Department of **Political Science**
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THE CONSTITUTIONALITY OF CONSTITUTIONAL AMENDMENTS - A Comparison between the French and Italian Case law

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Introduction

The thesis focuses on *formal* constitutional amendments, which retain the capacity to enact critical constitutional change. While the latter can occur informally as well, for instance through judicial interpretation or practice, the amendment procedure remains the most common and distinguished way of modifying the constitution, with formal revisions nowadays omnipresent in constitutional systems worldwide.

The thesis subsequently explores the nature of the amending power, examining in particular whether the latter encounters any *substantive* limit. This requires firstly analyzing various other elements, including whether the text provides any written limit, whether – even if the answer was negative – certain limitations can be derived from the scheme or "spirit" of the constitution, and what body should decide on such issues and, in the event, identify and enforce said limits. Amendments must, of course, comply with *procedural* requirements too; however, it is recognized that their legitimacy and enforcement by the judiciary constitutes a much less disputed matter.

Meanwhile, those who oppose substantive limits highlight the *democratic* character of their position. Provided that the regular process has been followed, a constitutional reform is held to be always valid, even more so as it probably enjoys greater popular, or at least parliamentary, support. In any case, no organ or court could lawfully review amendments, lacking both legal and political legitimacy and further demonstrating that revisions can in no way be invalidated.

On the other hand, the view which favors certain limits also champions democracy: however, instead of the will of the present-day majority, it grants special status to the people as drafters of the constitution, respecting their decision (express or implied) to place some values out of reach. Accordingly, this viewpoint approves of the intervention specifically of constitutional courts, which take on this further delicate task as a natural, albeit usually tacit, consequence of their role.

To assess these fundamental questions and contrasting perspectives, a comparison is carried out between the case law of two countries, Italy and France, that have undeniably comparable legal and constitutional systems. The opposite decisions reached by the respective judiciaries on whether amendments could be unconstitutional exemplify well the two sides of the argument. Concurrently, they demonstrate that conclusions can hardly be drawn without knowing the specific conditions, past jurisprudence, underlying ideas and history of the country in question; for this reason, the French and Italian situations are examined in depth in Chapter 2. Still, recognizing general themes which inform the discussion and can be applied almost universally, Chapter 1 and 3, while attempting to avoid undue generalizations, adopt a more comprehensive approach.

A few clarifications are in order. The thesis concentrates on constitutional courts, inquiring into whether they are legitimized to rule on constitutional amendments and their scope. Nonetheless, in accordance

to the extensive debate concerning the exact role and nature of the French *Conseil constitutionnel*, particular attention is devoted to the evolution of that body over time in an attempt to define its character and examine whether and how it has changed since its inception.

Secondly, while the distinctions between *procedural* and *substantive* and – within the latter category - between *explicit* and *implicit* limitations are addressed, the focus remains for the most part not on *external* but on *internal* limits, i.e. on those that are found within the constitutional system. Those deriving from supranational or international standards are pertinent for France and Italy, especially with regards to Community and Union law, and the relevant case law is accordingly analyzed. Still, in order not to drift from the main purpose of the research, other aspects and judgments, related to the respective internal orders, are granted greater attention.

Chapter 1: the role and limits of Constitutional Amendments

1.1 Origins and nature of constitutional amendments

Modern constitutions are typically written, contain provisions related both to the nation's institutional structure or form of government and basic rights, and generally illustrate the main principles and values that the society believes in.[1] Meanwhile, constitutional amendments provide flexibility, allow future generations to respond to and enact changes of various kinds, and guarantee peaceful, legal means to alter the state of affairs and correct imperfections.[2] Before the idea took hold in Europe, the first national constitution to prescribe a rule specifically dedicated to regulate the text's own amendment was that of the United States, where the 1777 Articles of Confederation required the unanimity of all states. The provision was itself inspired by several US state constitutions prescribing special amendment procedures and limitations of various kinds.[3] As the mechanism soon turned out to be too demanding, the still-in-force Constitution of the United States that replaced the Articles in 1789 designed a different provision – contained in Article V – again expressly meant to regulate amendments. Learning from past experience, James Madison explained that the procedure chosen should guard "equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults".[4]

Most constitutions today share this concern and distinguish the procedure required to pass ordinary legislation from that required to approve constitutional amendments. The text is rendered "rigid" in various ways, with hurdles including popular referendums, higher quorums, intervening elections, time delays, and more. The rationale is that if a society allowed its most fundamental rules to be changed too easily, uncertainty and instability would ensue as temporary majorities could abuse the amendment power and undermine the constitutional order. On the other hand, if the requirements were viewed as excessive, they would serve as an impediment by preventing a community from evolving or from facing some pressing issue: in this case they would be equally damaging or perhaps would simply be disregarded altogether, as the US states did in 1787.

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[1] Pasquino, Pasquale, 'Flexible and Rigid Constitutions' in *Rationality, Democracy, and Justice* (edited by Claudio Lopez Guerra and Julia Maskivker). Cambridge University Press (2015), 85-86.

[2] Roznai, Yaniv, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*. PhD Thesis, The London School of Economics and Political Science (LSE) (2014), 11-12.

[3] Albert, Richard, *Constitutional Amendments: Breaking, Making and Changing Constitutions*. Oxford University Press (2019), 13-17.

[4] Hamilton, Alexander, Madison, James, Jay, John, *The Federalist Papers*. Signet Edition (2003), 275.

The first set of limitations on constitutional amendments is thus of procedural nature, and characterizes all constitutions which are not defined as "flexible". In countries with an established rule of law, we can safely assume that if a procedure other than the one requested were utilized to pass a constitutional amendment, such breach would be sanctioned. The more compelling and critical question, however, is whether other restraints on constitutional amendment - related to their content and not to their form - exist.

1.2 Substantive limitations: explicit and implicit

The idea of substantive limits to constitutional amendments may at first seem paradoxical: since, once a constitutional norm is adopted according to the given procedure, it becomes part of the constitution, it carries equal normative force and as such could not violate it. If anything, according to the *lex posterior derogat priori* principle, the one approved later should prevail over conflicting norms adopted earlier.[5] Still, the literal meaning of the word *amendment* offers an initial argument to the contrary. *Emendere* means "to correct a fault", not to re-construct something anew; it could thus seem improper to use the amendment power to re-write or modify entirely a constitutional text.[6] Similarly, the oft-used term *revision* is different from abrogation and entails automatically a limit; it serves to modify or alter previous decisions but while maintaining the essence of the text at hand.[7] Finally, the word *constitution* itself means founding, stabilizing, hence referring to something that, while being permitted to mutate and evolve, should last and persist over time.[8]

Regardless of the persuasiveness of the etymological arguments, framers of constitutions have been inserting boundaries to what amendments can revise for a long time. In the previously mentioned Articles of Confederation, the procedural hurdle of unanimity was accompanied by an even more onerous caption, namely that "the Union shall be perpetual".[9] Earlier and even more ambitiously, John Locke, after writing the Fundamental Constitution of the colony of Carolina in 1669, had named the text "sacred and unalterable" and provided it never be replaced.[10]

Constitutions nowadays show a much larger degree of self-awareness and for the most part avert such sweeping restrictions, understanding that petrified texts, while theoretically unmodifiable, are politically fragile. Unlike its predecessor, the Constitution of the United States contained originally only two substantive limitations, one of which – prohibiting states from individually forbidding the "migration

[5] Roznai, 2014, 14.
[6] Ibidem, 128.
[7] Marcenò Valeria, 'Manutenzione, modifica puntuale, revisione organica, ampia riforma della Costituzione: la revisione costituzionale ha un limite dimensionale?' in *Alla prova della revisione. Settanta anni di rigidità costituzionale*. Editoriale scientifica (2019), 280.
[8] Gallo, Franco, *La revisione costituzionale ed i suoi limiti*. Ricerche giuridiche, Vol. 2, No. 2 (2013), 465-466.
[9] Articles of Confederation, art. XIII.
[10] Armitage, David, *John Locke, Carolina, and the "Two Treatises of Government".* Political Theory, Vol. 32, No. 5 (2004), 615.

and importation" of slaves – ceased to be valid in 1808.[11] In Europe, one of the first countries to implement the idea was France, when the National Assembly revised in 1884 the constitutional law of 1875 and provided that "the republican form of government cannot be made the subject of a proposition for revision". The clause – an unamendable provision - aimed to enshrine the victory of the Republic over the monarchy and to prevent a return to the latter by constitutional means; it also predictably sparked fierce debates among scholars, both inside and outside of France. Doubtful authors considered the provision to be either nothing but a "paper barrier", that could be easily circumvented through a *coup d'État*, a total revision of the text or a modification of the clause itself, or illegal altogether, as it purported to bind future constituents.[12]

Nevertheless, not only was the commitment maintained in the successive constitutions and imitated abroad, it also inspired other scholars to argue that there were further boundaries that the amendment power was not allowed to cross. In France, Pierre Guillemon (as cited in Haines[13]) contributed to the creation of the concept of *supra-constitutionality* when he contended that there were principles, such as those found in the Declaration of the Rights of Man and Citizen of 1793, that stood above constitutional laws. Drawing on his and other French scholars' works, Carl Schmitt likewise held that a constitution should tolerate neither amendments aiming to violate fundamental principles nor those overthrowing the "system of order", since admitting them would amount to denying the constitution's identity.[14] According to this view, the presence or absence of explicit limits is subsequently almost superfluous, because as Richard Kay notes, it would in any case seem improper that "an 'amendment' might alter the essential character of a constitution while simultaneously invoking its authority".[15] If the unamendable provision protected certain principles but not others, or if it had not been written in the first place, it would still be necessary to safeguard them by inferring without which rules the constitutional system would effectively be overturned.

