutional rights and duties (almost all but electoral rights) refer not only to citizens but also to foreign nationals (even if expressly referred only to Italian citizens in the text of the Constitutions)<sup>68</sup>;

c) decisions which identified an undeniable core of fundamental rights (including social rights), connected to human dignity, in the absence of any express reference in the Constitution to the concepts of “undeniable core” and “human dignity”;<sup>69</sup>

d) decisions which recognized that European law trumps inconsistent Italian legislation, including the Constitution, pursuant to the so-called “open clause” of Article 11 Const. referring to “limitations of sovereignty”: this has allowed ratification of the various European treaties – always conducted through ordinary legislation –

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<sup>65</sup> Decision No. 422/1995.

<sup>66</sup> Decision No. 138/2010.

<sup>67</sup> See, among the many, Decision No. 561/1987.

<sup>68</sup> Since Decision No. 120/1962.

<sup>69</sup> E.g. in Decision No. 80/2010.

without the need to modify the text of the Italian Constitution<sup>70</sup>. At the same time, the Court has identified in the “supreme principles of the constitutional system” a limit to the primacy of European law<sup>71</sup>;

e) decisions with which the Court has identified the material limits to constitutional revision and has indicated its power to review unconstitutional legislation<sup>72</sup>;

f) decisions with which the Court has “modified” the status enjoyed by international treaties in the Italian hierarchy of sources of law, modifying their status from primary legislation to intermediate sources of law (“*norme interposte*”), that is, norms which enjoy supremacy over legislative materials but remain subordinate to the Constitution and whose violation determines automatically an indirect violation of the Constitution reviewable by the Court. This overruling was motivated by the Court with the change in the text of the Art.117, par. 1 Cost., determined by the constitutional revision prompted by Constitutional Law no. 3/2001, an interpretation not necessarily mandated by the new text of Art. 117 Const.<sup>73</sup>;

g) decisions with which the Court introduced further limits to the abrogative referendum in addition to those expressly included in Art. 75 Cost., giving rise to a practice of more stringent control on the admissibility of the requests of abrogative referendum, filed either by 500.000 voters or 5 Regions<sup>74</sup>;

h) the jurisprudence of the Court on the relationship between the State and the Regions, and particularly the decisions which identified the existence of an implicit constitutional principle of loyal cooperation<sup>75</sup> and introduced mechanisms (unknown to the written text of the Constitution) through which the State protects the principle of national unity. In this way, the allocation of legislative competences contained in Article 117 of the Constitution may be derogated by a national law<sup>76</sup>;

i) the decision which recognized the power of amnesty as a power belonging exclusively to the President of the Republic, even in those cases when the Government opposes such grant (against the black letter of Art. 89 of the Constitution, requiring that every presidential act be countersigned by a member of the Government)<sup>77</sup>;

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<sup>70</sup> Since Decision No. 14/1964.

<sup>71</sup> Since Decision No. 183/1973, and especially in Decision No. 170/1984.

<sup>72</sup> Especially in Decision No. 1146/1988, quoted largely *supra*.

<sup>73</sup> Especially in Decisions No. 348 e 349/2007.

<sup>74</sup> Since Decision No. 16/1978.

<sup>75</sup> Especially Decisions No.19 and 242/1997.

<sup>76</sup> Decision No. 303/2003.

<sup>77</sup> Decision No. 200/2006.

k) the decision which recognized that the text of the Constitution may be integrated by “constitutional conventions”, such as the one that provides the individual no-confidence vote against Ministers, notwithstanding Art. 94 Const. refers only to the no-confidence vote against the whole Cabinet<sup>78</sup>;

l) the decisions by which the Court added many new kind of decisions of unconstitutionality (with different effects) to those provided by Art.136 Constitution (according to which “When the court declares a law or an act with the force of law unconstitutional, the norm ceases to have effect from the day following the publication of the decision”)<sup>79</sup>.

Other informal changes have been prompted by European law: its direct primacy on the Constitution, as recognized by the Constitutional Court, has produced important consequences especially with regard to the so-called “economic Constitution”, promoting freedom of competition and, according to some scholars, determining the desuetude of some constitutional provisions (e.g. Art. 41 Const.) aimed at imposing “socially-oriented” limits to the freedom of enterprise. A good example is provided by the introduction of the right to vote in local elections for EU citizens, a right introduced through simple legislation (legislative decree no. 197/1996), in the presence of a constitutional provision (Art. 48 Cost.) explicitly granting the right to vote only to Italian citizens.

Finally, some constitutional laws that could not be qualified as revisions of the text of the Constitution have an indirect impact on it.