The admittedly contentious theory of implicit limits on the amendment power rests on the distinction between constituent and constituted power, which dates back to the eighteenth century. While it will be expounded on and refined later, the basic assumption of this approach is that the constituent power is the power of establishing the constitutional order of a nation which, as such, is inherently unlimited and unrestricted and placed above the constitution itself. Meanwhile, the constituted power, as it is created by the former, is of inferior nature, subordinate to the constitution and obliged to comply with it, as well as prevented from acting against it. As a lesser and constituted power, the amendment authority could

[11] United States Constitution, article I, section 9, clause 4.

[12] Beaud, Olivier, *Le cas français : l'obstination de la jurisprudence et de la doctrine à refuser toute idée de la limitation au pouvoir de révision constitutionnelle*. Jus Politicum, No. 18 (2017), 94.

[13] Haines, Charles Grove, *Revival of Natural Law Concepts*. Harvard University Press (1930), 270-271.

[14] Schmitt, Carl, *Legality and Legitimacy* (edited and translated by Jeffrey Seitzer). Duke University Press (2004) (1932), 58.

[15] Kay, Richard S., *Constituent Authority*. American Journal of Comparative Law, Vol. 59, No. 3 (2011), 725.

not replace the constitution entirely or *de facto* overthrow it, because such functions could only be exercised by the people, which are usually identified as the holders of the constituent power.[16]

More specifically, few countries choose to expressly regulate and anticipate the possibility of a *total* reform of the text, such as the Swiss, Spanish and Austrian Constitutions currently, typically providing a more demanding procedure than the one required for a partial revision or for "ordinary" amendments. While this choice, as one made by the original constituent power, is legitimate, it could be held that such reform may replace even all the provisions of the constitution, but not the basis premises of the state. Regardless of the number of norms affected, what matters is always that the revision does not consist in a complete destruction of the basic principles of the preceding order.[17]

What is undisputed is that in the last decades there was on one hand a proliferation of unamendable provisions – i.e. explicit limits – in constitutions worldwide and on the other a growing acceptance of implicit limits too, irrespectively of whether the constitution already identified other restrictions.[18] The trend is explained historically, in Europe and elsewhere, with the widespread determination to commit, after World War II, to the key features of a democratic government, including fundamental freedoms and rights. At the same time, the realization of their significance and the potential risk of them being violated suggested giving special safeguard to said principles.

Such choice nonetheless demands a careful balancing act between the detection of what is truly paramount for a society and what it is fairer to leave to future actors to appraise. Identifying too great of a core as a set of unchangeable principles might lead the amendment power to feel deprived of choice and perhaps disregard them altogether, similarly to when procedural requirements are too onerous, hence obtaining a result opposite to the one intended.

1.3 Judicial review of constitutional amendments

Even when constitutions provide for explicit limitations on the amending authority, they – somewhat surprisingly – tend not to spell out who is supposed to enforce them. Constitutional courts typically take on this task, yet their involvement must be convincingly justified, as for any competence not explicitly mentioned in the text.

The main objection is precisely that, while constitutional courts are entitled to annul unconstitutional laws, they would openly disregard the letter of the text if they extended this power to amendments too. In sanctioning the legislature, they would read into the constitution a power not expressly conferred upon them, failing to recognize that they are themselves a constituted – and thus limited - power. The

[16] Machen, Arthur W. Jr., *Is the Fifteenth Amendment Void*. Harvard Law Review, Vol. 23, No. 3 (1910), 170. See Section 3.1 for a more thorough and partly revisited discussion.
[17] Roznai, 2014, 130.
[18] See ibidem, 28.

more considerable procedural hurdles overcome by the amending authority further strengthen the case in favour of the revision not being reviewed or struck down by the unelected judiciary, which would otherwise dangerously put itself above the constitution.

Still, if the theory of vertical separation of powers between the original constituent and the amending power is accepted, there must be a body in charge of determining whether the latter has exceeded its limits, particularly when there are explicit barriers in the constitution. In order to assess whether the latter are to be enforceable, the only true candidates are constitutional courts: just as they perform judicial review in conflicts between ordinary legislation and the constitution, and given that they apply and interpret the latter, so should they resolve conflicts between different constitutional norms, fulfilling their role as guardians of the constitution.[19] In this sense, unconstitutional amendments are to the "eternity clauses" what unconstitutional laws are to the constitution.[20]

Indeed, the sole other possible alternative would be to entrust fully the task of respecting the constitution to the government, that is to say the same body that might infringe upon it, in which case the risk of abuse of power and lack of self-restraint would evidently be too great. Similarly to the institution of judicial review at large, this mechanism is meant to ensure not the supremacy of the constitutional court over other constituted powers, but rather that of the constitution, whose integrity must be maintained even when it is being amended.[21] Accepting a blatantly undemocratic norm, or one violating basic rights, even if it had overcome an enforced procedure and enjoyed popular support, would not only seem *prima facie* unfair but also paradoxical, since it would mean that legislatures could bypass the problem of judicial review by simply approving constitutional amendments instead. From this perspective, the intervention of the judiciary, far from being anti-democratic, is a way of averting the tyranny of the majority and protecting the rights of minorities.[22]

There are two less common but more simple scenarios to assess. The first occurs whenever the constitution explicitly allows the constitutional court to review amendments, in which case the legitimacy of their intervention is hardly debatable. The other possibility is that the text either explicitly denies any form of substantial review, or limits the court to verifying whether the procedure employed was correct. In this case the constitutional court would indeed act *ultra vires* if it were to perform (any or substantial) review, because it would be attributing to itself a power explicitly denied by the constitution. The court should thus recuse itself in compliance with the will of the original constituent power, which would have expressed a clear voluntary negative arrangement, unless the obligation had

[19] Preuss, Ulrich K., *The Implications of Eternity Clauses: The German Experience*. Israel Law Review, Vol. 44, No. 3 (2011), 441-442.
[20] Barak, Aharon, *Unconstitutional Constitutional Amendments*. Israel Law Review, Vol. 44, No. 3 (2011), 333.
[21] Roznai, 2014, 177.
[22] Ragone, Sabrina, *I controlli giurisdizionali sulle revisioni costituzionali. Profili teorici e comparativi*. Bononia University Press (2014), 166.

been added through an amendment: in this case the legislature would try to extend its own competences in undue fashion.[23]

Among the many to adopt this line of reasoning, the Brazilian Supreme Court proclaimed to be "legally bound by the original constituent power" to declare amendments null and void if they clashed with the constitution.[24] Any different decision would mean that unamendable provisions are merely declarative, as no other body could legally enforce them. Starting from those, it is undoubtedly easier for courts to infer the existence of a core of implicit unamendable principles too, e.g. theorizing that if they allowed the destruction of the constitution – whether express or otherwise – then their own decisions would lack legitimacy, since they derive it from that source.[25] Nevertheless, more controversially, constitutional courts have in certain occasions set out to protect the fundamental core of the text even in the absence of an explicit limitation, whereas usually implicit restrictions can be more easily deduced from other provisions.

At any rate, the two cases taken under consideration in this thesis are of the more frequent variety: France and Italy both have rigid constitutions, a single and almost identical unamendable provision, constitutional courts tasked with striking down unconstitutional laws but a text tacit on whether they can also review constitutional amendments. Despite the resemblance, their two bodies entrusted with judicial review reached opposite conclusions, demonstrating the validity of the two different strands of arguments shown here as well as the different legal and political character of the countries.

[23] Roznai, 2014, 184. For a practical example, see the Indian case in Section 3.3.
[24] As reported in Ibidem, 187.
[25] Ragone, Sabina, *The Basic Structure of the Constitution as an Enforceable Yardstick in Comparative Constitutional Adjudication*. Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito. Vol. 11, No. 3 (2019), 329.

Chapter 2: the French and Italian cases

2.1 France

2.1.1 The Constitutional Council

If the thesis that only constitutional courts should be able to rule on the legitimacy of constitutional amendments is accepted, then the French case encounters an immediate hurdle, given that its *Conseil constitutionnel* (Constitutional Council), as the name itself suggests, might fail to meet that standard. Ever since its inception, the body has been the subject of changes as much as of discussions striving to grasp its exact nature.

Established in 1958, the Council came to replace the ineffective Constitutional Committee of 1946. Far from a modern constitutional court, the latter could merely send back a law to the National Assembly if it held that it "impl[ied] amendment of the constitution"[26] and even had the duty of mediating between the two houses of Parliament.[27] Its predictably minimal - and clearly more political than judicial - role during the twelve years of the Fourth Republic led the drafters of the new constitution to design a strengthened organ in its place.

The new Constitutional Council could review, before their promulgation, both *lois organiques* and *lois ordinaires* (organic and ordinary laws respectively). The former, also known as institutional acts, specify the organization and functioning of public powers in the application of the articles of the Constitution, and as such are reviewed automatically by the Council. On the other hand, the latter can be brought before it solely by those having standing to do so under article 61, at the time only the President of the Republic, the Prime Minister, the President of the National Assembly and the President of the Senate.[28] In rather peculiar fashion, these same offices, with the exception of the Prime Minister, also nominate the nine members of the Council – who serve for a non-renewable term of nine years -, with each naming three; former Presidents of the Republic become members ex officio if they choose so.[29] The Council was thus characterized by a noticeably limited access to it and its eminently political composition.

[26] French Constitution of 1946, art. 91.
[27] Beardsley, James, *Constitutional Review in France*. The Supreme Court Review, Vol. 1975 (1975), 211.
[28] French Constitution of 1958, art. 61 (original text).
[29] Waline, Marcel, *The Constitutional Council of the French Republic*, American Journal of Comparative Law, Vol. 12, No. 1 (1963), 487.

The *Conseil constitutionnel*, unlike most of its theoretical European counterparts, could moreover only review national laws, but not local ones, administrative acts or decree-laws.[30] Nor could it act as a guarantor of fundamental rights, since these for the most part were not provided by the Constitution. With its intervention confined to reviewing *proposed* rather than existing legislation, the body lacked in any case the valuable benefit of appreciating how a bill functioned in practice and affected real situations before having to express itself. Its main aim was instead to arbitrate conflicts between the legislature and the executive, and more precisely to prevent the former from taking over the latter's competences. Together with the Constitution enumerating the categories in which Parliament could legislate, it was hoped that the mechanism would be sufficient to rein in what was perceived as the excessive power enjoyed by parties and parliamentarians during the Fourth Republic, deemed the main culprit of the ensuing chronic instability. The Council's bias and actual chief function were so evident that it was described as a "cannon aimed at Parliament".[31] Meanwhile, to further stress that its members were not "true" judges, the Constitution peculiarly does not require that they have any legal training, while the Council is completely detached from, and has no control over, the other courts.

It thus seems undisputable that the framers did not intend to create a body with the same functions and standing as the US Supreme Court or the German and Italian Constitutional Courts. Still, knowing the predominant theory on the relation between judicial and legislative power in the country, it is surprising that an organ – with all the aforementioned caveats - was established with even a limited form of judicial review in the first place.

Aversion toward the judiciary in France was significantly influenced by Edouard Lambert's 1921 *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis*, which, drawing from the US experience, warned that judicial review would be used to bar progressive legislation.[32] The book is credited not solely with popularizing the expression "government by judges" in the country but also the refusal of the thesis that "the constitution gives courts a legal basis for overruling legitimately promulgated legislation".[33] The ideas of Montesquieu, namely that judges should merely be "*la bouche qui prononce les paroles de la loi*" (the mouth that pronounces the word of the law) and play a passive, secondary role still clearly prevailed.[34] Courts had to apply the law, not review it, since whatever Parliament had approved was *ipso facto* legitimate and immune from any control, as the will of the representatives mirrored that of the people.[35] A slight variation of the same concept holds that if courts were allowed to exercise judicial review, they would be partaking in the legislative power, thus breaking

[30] Favoreu, Louis, *L'exception d'inconstitutionnalité" est-elle indispensable en France?.* Annuaire international de justice constitutionnel, Vol. 8 (1992), 13.
[31] Dyevre, Arthur, 'The French Constitutional Council' in *Comparative Constitutional Reasoning* (edited by András Jakab, Arthur Dyevre and Giulio Itzcovich). Cambridge University Press (2017), 324.
[32] Ibidem, 323-324.
[33] Davis H. Michael, *The Law/Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court.* American Journal of Comparative Law, Vol. 34, No. 1 (1986), 46.
[34] Fabbrini, Federico, *Kelsen in Paris: France's Constitutional reform and the Introduction of A Posteriori Constitutional Review of Legislation*. German Law Journal, Vol. 9 (2008), 1301.
[35] Beardsley, 1975, 192.

with the principle of separation of powers. The idea rests on a strict distinction between politics and law, and maintains that granting judges what amounts to a veto power on the legislature would mean their undue passage from the latter to the former.[36]

Similarly to how judicial review remained tainted with accusations of unfairness or downright illegality, the Constitutional Council was evidently limited in terms of legitimacy and of powers at disposal. The one remarkable concession present in the Constitution was the clarification that its decisions are binding on all public authorities and are not subject to any review, i.e. they have the effect of *res judicata*, at the time the strongest argument that could be made to regard the Council as the supreme court of the State.[37]

The *Conseil constitutionnel* therefore had to overcome considerable hurdles and skepticism, and could only develop into a more conventional and powerful institution progressively and over time, through both constitutional amendments and its own decisions. Among the former, the 1974 revision was instrumental as it extended the possibility of referral to the Council to "sixty Members of the National Assembly or sixty Senators",[38] that is to say potentially to the opposition, while previously the sole offices mentioned in the text were all presumably members of the majority. The amendment achieved its goal considering that it resulted, almost immediately, in a rise in the number of cases heard by the Council.[39]

The most important revision, however, occurred more recently, in 2008. Amidst the comprehensive constitutional reform, the most radical changes concerned arguably the Constitutional Council, through the introduction of *a posteriori* constitutional review.[40] In a significant departure from French tradition, it became possible for lower courts to refer issues of constitutionality to the Council, after the requests are filtered by the *Conseil d'état* and the *Cour de cassation* (Court of cassation). This form of *incidenter* proceeding meant that individual citizens embroiled in true controversies could finally reach - almost directly – the Constitutional Council if they believed to be tried on the basis of an unconstitutional norm.

The *Conseil constitutionnel* had completed its transition from a body accessible only by the political majority and limited to declaring provisions unconstitutional *ex ante* (a form of "constitutional preview"[41]) to a more classical constitutional court, similar to its European counterparts.

The arguments to consider the Constitutional Council a true constitutional court since the beginning could rely on other elements, such as the overstatement of some of its oddities: e.g. the lack of a concrete litigation or the requirement of legal training which, as in the United States, is absent in the text but present by praxis. Regardless, it is more correct to view the Council as having developed and changed

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[36] Saint-Bonnet, François, *Le "constitutionnalisme" des parlementaires et la justice politique – Les équivoques des "lits de justice" du XVIIIe siècle*. Parlement[s], revue d'histoire politique, Vol. 1, No. 15 (2011), 19.

[37] Waline, 1963, 488.

[38] French Constitution of 1958, art. 61 (revised and current text).

[39] Dyevre, 2017, 340.

[40] Fabbrini, 2008, 1298.

[41] Baranger, Denis, *The Language of Eternity: Judicial Review of the Amending Power in France (or the Absence Thereof)*. Israel Law Review, Vol. 44, No. 3 (2011), 389-428.

over time, so that even the latest reform is best seen more as the conclusion of a lengthy process than a sudden rupture with the past, as the next section better illustrates.

2.1.2 The case law from 1962 through the Maastricht judgments

The first crucial case heard by the Constitutional Council was in 1962 and revolved around none other than the architect of the Fifth Republic and then-President of the Republic, Charles de Gaulle.
The 1958 Constitution provided that the President of the Republic was elected by an electoral college composed of members of Parliament, mayors, some municipal councilors and other officials, for a total of almost 80,000 people.[42] President de Gaulle, wishing to establish a more powerful presidential office – in particular vis-à-vis the legislature -, proposed an amendment to the Constitution that would replace the electoral college with direct popular vote. Facing opposition from Parliament – and especially from the Senate, which had a similar composition and character to the electoral college -, he chose to submit the bill to referendum, thereby bypassing the legislature, despite article 89 stating that constitutional amendments must be passed by both Houses, and *then* possibly by referendum (unless Parliament convened in Congress approved the text by a three-fifths majority). De Gaulle contended that his actions were legal as the President could, under article 11, submit directly to the people's judgment, among others, bills relating to the organization of public powers.[43] The Parliament lamented not being involved as well as being divested of its sovereignty as a consequence of the amendment: it conceivably risked losing authority both due to the contents of the revision and to the procedure through which it had been adopted. When the referendum obtained a supermajority of 61.75%, de Gaulle's trust in his popular support and aversion toward the parties' system seemed validated. Still, the President of the Senate, Gaston Monnerville, disagreeing with the President's utilization of the improper method to pass the reform, referred the case to the Constitutional Council. The latter had the unequivocal opportunity of dispensing with the suspicions, present ever since the body had been established, that it would consistently defer to the executive. In particular, while politically unassailable, the juridical case in favor of de Gaulle's position was almost non-existent, as the *Conseil d'état* also remarked.[44] The response of the Council, concluding it had "no jurisdiction" to strike down a reform voted by the people,[45] confirmed instead the widely accepted theory in France that the judiciary should not annul a decision taken democratically. Richard Albert argues that the judgment brought about two constitutional amendments: one, formal, providing the direct election of the President of the Republic wanted by de Gaulle; the other,

[42] Albert, 2019, 22.
[43] Ehrmann Henry W., *Direct Democracy in France*. The American Political Science Review, Vol. 57, No. 4 (1963), 894.
[44] Baranger, 2011, 393.
[45] Conseil constitutional [CC], Decision No. 62-20DC, Nov. 6, 1962 (Referendum Act), Rec. 27.

informal, allowing direct consultation of the people as an alternative way to alter the Constitution alongside approval by both Houses.[46]

The Council broke free of the glaring, troublesome influence exerted upon it by the executive – which had prompted then-leader of the opposition and future President of the Republic François Mitterrand to deride it as de Gaulle's "errand boy"[47] - only nine years later, when it took a decision so disruptive as to be described as a juridical *coup d'état*, or at least a legal revolution.[48] As was noted above, the Council was initially unable to defend individual rights at the constitutional level as those were found not in the main text, but rather in the Preamble to the Constitution of 1946 and in the Declaration of the Rights of Man and Citizen of 1789. While authors such as Léon Duguit had tried to argue, throughout the nineteenth and twentieth century, that the Declaration had acquired constitutional status after having been adopted by, and survived to, all following Constitutions since then, courts had repeatedly refused to use it as a binding standard against the legislature. Although hope could now reside in a new central body, i.e. the Council, and not solely on lower tribunals, both the jurisprudence of the institution and the legal case for the application of the text seemed to leave feeble chances. With regards to the Preamble of 1946, the argument was, if anything, even weaker, since the current Constitution merely stated in its own Preamble that the French people "solemnly proclaim their attachment" to it (as well as to the Declaration), a far cry from a clear-cut legal command. Additionally, the two texts were not annexed to the Constitution when the latter was submitted to referendum in 1958 and even the *travaux préparatoires* indicated that the drafters did not mean for the two texts to carry equal legal force to the Constitution.[49]

In spite of these apparently insurmountable obstacles, the Council, to all appearances subverting the framers' intentions, reached the opposite conclusion in 1971, when it proclaimed to have the authority to review laws against both the Preamble to the Constitution of 1946 and the Declaration, as well as the fundamental principles recognized during the Third Republic. The Council, in its first high-profile fundamental rights case, did not truly attempt to justify the momentous choice, but more simply asserted it almost as if it were taken for granted.[50]

The consequences of the "Freedom of Association" ruling were enormous, most evidently for marking the point in which the *Conseil constitutionnel* established an effective system of judicial review and rendered the principle of constitutional supremacy operative, after decades – if not centuries – of refusal of the idea in France. The Council was no longer a mere arbiter between the executive and the legislature, with the former typically ending up as the preferred side, but rather the guardian of fundamental constitutional rights against both powers.[51] The judgment also prompted politicians to take notice of its new, enhanced role, leading to the adoption of the aforementioned – and equally consequential – 1974

[46] Albert, 2019, 23.
[47] Dyevre, 2017, 326.
[48] Ibidem, 327.
[49] Ibidem, 343.
[50] CC, Decision No. 71-44DC, Jul. 16, 1971 (Freedom of Association), Rec. 29.
[51] Saint Bonnet, 2011, 20.

constitutional revision. In the span of less than four years, the Council had become a truly authoritative institution and had moved unmistakably closer to a more traditional constitutional court.