Constitutional Law no. 1/1953, titled “Provisions on the Constitutional Court integrating the Constitution”, in fact “integrates” the text of the Italian Constitution (in particular Article 134 listing the Court’s functions), without modifying it expressly. Constitutional Law No. 1/1958 “Expiration of the deadline established in the XI transitional and final provision of the Constitution”, extends a five- years term provided for the establishment of new Regions. Constitutional Law No. 1/1967, addressing “Extradition for crimes of genocide” is designed as an interpretive law, establishing that constitutional provisions prohibiting the extradition for political crimes (Articles 10, last paragraph and 26 last paragraph of the Constitution) shall not find application to the crime of genocide. Constitutional Law No. 1/2002 determines, as we said, the “Cease of

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<sup>78</sup> Decision No. 7/1996.

<sup>79</sup> See T. Groppi ‘The Constitutional Court of Italy: Towards a Multilevel System of Constitutional Review?’, 3 *Journal of Comparative Law* (2008) pp. 100-118.

the effects of paragraphs 1 and 2 of the XIII transitional and final provision of the Constitution”.

## 7. Amending the amendment procedure

Article 138 itself has not been immune from proposals of revision.

Constitutional Law No. 1/1993 did not consider Articles 138 and 139 Const. among the provisions susceptible of modification with the special procedure therein provided. Thus, it was not the same for Constitutional Law no. 1/1997, which referred, conversely, to the possibility of preparing a draft for the revision of the entire Part II, with express reference also to the “system of guarantees”.

In fact, during the first stage of the works of the Commission established on that basis, the issue of the amendment of Article 138 was carefully considered. The “Parliament and normative sources of law” Committee, which dealt with the issue, submitted to the full Commission a text – approved on June 3, 1997 as a basic draft – which proposed: a mandatory two-thirds supermajority quorum in the second vote of the Chambers; raising the number of signatures required for requesting a referendum and the introduction of a structural quorum in order for the referendum to be valid; involvement of the Regions in the amendment of the provisions of Title V Const., therefore introducing the concept of “variable rigidity”; introduction of a direct *a priori* recourse to the Constitutional Court with suspensive effects which could be lodged by 1/5 of the members of each Chamber to challenge draft constitutional laws.

However, the growing conflicts between the various political forces and the imminent expiry of the period within which the Commission was supposed to complete its activity, eventually persuaded to set aside the issue. In the final proposal approved by the Commission (that, as we said *supra*, was never approved by the Chambers), therefore, Article 138 remained unchanged.<sup>80</sup>

Moreover, even before 1997, consistent with critics on the effects of the introduction, in 1993, of a majoritarian electoral system, which would have weakened the system of guarantees, proposals in the direction due of a higher quorum had been submitted. For example, the draft constitutional law presented by a group of centre-left

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<sup>80</sup> See the June 30, 1997 text; in the November 4, 1997 text it was limited to substitute the words “Regional Councils” with “Regional Assemblies” for uniformity reasons with the remainder of the proposal. P. Passaglia, Le proposte di modifica dell’Art.138 Cost., in P. Costanzo et al. (eds.), *La commissione bicamerale per le riforme costituzionali* (Cedam 1998) p. 37.

deputies<sup>81</sup> advocated the need to always approve constitutional laws by a two-third majority.

Another element of concern addressed in this proposal was the constitutional referendum, which could be required only on specific provisions or on groups of provisions addressing the same subject. It was determined that if “on the same provisions several requests for the referendum are presented, or if disputes on the aggregation of the provisions to be submitted to each referendum arise, the decision must be deferred to the Constitutional Court”.

More recently the issue of the reform of Article 138 was once again raised. In 2003, in the presence of the risk that a systematic constitutional reform could be enacted with the exclusive support of the government majority (as it finally happened in 2005), a group of centre-left Senators submitted a proposal incorporating the two main issues addressed in the previous draft.<sup>82</sup>

According to this new draft, the majority required in the second deliberation to approve the draft constitutional law would have been raised to mandatorily reach two-thirds of the members of each Chamber, while the third paragraph of Article 138 would have been changed in order to allow referendums on homogeneous questions, vesting the Constitutional Court with the power to review their textual formulation.<sup>83</sup>

On the contrary, the Constitutional Law approved in a second deliberation on November 16, 2005 (but eventually rejected in the referendum of June 2006) decided to require a lower quorum. Its Article 52 provided for the repeal of the last paragraph of Article 138 Const., which excludes the possibility of the constitutional referendum in those cases when the two-thirds majority has been reached in the second deliberation. Thus, failing any incentive to the achievement of larger majorities, the guarantee of the constitutional rigidity would have been left to the double parliamentary deliberation with absolute majority, and to the optional referendum. This project seemed to retain the idea that the Italian Constitution is difficult to modify due to Article 138, and, therefore,

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<sup>81</sup> See, Chamber of Deputies, XII legislature, Constitutional Law Draft no. 2115, presented on February 28, 1995 on “Amendments of Articles 64, 83, 136 and 138 of the Constitution”.