Later, during the 1990s, the Council heard a string of cases related to the Maastricht Treaty, which founded the European Union. The referrals were based on article 54 – and not 61 - of the Constitution, according to which the *Conseil constitutionnel* is entitled to verify whether an international obligation is contrary to the Constitution, in which case the latter must be modified before the treaty can be ratified.[52] The first judgment came in April 1992, two months after the agreement had been signed, and indeed found the Maastricht Treaty to be incompatible with the Constitution as presently written.[53] In June, a constitutional law was subsequently approved, inserting, among other changes, a whole new Title dedicated to "the European Communities and the European Union" and addressing issues such as the economic and monetary union and the right of European citizens to participate in French municipal elections.

A second referral was made in September, arguing that the revision was insufficient and consequently that the agreement still violated the Constitution. In particular, the Treaty was allegedly non-compliant insofar as it clashed with the principle of national sovereignty expressed in article 3 both of the Constitution and of the Declaration of the Rights of Man and of the Citizen, which the Council could by now apply. The main point of contention was whether the extension of the right to vote in municipal elections - exclusively to Union citizens residing in France – was no longer problematic thanks to the new amendment or remained faulty. The Council ultimately concluded in favour of the latter thesis, reasoning that the sovereignty of the constituent authority implies that the latter has the power to "repeal, amend or amplify constitutional provisions in such manner as it sees fit",[54] including if it so desired the possibility to transfer sovereignty itself – whether implicitly or explicitly - to a different entity. It further reminded to the Members of Parliament which had invoked its intervention that the only limitations that constrain the amending authority are the period of vacancy of the Presidency of the Republic (article 7 of the Constitution), whenever the integrity of the nation is in peril (article 16), or when the revision aims to change the republican form of government (article 89). The latter, translated from the original 1884 formulation with just a minor tweak,[55] thus represents the only *substantive* limit on the amendment power, since the other two are clearly of procedural nature.

The *Conseil constitutionnel* had the opportunity to clarify its stance on the scope and (potential) limits on constitutional amendments in the same month, when a final case on the Maastricht Treaty was brought before it. The agreement had just been approved via referendum according to article 11 of the Constitution and the deputies held in their referral that the law had been passed in breach of the text itself. The Council nonetheless clarified that its review is limited by the Constitution to ordinary and

[52] French Constitution of 1958, art. 54.
[53] CC, Decision No. 92-308DC, Apr. 9, 1992 (Maastricht I), Rec. 55.
[54] CC, Decision No. 92-312DC, Sept. 2, 1992 (Maastricht II), Rec. 76.
[55] The current text bans revisions to the republican form of government, whereas their mere *proposal* was forbidden in the 1884 and 1946 configurations, meaning that apparently in the latter case the issue could not even be raised.

organic laws, its jurisdiction not extending to all "legislative enactments". Therefore, it could not simply assume that the expression included laws voted by the people, such possibility not being explicitly covered by the Constitution.[56]

2.1.3 Decision N° 2003-469 DC

In 2003, the *Conseil constitutionnel* faced a challenge to a constitutional amendment, finally having the opportunity to settle the question of whether revisions could ever be unconstitutional. On one hand, the Council had ruled out the possibility of expanding its protection of the Constitution through the inclusion of implicit limitations when, in the "Maastricht II" decision, it had affirmed its intention to abide by the letter of the text and recognize solely the boundaries chosen by the original constituent power. Moreover, it had apparently rejected the distinction between the latter and the amending authority, considering them as equally sovereign. On the other hand, however, it had made clear that article 89 was no mere principled proclamation, but rather a legally binding command that the Council was seemingly eager to enforce.[57]

The constitutional revision under scrutiny concerned the decentralized organization of the Republic, shifting a number of competences to the territorial communities. Accordingly - and following the principle of subsidiarity adopted by the Treaties of the European Union -, the Communes, the Departments, the Regions, the Special-Status and Overseas communities would take on powers "that can be best exercised at their level".[58]

According to the referral by the senators, the transfer of competences away from the central government was vague, excessive and, more importantly, unconstitutional.[59] Firstly, in adding in article 1 that the organisation of the country would henceforth be "on a decentralised basis", the revision was allegedly at odds with the same article's statement that the Republic is "indivisible". Under scrutiny were furthermore the introduction of the principle of subsidiarity as well as article 72, allowing communities to make their own regulations and even to derogate – albeit "for limited purpose and duration" – from statutes or regulations. The vagueness of the phrase could dangerously lend itself to being exploited and could strip the Nation of significant prerogatives, harming the principles of equality, of territorial indivisibility and of national sovereignty. Meanwhile, the new article 72-4 would prohibit the government from enacting certain changes to statutes and regulations of overseas communities "without the prior consent of voters in the relevant community or part of the community",[60] hence shifting sovereignty from the people as a whole to a *section* of the people, and delegitimizing the President of

[56] CC, Decision No. 92-313DC, Sept. 23, 1992 (Maastricht III), Rec. 94.
[57] Cissé, Balla, *Le juge, la doctrine et le contrôle des lois de révision de la constitution*. Éditions L'Harmattan (2020), 90-91.
[58] French Constitution of 1958, art.72 (current and revised).
[59] CC, Decision No. 2003-469DC, Mar. 26, 2003 (Constitutional Law on the Decentralized Organization of the Republic) , Rec. 293 - Referral by sixty senators.
[60] French Constitution of 1958, art.72-4.

the Republic elected by universal suffrage. Local assemblies could also modify laws voted by Parliament if the Constitutional Council, on a referral from the authorities of the territorial communities, found them to unduly intervene in competences that belonged to the territorial communities, while Parliament could be stripped of its legislative power, which would be handed to the executive, with regards to statutory provisions applying to overseas communities.[61]

In advocating the thesis according to which the *Conseil constitutionnel* can review constitutional amendments, the referral cited the organ's own jurisdiction, starting from the "Referendum Act" judgment of 1962. While in that instance the Council had ultimately not intervened, it had recognized to have competence to examine the conformity of "laws voted by the Parliament"; following that terminology, constitutional amendments fit the description since, according to the article 89 procedure, they must always be ratified by Parliament, either convened in Congress or separately by the two Houses. On a different occasion, namely the aforementioned "Maastricht II" decision, the Council had moreover acknowledged that the sovereignty of the amending authority encounters a limit insofar as it cannot modify the republican form of government. The referral was careful to state that the *Conseil constitutionnel'*s review would not have to amount to the recognition of a form of *supra-constitutionality*, but would rather be the means to ensure the enforceability of the only unamendable provision of the Constitution. While imitated by numerous other countries, France had been among the first to safeguard specifically the republican form of government and had reiterated the choice in the Constitutions of 1946 and 1958 alike, in the latter case having soundly refused the proposal to replace the word "republican" with "democratic", which would have been in disregard with constitutional tradition. At the same time, it would be short-sighted to identify the republican form of government solely with its formal characteristics and allow, for example, amendments repressing fundamental liberties or principles, which must instead be considered the Republic's part and parcel. These are indeed found in various articles of the Constitution or texts carrying equal normative status, including those ensuring the principle of equality (article 1 of the Constitution), freedom of religion (same article), the sovereignty of the people (article 3), universal, equal and secret suffrage (same article), the separation of powers (article XVI of the Declaration of 1789), and more. Thus, in light of the broader historical context of the French State and of the unamendable provision, the conception of Republic should be understood and interpreted by the Council in a wider sense, at least embracing other provisions of the text, if not unexpressed principles.

The Council, without entering the merits of the revision at hand, laconically and swiftly rejected the hypothesis. It firstly reiterated that it can only appraise the "conformity with the constitution" of *lois organiques* or *lois ordinaires*, asserting that from no provision of the Constitution does it appear that it also has the power to review constitutional amendments; as a consequence, the *Conseil constitutionnel* had simply

[61] French Constitution of 1958, artt. 74 and 74-1.

"no jurisdiction" in the case at hand, just as it had stated in the 1962 judgment.[62] Expanding on its reasoning in the commentary, and citing that ruling – which had also been mentioned by the referral -, the Council explained that it had already ruled out the possibility of reviewing constitutional revisions back then.[63] It further explicitly mentioned the intention to avoid a "government by judges", which would have been a serious peril if it had obstructed the amending authority. In solving a dispute with Parliament, the Council, as a constituted power itself, would defer to the amending authority, identified instead as the superior constituent power. The distinction between the original constituent and amending power is definitely abandoned, as the two are considered fully equal.

The lingering influence of the theories of the likes of Montesquieu and Lambert has thus not waned in France, despite the presence of an increasingly autonomous institution which can be assimilated to a true constitutional court. While most of those, e.g. in Germany or Italy, had inferred the duty to enforce unamendable provisions, the Council declined assuming a power that it viewed as not expressly assigned to it. Following its logic, not even a straightforward return to monarchy – no matter how far-fetched it may seem in modern-day France – would fail to be considered unconstitutional. Indeed, if any amendment to this end were passed – e.g. modifying article 89 itself, or extending the president's term of office to life -, the Council "would be bound by its own precedents to refuse to review it".[64] Besides rejecting the wider definition of "Republic" as outlined by the referral, the Council thus denies even having to protect it in its most narrow understanding, effectively rendering the clause in question meaningless. With no substantive limitation left, the body's role consists exclusively in overseeing that the amending power follows the right procedure. The only other occasion in which the *Conseil constitutionnel* is involved with amendments is when it imposes that one be made to the Constitution when, as in the "Maastricht I" judgment, it finds the text as presently written to be in contrast with an international treaty that France has signed but not ratified; however, the Council lacks the power to annul or declare void the treaty, nor can it control the contents of the amendment.

Whereas French courts, unlike other jurisdictions, tend not to resort to lengthy, well-specified arguments, their conclusions are nonetheless oftentimes inspired by the doctrine, and in this instance the Council concurred with the formal theory of the constitution espoused most prominently by Georges Vedel. According to this view, the fundamental text is characterized by the procedure through which it is approved rather than by any specific content, and so as long as the former is respected, the amending power is not limited in any way as to the constitutional provisions it can adopt; the author of the constitution matters less than how it is approved and modified. The idea of *supra-constitutionality* is *a fortiori* rejected: firstly, because there would be some vague, unwritten content, perhaps to be found in natural law, that amendments should respect; and secondly because it would imply a hierarchy within the constitution among different norms.[65]

[62] CC, Decision No. 2003-469DC, Mar. 26, 2003 (Constitutional Law on the Decentralized Organization of the Republic), Rec. 293.
[63] CC, Decision No. 2003-469DC, Mar. 26, 2003(Constitutional Law on the Decentralized Organization of the Republic) , Rec. 293 – Commentary of the decision.
[64] Baranger, 2011, 404.
[65] See Baranger, 2011, 399-403.

As a further testament to the commitment to a pure form of democracy and utmost trust in the will of the people, Vedel likened the situation to the ancient practice of the *lit de justice*, whereby the king appeared in person before the courts and could overturn their decisions. Similarly, as the last choice should nowadays be in the hands of the people and not judges, the decisions of the former - in the form of a constitutional amendment – may always overtake a ruling given out by the latter, if it has declared an ordinary law unconstitutional.[66] Accordingly, the difference between the people in 1958, the people through referendum, and Congress is minimized, as all enjoy equal legitimacy and sovereignty; therefore, their power is boundless as well as beyond judicial review. The French Constitution seemingly supports this view when it asserts that the people shall exercise national sovereignty "through their representatives" in Congress "and by means of referendum" (article 3). However, this theory fails to acknowledge that while the amending authority is limited by the constitution – here, both procedurally and (in principle) substantively, by art. 89 -, the original constituent authority is unconstrained by any text or procedure.[67]

Consequently, upholding democracy and the decisions taken by the people to this extent implies doing so even when the latter transform the Republic into a monarchy or a dictatorship, or they approve of alterations that destroy the Constitution as currently known or some of its central principles; the Council has – *de facto* if not openly - conceded this and accepted the associated risk when it proclaimed the amending power to be absolute.

[66] Ibidem, 407.
[67] Beaud, 2017, 109-110.

2.2 Italy

2.2.1 The Constitutional Court

In Italy, a strong Constitutional Court was established in the aftermath of World War II and attributed the task of striking down laws contrary to the newly adopted Constitution. The eager acceptance of the institution of judicial review – in its centralized model propounded by Hans Kelsen, hence with no other body having the same power – as well as of constitutional amendments and a constitutional tribunal, despite all representing novelties for the country at that time, is owed once more chiefly due to historical legal and political considerations.

The Constitution in force since 1848, the Albertine Statute, had been flexible, i.e. it could be modified through ordinary legislation, a characteristic which had allowed the fascist regime to easily exploit it without having to formally change the fundamental text, the main reason why the Constitution which came to replace it a hundred years later was made rigid.[68] The enforced procedure for constitutional amendments currently requires firstly that the two Houses approve the identical text twice after debates "at intervals of not less than three months", and secondly that, unless the law has been adopted by a majority of two-thirds in both the Chamber of Deputies and the Senate, a popular referendum may be submitted.[69] The drafters evidently believed that such notable changes deserved greater deliberation than usual and that the control exerted by citizens would be a sufficient democratic oversight, but at the same time did not arrange an excessively demanding mechanism. Besides this procedural requirement, the Constitution also provides a substantive limitation to amendments, as article 139, emulating the French formula, explicitly protects from revisions the republican form of government. This choice, which was made by the Constituent Assembly that drafted the Constitution, coherently enshrined in the text the will of the people conveyed through their selection in 1946 of the Republic over the monarchy as the preferred form of government. On the same occasion, the people voted, for the first time by universal suffrage, for the members of the Constituent Assembly itself: so, while they participated minimally to the contents of the Constitution – or rather they did so indirectly, through their representatives –, the one, fundamental choice they made, recognized as the expression of the original constituent power, was accorded special status.

Reasoning that in rejecting fascism the Italian people had also pledged their commitment to a series of principles and values, and given moreover that the Constitution referred various times to "inviolable rights" (articles 2, 14, 15, 24), a wider notion of "Republic" soon came to prevail in the scholarly

[68] Faraguna, Pietro, *Unamendability and Constitutional Identity in the Italian Constitutional Experience*. European Journal of Law Reform, Vol. 21, No. 3 (2019), 330.

[69] Italian Constitution, art. 138. The request can be made by one-fifth of the members of a House, five hundred thousand voters or five Regional Councils, within three months of the publication of the law.

doctrine, arguing that the state was prevented from ever withdrawing or suppressing them – not even through constitutional amendments.[70] However, these could at most be considered *implicit* limits, because in the Constituent Assembly an amendment that would have made those principles expressly unamendable was rejected.[71] Some deputies contested the inclusion of article 139 too, maintaining that the formula was profoundly undemocratic in its imposing a determinate institutional structure on future generations, which should instead be left free to decide for themselves the form of government preferred and to re-discuss any choice previously taken.[72]

The Italian Constitutional Court (*Corte costituzionale*) commenced operations only in 1956, eight years after it had been established, declaring unconstitutional legislation of the fascist era, thereby symbolically asserting with its first ruling a significant power, namely to review laws passed prior to the adoption of the Constitution.[73] Its fifteen members are elected for a non-renewable nine-year term for one third by the President of the Republic, for one third by Parliament in joint session, and for one third by the ordinary and administrative supreme Courts.[74] Therefore, differently from the unconventional method utilized in France, the appointment of judges is not left to individual political offices with the exception of the President of the Republic – which, moreover, in Italy is, in comparison, a less partisan and more ceremonial figure. Judges must be magistrates, lawyers or law professors, the requirement of legal expertise – together with the involvement of the highest courts in determining the composition of the body – being viewed as necessary to balance out the unavoidably political nature of constitutional review.[75]

Concerning judicial review, the *Corte costituzionale* can assess the constitutionality of national laws, decree-laws, regional laws and statutes (which regulate the internal organization of regions) but not administrative acts, and is accessible via *principaliter* or *incidenter* proceeding. The former is a case of direct review whereby the national or a regional government can contest a regional or national law within sixty days of its publication. The regions' claim is limited to lament an interference with their competences, whereas the State can denounce any violation of the Constitution. Meanwhile, the latter method is exclusively *a posteriori* and allows ordinary judges to raise, during a case, an issue of constitutionality before the *Corte costituzionale*; the only filter is constituted by the requirement that the question must be relevant to the controversy at hand and that the doubt must not be manifestly unfounded.[76] The proceeding before the judge *a quo* is subsequently suspended until the Constitutional

[70] Faraguna, 2019, 335.
[71] Luciani, Massimo, *Le contrôle de constitutionnalité des lois en Italie*. Cahiers du Conseil constitutionnel, No. 27 (2009), 29.
[72] Marcenò, 2019, 305.
[73] Del Duca, Louis F., and Del Duca, Patrick, *An Italian Federalism - The State, Its Institutions and National Culture as Rule of Law Guarantor*. American Journal of Comparative Law, Vol. 54, No. 4 (2006), 831.
[74] Italian Constitution, art. 135.
[75] Groppi, Tania and Spigno, Irene, 'The Constitutional Court of Italy' in *Comparative Constitutional Reasoning* (edited by András Jakab, Arthur Dyevre and Giulio Itzcovich). Cambridge University Press (2017), 524.
[76] Barsotti Vittoria, Carozza G. Paolo, Cartabia Marta and Simoncini Andrea, *Italian Constitutional Justice in Global Context.* Oxford University Press (2016), 54-58.

Court reaches its decision, so that the latter never participates directly to, nor solves, an actual case.[77] The issue of what actors should have access to the *Corte costituzionale* was so controversial and disputed that it was left out of the original Constitution and settled later.[78] Ultimately, as in France, ordinary citizens were - and remain - excluded, resulting in their impossibility to directly challenge laws that they deem unconstitutional even if their rights may be affected; rather, they can do so only if they are brought to trial on the basis of that norm. Access in Italy is actually more restricted from a strictly political standpoint, considering that the parliamentary minority has no opportunity to question the constitutionality of a law passed by the government.

Nonetheless, and despite being an unprecedented institution in Italy, the Constitutional Court was considered authoritative and independent from the outset, soon obtaining legitimacy even from skeptical groups which had initially opposed its establishment. Unlike the French *Conseil constitutionnel*, which was initially severely limited and had to morph into a more pronounced role over time, the Italian *Corte costituzionale* has not been significantly modified since it heard its first case and could immediately influence constitutional change thanks to its reliance on an unexpectedly wide political and scholarly support.