<sup>82</sup> Senate of the Republic, XIV legislature, Constitutional Law Draft No. 1933 January 21, 2003, on “Amendments of Articles 49, 51, 63, 64, 66, 71, 72, 74, 76,77, 82, 83, 88, 92, 94, 95, 134 and 138 of the Constitution and introduction Articles 58-*bis*, 81-*bis*, 82-*bis* and 98-*bis*, as well as of the XVII-*bis* transitional and final disposition of the same Constitution, on the form of government, constitutional guarantees, opposition statute and constitutional amendments”.

<sup>83</sup> Art. 138, par. 2, would provide that “if the constitutional law amends or repeals provisions included in more than one Article of this Constitution, amending provision of rules included in each title or section are separately subjected to a *referendum*. The Constitutional Court may order that provisions included in the same title, section or Article are separately subjected to a referendum provisions, if they concern non-homogeneous questions or institutions and if it is conducive to the clarity of the decision”.

that it would be necessary to simplify the amending procedure. An idea that, as we tried to show in the previous pages, has not any link with the practice of constitutional amendments in Italy.

However, it appears, conversely, that the experience developed during the XIII (1996-2001) and XIV (2001-2006) legislatures has shown that the procedure pursuant to Article 138 can indeed allow the realization of “major reforms”, as long as a clear political will to do so actually exists. What Article 138 Const. has not been able to guarantee, it is the shared nature of the reforms and, with it, the maintenance of the consensual nature of the Constitution. The desire to restore this fundamental element, thereby preventing any random majority to incur into the temptation to make “their own” Constitution, justifies the proposals presented for the increasing of the quorum. In addition, whenever Article 138 Const. will be considered adequate – from a legal and factual standpoint – to approve large revisions, the problem of constitutional referendum homogeneity will then rise: this is indeed another feature of Article 138 Const. that nowadays requires careful consideration.

## **8. Conclusions**

The Italian experience shows a significant difference between the “written Constitution” and the “living Constitution”

As previously noted, this is partly the product of the influence exerted by the Italian legal – more specifically: constitutional – culture on the life of the Constitution: a culture which abandoned its original positivistic approach to embrace a concept and practice of constitutional evolution where any idea of “maintenance” (that is, updating, adjustment to new demands, realignment to dominant practices and interpretations) of the constitutional text is absent. Thus, in the factual experience, revisions finalized to the “maintenance” of the text are, with few exceptions, absent as well.

In this Article, however, we have tried to illustrate how the current status is the result also of the acceptance, by both scholars and politicians, of the idea that every constitutional revision aiming to go beyond the mere maintenance of the text, requires a broad political consensus, larger than that required according to the text of Art. 138.

In other words, Article 138 Const. does not outline an overtly complicated procedure for constitutional revision, but, over time, it has been interpreted as introducing (well beyond the textual requirements of Art. 138 Const. itself!) a further

degree of rigidity. This interpretation originates from a concept of the constitutional revision tightly connected with the constituent process: since the Italian Constitution is a negotiated document, that is, a product of the agreement between the antifascist political parties, its changes must enjoy an analogous consensual character<sup>84</sup>.

Whenever this broad consensus is missing, the constitutional revision becomes therefore impossible.

Some new political parties, established in the 1990s, and not connected to the traditional ideologies and political parties which participated to the Constituent Assembly, in 2005 tried to impose a broad revision of the whole second Part of the Constitution with the mere support of the governmental majority. This attempted revision, as we have seen, was rejected by the people in the referendum held in 2006.

This circumstance has reaffirmed the existence of a full-fledged constitutional convention favoring consensual constitutional revisions.

The existence of such convention has been recently recognized in the current process of revision aiming to include in the Constitution a provision mandating budget equilibrium, pursuant to an express request by the European Union<sup>85</sup>. The constitutional revision has been approved on November 30<sup>th</sup>, 2011 by the Chamber of Deputies, in the first vote, with a large majority and no opposing votes<sup>86</sup>, and few days later by the Senate, with the same large majority<sup>87</sup>. The current state of necessity and urgency, due to the external pressures, consequence of the economic and financial crisis that invested the Euro-zone in 2011, clearly favored the achievement of a broad consensus, which, in other circumstances – as we tried to show – have proved considerably more difficult to reach.

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<sup>84</sup> See *supra*, par. 2.2.

<sup>85</sup> Articles 81, 100, 117 and 119 will be amended.

<sup>86</sup> The amendment was approved by 464 out of the 630 members of the Chamber, with 11 abstentions and no opposing votes. The rest of the members of the Chamber were not present. It is the first voting, thus from the legal point of view the large majority reached was neither relevant, neither necessary. The effectivity of the consensus will be checked on the second voting. However, no doubts could be that the political consensus is generalized.

<sup>87</sup> The amendment was approved by the Senate on December 15, 2011 by 255 out of 315 members, with 14 abstentions and no opposing votes.