2.2.2 The case law in the 1970s and early 1980s

While treaties in France prevail over subsequent national laws and, as was seen above, provide the involvement of the Constitutional Council, in Italy the Constitution rejected the idea of according a higher rank to treaties than to domestic legislation: consequently, judicial review would normally ensure also against laws authorizing the ratification of international agreements the prevalence of the Constitution, as the higher legal source.[79] However, the *Corte costituzionale* soon came to confront two treaties upon which the Italian legal order conferred special status: the Concordat and the Treaty of Rome. The former is part of the Lateran Pacts, signed in 1929, which regulate the relations between the Italian State and the Holy See, whereas the latter established in 1957 the European Economic Community (EEC).

The Concordat represents an exception to the principle of equal rank since it is entrenched in article 7 of the Constitution, which proclaims that the State and the Church are "independent and sovereign" and that the treaty may only be modified by mutual agreement or by constitutional amendment. The Italian Constitutional Court subsequently heard a number of cases mainly contesting the legitimacy of

[77] Del Duca and Del Duca, 2006, 832.
[78] Ferejohn, John, and Pasquino, Pasquale, 'Constitutional Adjudication, Italian Style' in *Comparative Constitutional Design* (edited by Tom Ginsburg). Cambridge University Press (2012), 301.
[79] La Pergola, Antonio and Del Duca, Patrick, *Community Law, International Law and the Italian Constitution*. The American Journal of International Law. Vol. 79, No. 3 (1985), 607.

ecclesiastical courts providing the annulment of religious marriages. The referrals pointed in particular to the Constitution's article 102 prohibiting the establishment of "special judges", and variously contested the violation of the sovereignty and exclusive jurisdiction of the state, the principle of equality and the lack of proper guarantees for defendants. Throughout the 1970s, the Constitutional Court nonetheless repeatedly upheld the contested laws, reminding that the Holy See was equally sovereign itself, and as such its jurisdiction over certain matters was legitimate.[80] At the same time, the organ clarified that the laws implementing the Concordat were not *per se* exempted from judicial review and, especially, would be sanctioned if they ever conflicted with fundamental principles of the Constitution. This theoretical claim became practical in 1982, when the *Corte costituzionale* struck down parts of a law providing the automatic civil effect of the annulment of marriages, while reducing the state court (*Corte d'Appello*) to a mere formal control of the proceeding of the ecclesiastical court. The decision held that this contrasted with the constitutional right to defence and to a fair hearing and the prevalence of such principles was in turn justified by article 1 of the Constitution, which proclaims the sovereignty of the State. Consequently, no derogation from the basic principles of the constitutional order can be tolerated, not even for the Vatican State which is itself an autonomous and sovereign entity.[81] With said judgment the Italian Constitutional Court definitively determined that fundamental principles prevailed also on treaties that have higher rank than ordinary legislation and are expressly provided a higher status by the Constitution. In this case, the ruling further caused the Church and the State to include a provision requiring the intervention of an Italian judge that gives civil effect to the annulment of marriage in the renegotiation of the 1929 Concordat, which was concluded in 1984.

With regards to the EEC, the *Corte costituzionale* entered a bitter dispute with the Tribunal of that supranational new entity, the European Court of Justice (ECJ), throughout the 1960s and 1970s. The treaties establishing the EEC seemed to represent an anomaly, occupying a place in between regular agreements and the charter of a federal state; for Italy, the scenario was complicated by the fact that the country had acceded to them via ordinary law, and not through constitutional revision.[82] The Constitutional Court's hostility to the state of affairs meant that, in the beginning, it even refuted the supremacy of supranational law over ordinary legislation, treating European treaties like any other international agreement; hence it insisted that the regular *lex posterior derogat priori* criterion should be applied.[83]

In 1973, the *Corte costituzionale* partially disavowed this approach. The judge *a quo* expressed concerns regarding the aforementioned handing over of national sovereignty which, in light of how vast the Community's legislative competence was becoming, had - in his opinion - escalated into a violation of the Constitution which failed to properly regulate the possibility. The treaties allegedly created an undue

[80] See judgments 30/1971; 12/1972; 1/1977.
[81] Judgment 18/1982.
[82] La Pergola and Del Duca, 1985, 599.
[83] Barsotti, Carozza, Cartabia and Simoncini, 2016, 210.

new primary source of law and hence a modification of the fundamental constitutional structure of the state; moreover, if this source had resulted in the violation of basic constitutional principles, the supremacy of Community law would have made it impossible for the Italian Constitutional Court to safeguard them. The latter instead argued that article 11 of the Constitution, permitting on certain occasions "limitations of sovereignty", was sufficient as an evident and explicit acceptance of forms of collaboration and international organization, potentially including the transfer of legislative competences. The apprehension that Community law could violate fundamental principles was, in all likelihood, to be considered unfounded, given that article 11 is itself part of those and that both the Italian and the European legal order are inspired by similar beliefs and values. Nevertheless, the Constitutional Court confirmed that, were this to happen, it would be impossible for it to abandon its role as ultimate guarantor of fundamental rights and principles and allow their open violation, even if it were perpetrated by a distinct legal order.[84]

Thus, while making an intermediate step toward the position of the ECJ, the body outlined some insurmountable obstacles. Moreover, a critical divide remained between the two tribunals, with the supranational body claiming that the Treaty of Rome had given rise to a single legal order – according to the monist theory -, while the Italian Court maintained that the two were distinct and separate, though coordinated – following the dualist view. As a consequence, the *Corte costituzionale* held, until 1984, that even if it was true that subsequent national law inconsistent with Community law should be declared invalid, this prerogative should not belong to the ECJ: the breach would in fact be of article 11 of the Constitution which the Italian Constitutional Court alone is entitled to defend.[85]

Ultimately, the Italian body deferred to the opinion of the ECJ that the system thereby designed was far too cumbersome. It instead accepted the full supremacy and direct applicability of Community law, considering it compatible with its dualist view in its "Granital" ruling.[86] Still, besides reaffirming its promise to uphold basic principles, the Constitutional Court explained that it should intervene also in the remote case in which the government were to cede full sovereignty to the supranational order, in defiance of the limited transfer prospected by article 11; it nevertheless underlined that the two eventualities appear equally implausible.

In devising this theory of *counter-limits*, the *Corte costituzionale* thus unmistakably took on the role of defending constitutional values vis-à-vis the supranational legal order, despite the Italian system's openness to it and to international law at large. This is marked not solely by the already analyzed article 11, but by the previous article of the Constitution too, which declares that the legal system "conforms to the generally recognized principles of international law",[87] pledging to recognize customary international law as it evolves. The situation is equivalent to that of Community (now European Union)

[84] Judgment 183/1973.
[85] La Pergola and Del Duca, 1985, 611.
[86] Judgment 170/1984.
[87] Italian Constitution, art. 10.

law, in that while by virtue of article 10 customary international law prevails over domestic legislation, this subordination finds a limit in fundamental constitutional values.[88] Hence, in a purely hypothetical scenario, if a principle as repugnant as apartheid became accepted by most countries, Italy would be prevented from doing the same because the *Corte costituzionale* would find it manifestly incompatible with its constitutional principles.[89]

2.2.3 Judgment No. 1146/1988

While the Italian Constitutional Court had, by 1988, repeatedly identified some constitutional principles as unmodifiable - despite the lack of a special protection offered by the text - European Community law, canon law and customary international law were all legal systems *external* to the Italian one.
In that year the *Corte costituzionale* heard, for the first time, a challenge to a constitutional amendment, which would allow it to clarify whether it intended to enforce the previously detected implicit limits, as well as the explicit one provided by article 139, also against a revision by Parliament.
The Constitution refers, somewhat ambiguously, to laws amending the Constitution and other constitutional laws (in article 138) and elsewhere to laws on constitutional matters (in article 72). Despite the confusing language, the Italian Constitutional Court clarified that the latter term refers to either type included in article 138, whereas the difference between those two is that the first indicates laws that directly alter the constitutional text and the other those that integrate or derogate from it.[90]
In the judgment at hand, no. 1146/1988, the provision in question was a constitutional law (no. 1/1971) which modified the special statute for Trentino-Alto Adige, initially regulated by a previous constitutional law (no. 5/1948). In applying articles 49 and 28 of the statute, the judge *a quo,* dealing with a case of a man charged with desecration of the flag, should have recognized that the defendant, being a member of the Provincial Council, was exempted from the responsibility of the votes and opinions expressed under his functions. This immunity had subsequently led the judge to question whether the two provisions complied with the principle of equality guaranteed by article 3 of the Constitution, given the different treatment between the category under consideration and either members of Parliament or ordinary citizens.
The *Corte costituzionale* assumed the power to review constitutional amendments, declaring:

> The Italian Constitution contains some supreme principles that cannot be subverted or modified in their essential content either by laws amending the Constitution or by other

[88] Barsotti, Carozza, Cartabia and Simoncini, 2016, 206.
[89] See La Pergola and Del Duca, 1985, 605-606. However, as the authors point out, the Court should first have to wait that a written national law to this effect was passed and then that someone challenged it, because the Court can declare void a law, not article 10 *per se.*
[90] Marcenò, Valeria, 2019, 279.

> constitutional laws. These include both principles that are expressly considered absolute limits on the power to amend the Constitution, such as the republican form of government (art.139 Const.) as well as principles that, although not expressly mentioned among those not subject to the procedure of constitutional amendment, belong to the essence of the supreme values upon which the Italian Constitution is founded.[91]

Not only did the decision confirm the legal validity of article 139, but by giving a broad reading of the expression "republican form of government", it extended such safeguard to the essential principles of the constitutional order. The Italian Constitutional Court further reasoned that, otherwise, precisely the most fundamental norms of the text would lack protection and would be rendered ineffective, and the body would have failed to fulfil its duty as guardian of the Constitution. While it was not the case here, the body *could* find constitutional revisions to be unconstitutional.

The step taken by the organ was nonetheless an audacious one, because the republican framework which the Constitution had crystallized referred seemingly to no more than two characteristics: the election of the Head of State and the predetermined and limited nature of its mandate. However, the most authoritative doctrine had soon identified a core of unamendable principles and values, drawing from the *material* view of the constitution proposed by Costantino Mortati.[92] According to the influential author, such nucleus is inalterable as it consists in the set of fundamental values shared by society; consequently, if the consensus was found on unexpressed principles, then these would constitute implicit (or implied) limits on the amendment power. The divergence between this approach and George Vedel's *formal* theory of the constitution, each significantly informing the intellectual debate in their respective countries, is telling.

The recognition of limitations and of a hierarchy within the same legal source requires identifying said *supra-constitutional* principles. For its part, the *Corte costituzionale* has clarified that these are to be determined on a case-by-case basis and that the category is open-ended, not wishing to prematurely rule out any principle or possible evolving interpretation thereof. Among those expressly acknowledged thus far the body has included popular sovereignty, the equality of citizens before the law, the secularity of the state, the unity and indivisibility of the Republic, the autonomy and independence of the judiciary, and the aforementioned inviolable rights.[93] The presence of an intra-constitutional hierarchy may admittedly create the difficulty of recognizing one among basic principles too, which the Court has avoided by reminding that no fundamental right prevails over any other; a continuous balancing act must instead be carried out by the legislator - and overseen by the judiciary - among equally integral principles.[94]

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[91] Judgment 1146/1988, translated in Barsotti, Carozza, Cartabia and Simoncelli, 2016, 98.
[92] See Ragone, 2014, 135.
[93] Gallo, 2013, 468-469.
[94] See judgment 85/2013.

Many of the values identified by the Constitutional Court are included in the first twelve articles of the Constitution which are aptly named *fundamental principles*. For instance, regarding inviolable rights (article 2), the defence granted by the body must be understood not as preventing any alteration (or else, paradoxically, even a *stronger* protection would be precluded), but rather as prohibiting the blatant breach of their essential content or their total elimination. Due to the inclusion of article 1 and the principle of popular sovereignty, it could also be argued that tutelage of the Republic extends to the *democratic* character of the nation, the two elements being inextricably linked.[95]

Not coincidentally, the historic ruling of the *Corte costituzionale* came at a time when discussions of comprehensive institutional reforms abounded, with three different (and ultimately unsuccessful) attempts to modify the entire second part of the Constitution between 1984 and 1997.[96] The political scenario, coupled with the conclusion reached by the Constitutional Court, led some authors to suggest a distinction between the first and the second part of the text when it comes to revisions. Supposedly, while there is a more or less shared agreement that the latter, which regulates the organization of public powers, is in need of a complete overhaul, the former must be upheld *a fortiori* as it contains still paramount values which cannot be revised. However, the proposed separation appears unconvincing: firstly, because it would place out of the reach of the amending power too broad a component of the Constitution, and secondly, and in a contradictory way, because some fundamental norms – including articles 138 and 139 themselves - are found in the latter part of the text.[97]

An apparently less strong claim maintains that inhomogeneous modifications of the Constitution would violate the democratic principle as well as the right to a free vote guaranteed by the text. In the (likely) ensuing referendum the people would be bound to express a single vote on an excessively wide variety of issues and would be unfairly prevented from deciding on each change individually. Still, comprehensive reforms cannot be disallowed *a priori*, and if they aim to alter, e.g., the form of government, they will necessarily entail the revision of multiple aspects and articles of the Constitution. The breadth of a revision cannot suffice as a motivation to have it ruled out, unless it transformed the system into an utterly unrecognizable one, which repudiates the beliefs previously held; but this goes for any modification, whereas under normal circumstances the only requirement and expectation should be the presence of a coherent design by the reformer.[98]

Part of the reason why debates and disagreements over constitutional amendments in Italy linger is that the *Corte costituzionale* had few occasions to better define or reiterate its stance. One such instance was in 2004, after constitutional laws no. 1/1999 and 3/2001 had, collectively, completely modified Title V of the Constitution which regulates the relations between the central state and local entities. The

[95] Ragone, 2014, 136.
[96] Carrozza, Paolo, 'Constitutionalism's Post-Modern Opening', in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Martin Loughlin and Neil Walker eds., Oxford University Press (2007), 175.
[97] Ragone, 2014, 137.
[98] Pace, Alessandro, 'I limiti alla revisione costituzionale nell'ordinamento italiano ed europeo' in *Costantino Mortati. Potere costituente e limiti alla revisione costituzionale*. Roma dicembre 2015, 5.

government thereon lamented that the regional statute of Calabria failed to conform with the revised text of the Constitution regarding the appointment of the President of the Executive (or President of the Regional Council). The latter, according to articles 122 and 126, may be elected "by universal and direct suffrage", in which case the office should be tied to the Regional Council via the *simul stabunt simul cadent* principle; alternatively, the regions may choose a different institutional arrangement. The government argued that the regional statute of Calabria had surreptitiously introduced the direct election of the President of the Regional Council but then provided that, in case of its replacement, the office be taken by the Vice-President, in breach of the constitutional requirement. The region countered that, were the allegation to be accepted, the Constitutional Court should review the legitimacy of article 126(3) of the Constitution. The latter, rewritten by constitutional law no. 1/1999, equates voluntary resignation and accidental events – death, removal, or permanent inability of the President of the Executive – to a motion of no confidence, imposing in every case the dissolution of the Regional Council. The region claimed that, in preventing the majority from carrying out the program chosen by the people and precluding any alternative, the article defied the principles of reasonableness and parliamentarism (and precisely articles 3, 92, 94, 97 and 123 of the Constitution).

While the *Corte costituzionale* sided with the government on both issues, it accepted reviewing article 126(3), thus confirming that it could also examine the validity of laws directly amending the Constitution.[99] Simultaneously, in rejecting the thesis of the region, it reminded that its standard of review is constituted by supreme principles only and found the parliamentary form of government not to be an indispensable element of the constitutional order, so much so that the text expressly envisages different configurations at the regional level.

In dealing with the first far-reaching reform of the Italian Republic, the Constitutional Court thus seemed to be generally oriented to allow even significant adjustments to the text, understanding that these can be necessary from time to time. On the other hand, the body is equally determined to enforce boundaries on the amending authority, by concurring with the prevalent scholarly doctrine. This approach, differently from the French, rests on a view of democracy that differs from the will of the political majority at the time, as it includes effective mechanisms meant to protect minorities.[100] This follows from considering the core of constitutional law as, ultimately, setting legal limits to political power, so that no amount or type of popular support can justify blatant violations of the identity of a constitution.[101] It would be misguided and ingenuous to regard these restrictions, whether explicit or implicit, as absolute in all-encompassing fashion; the possibility that they could be dispensed with, for example through a (potentially non-violent) coup d'état or revolution, or via the suppression or circumvention of article 139, would always remain.[102] The rigorous doctrine developed by the Italian Constitutional Court would

[99] Judgment 2/2004.
[100] Gallo, 2013, 465.
[101] Faraguna, 2019, 344.
[102] Luciani, 2009, 31.

clearly not suffice to halt such catastrophic historical events, but rather would serve as a way to recognize the passage to a completely new system and constitutional order, in disregard with the pillars of the previous one.[103]

[103] Marcenò, 2019, 308.

Chapter 3: Unamendability and limited amendment power

3.1 The distinction between constituent, constituted, and amendment power

The stance toward unamendability ultimately depends on assessing what part the amending power plays amidst the relation between constituent and constituted power, which was briefly presented above.[104]
The distinction was initially introduced by Sieyès to separate sharply the unfettered will of the nation – identified as "the law itself" - from the legal and political institutions created and limited by the former.[105] The original constituent power, one of the most discussed and redefined concepts in modern constitutionalism, must be understood not as the power to command, but rather to found, to construct, to create – a *constituting* power.[106] While individual monarchs or authoritarian leaders may conceivably seek to attain such legitimacy, true constituent power "originates from a collective" and belongs exclusively to the people, which are the only actor entitled to establish a new political and legal order.[107]
While being exercised in an extra-legal manner, acting outside of a constitution or of any other norm, the constituent power has an eminently legal aim and regulates the forms and functions of the constituted powers, such as the judiciary or the legislature.
However, this strict dichotomy neglects the extraordinary authority enjoyed by the amending power, which fails to conform clearly in either category. On the one hand, it resembles the constituent power insofar as it gives people – either directly or through their representatives – control over the constitution, allowing them to reconsider even integral elements; moreover, revisions have the exceptional power to significantly alter and affect other constituted powers. On the other hand, the amending power is bound by the constitution, constrained by the given procedure and does not operate, unlike the constituent power, in a legal vacuum.[108] Acknowledging this special, circumscribed sovereignty leads to the solution of considering the amending power as unique, in between the constituent and the constituted power – a secondary (or derived) constituent power, as opposed to the primary (or original).[109] The latter is extra-

[104] See Section 1.2.
[105] Sieyès, Emmanuel-Joseph, *What is the Third Estate?* (1789), 12 (Chapter 5).
[106] Kalyvas, Andreas, *Popular Sovereignty, Democracy, and the Constituent Power*. Constellations – An International Journal of Critical and Democratic Theory, Vol. 12, No. 2 (2005), 225.
[107] Somek, Alexander, *Constituent Power in National and Transnational Contexts*. Transnational Legal Theory, Vol. 3, No. 1 (2012), 34.
[108] Roznai, 2014, 91-94.
[109] Ibidem, 96-97.

and pre-constitutional, while the former presupposes the existence of a fundamental text, which at the same time is authorized to alter.

Still, accepting this division and that the amending power needs to follow the required formal procedures does not automatically imply that it should also be subject to *substantive* limitations. The derived constituent power could legitimately take over from the primary one, which has extinguished its role, and equivalently change essential political decisions, the constitution being a contingent social fact.[110] Limits are deduced, however, inferring that the amendment power is *delegated* on the basis of the trust conferred upon it by the people exercising their original constituent power. As an authority subordinated to the one to which it owes its legal competency, the amendment power must comply with the terms – procedural or substantive, implicit or explicit – imposed on it.[111]

If the power is assigned for certain ends only, then using an amendment to destroy the constitution is surely the most blatant breach of said trust and of the conditions which the delegated authority must comply with.[112] However, it would not be the only one, because if the hierarchy between the two different constituent powers is valid, then the same relation exists between the constitutional norms emanated by them. Those produced by the secondary constituent power would not prevail over the provisions written by the primary constituent power because their source, and not chronology, would matter in case of conflict. Indeed, constitutional courts typically refuse to review the original text and differentiate it from amendments, recognizing the latter as the outcome of a derived and inferior source.[113]

This theory is, however, incomplete without a proper account of the primary constituent power. The concept, too often described mystically and with indeterminacy, may be dismissed simply as a legal fiction and portrayed as a transcendent, imaginary collective body, whereas in reality people must act in a previously institutionalized framework – generally a constituent assembly – in order to convey their will. Moreover, no provision is ever truly carved in stone and the people, as ever-present holders of the constituent power, may always re-emerge to take their role and establish an entirely new constitutional and legal order.[114]

The near-consensus on the centrality of the *people* as the chief source of legitimacy has led to their increasing inclusion in constitutional matters. In particular, the institution of the referendum, typically used to ratify amendments, has become almost ubiquitous (including, at times, even when not expressly required by the constitution); France and Italy have both illustrated this. It could be argued that the

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[110] Bernal, Carlos, *Unconstitutional Constitutional Amendments in the Case Study of Columbia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine.* International Journal of Constitutional Law, Vol. 11, No. 2 (2013), 343-344, 349.

[111] Roznai, 2014, 102.

[112] Marbury, William L., *Limitations upon the Amending Power*. Harvard Law Review, Vol. 33, No. 2 (1919-1920), 225.

[113] Ragone, 2019, 329.

[114] This is Schmitt's conviction. See Arato, Andrew, *Carl Schmitt and the Revival of the Doctrine of the Constituent Power in the United States*. Cardozo Law Review, Vol. 21, No. 5-6 (2000), 1740-1741.

greater the involvement of the people is, the closer the amendment power is to the primary constituent power; similarly, the more inclusive and democratic the mechanism is – and, in general, the more demanding the procedure -, the wider scope the secondary constituent power should be granted. Popular involvement typically signifies greater social and political - besides legal - legitimacy, and should be negatively correlated with the risk of abuse of amendment power. Indeed, judicial review against unconstitutional amendments is intended as a control against a possible encroachment by government, which could attempt to erode fundamental rights and freedoms, and not by the people – the subject that, on the contrary, the mechanism aims to safeguard.

However, as several authors have pointed out – and as was previously hinted for the Italian case -, referendums are an insufficient proxy for full popular participation. While paying lip service to the will of the people, referendums remain a constituted power, their content being entirely pre-determined by representatives and the risk of their turning into a mere plebiscitary exercise quite high.[115] Intervening elections or other forms of popular involvement would likewise remain instituted avenues, confirming in their limitedness the difference between the amending and the primary constituent power, the ultimate sovereignty of the people residing solely in the latter.[116]

The boundlessness of the original constituent power is demonstrated by the fact that, with few exceptions, most constitutions prescribe the rules for their amendment but do not contemplate their replacement. Those that do may be criticized for attempting to regulate an inherently unlimited power and, in subduing it to another volition, perhaps even render it a constituted power. The reappearance of the constituent power should occur spontaneously and from below, as an expression of the people as a source of absolute power, and not the people as a legal and preordained organ of the state. Still, the constitution could, more mildly, be indicating a vehicle for the future constituent power, which may or may not decide to follow it; such mechanism would not – and could not have the pretense to – be an imperative command.

Regardless of whether its arising is explicitly anticipated in the text or (more frequently) not, full constitutional revision or recreation will probably manifest itself through the activation of the aforementioned elected constituent assembly. This institution is by now, in Western constitutional law, uniquely and fully legitimized as "capable of performing its constitutive function only one time for a single constitution".[117] Especially if convened from below, by the people themselves, triggering the constituent assembly thus denotes the intention to lawfully reconstitute a system, while guaranteeing the proper requirements for popular participation and democratic openness.[118]

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[115] Colón-Riós, Joel, *The legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform*. Osgoode Hall Law Journal, Vol. 48, No. 2 (2010), 236. See Section 2.2.3 for the discussion in Italy.
[116] Harris, William F. II, *The Interpretable Constitution*. John Hopkins University Press (1993), 167.
[117] Carrozza, 2007, 174.
[118] Colón-Riós, 2010, 240.

3.2 Objections: dangers and unintended consequences of the theory

This revised notion of primary and secondary constituent power is not without criticism.

The main objection remains that unamendability is profoundly undemocratic, guilty of constituting "the worst tyranny of time, or rather the very tyranny of time" as it "places the sceptre over a free people in the hands of dead men".[119] The generation of the authors is, arbitrarily and unfairly, selected as authoritative above all others and legitimized to decree as final and not subject to change what it has chosen. To this end, Jeremy Bentham criticized the drafters of the near-unamendable 1791 French Constitution for considering themselves infallible and simultaneously preventing future legislators from being truly sovereign.[120] A choice to this effect seems all the more audacious in light of the various debates, disagreements and compromises that usually characterize constituent assemblies, and which should eliminate the idea that there is a unanimous and unmodifiable consensus. However, the thesis presented above clarifies that limits are placed on the derived power, not the primary; accordingly, one specific path – the amendment track – is precluded to the polity to fundamentally alter the constitution, not every possible route.[121]

A second concern expressly regarding unamendable provisions is that they may have the unintended consequence of leading to revolutionary changes since legal means are not viable to modify them. The legislature, with no alternative at disposal, would be, in a way, involuntarily encouraged and induced to adopt extra-constitutional methods. If not counterproductive and dangerous, such eternity clauses would at best be pointless: in a first scenario, because it would be superfluous to include them if no one would ever think of revising the basic principles being safeguarded; in a second, because a legal protection would certainly not suffice if a given amendment enjoyed overwhelming societal and political support.[122] Indeed, unamendable provisions are best understood as a safety valve, a useful measure of caution prevalently during ordinary and peaceful times, acting as a deterrent to the temptation of change. Meanwhile, in unstable periods every constitutional scheme is arguably inadequate to halt abrupt transformations; nonetheless, unamendability at least retains the merit of signaling whether a given reform amounts to a subversion that clashes with the fundamental values of society.

A criticism of implicit limitations in particular is centered around the *expressio unius est exclusio alterius* argument: the framers would have expressly prohibited certain amendments if they had intended to, as the presence of explicit limits demonstrates; the omission of other restraints was intentional, and cannot

[119] Mulford, Elisha, *The Nation: The Foundations of Civil Order and Political Life in the United States*. Hurd and Houghton (1870), 155.
[120] Schwartzberg, Melissa, *Jeremy Bentham on Fallibility and Infallibility*, Journal of the History of Ideas, Vol. 68, No. 4 (2007), 576.
[121] Roznai, Yaniv, *Unconstitutional Constitutional Change by Courts*. New England Law Review, Vol. 51, No. 3 (2017), 561.
[122] Akzin, Benjamin, *The place of the Constitution in the Modern State*. Israel law Review, Vol. 2, No. 1 (1967), 13. See also the end of Section 2.2.3.

be deduced retrospectively.[123] However, from another perspective, explicit and implicit limits are not mutually exclusive, but rather mutually reinforcing, as the inclusion of the former indicates that the amending power is not absolute. Moreover, eternity clauses typically shield comprehensive, general principles which can only be construed and interpreted in extensive fashion. It would be absurd to allow the delegated amendment authority to utilize the procedure provided by the constitution to destroy that same text on which its legitimacy is based and which is its own *raison d'être* - as this would amount to punish the constitution for not clarifying that a revision cannot be used to repeal it.[124]

It is unsurprising that judicial review of constitutional amendments draws considerable disapproval, since its legitimacy is, to some extent, questioned even when exercised over ordinary legislation. The mechanism would supposedly be replacing the risk of political wrongdoing with one of constitutional dictatorship or "legal authoritarianism".[125] The latter scenario actually appears even less desirable and justifiable, because while amendments can rely on the endorsement of a significant part of the electorate, the constitutional court consists in an unelected and unaccountable body. If the people – most likely through their representatives - have chosen to approve a constitutional revision, it means that they consider it an essential element of the order; yet invalidating it would deny the will even of *super*majorities.[126] In the dispute between legislature and judiciary, the former should allegedly prevail due to the latter's lack of democratic legitimacy. Finally, precisely the relative vagueness of the unamendable provisions and principles seems to recommend against leaving to the judiciary too much leeway in arbitrarily determining what the essence or the core of the constitution is.

Concerning the last point, it may be contended that, if there are disagreements over fundamental features of the constitutional system, surely the most appropriate candidate to settle them is the supreme interpreter of the constitution. In light of the distinction previously given, constitutional courts disavow acts of the secondary constituent power as *ultra vires* due to their contrast with the original constitutional text; in so doing, they preserve the will of the people in their primary constituent power. The latter, having fixated and stabilized over time, should be preferred and upheld against the temporary, more fleeting, potentially dangerous will of the momentary majority. More than the adoption of the correct procedure, true democracy entails the protection of substantive values and principles, and entrusting this task to the constitutional court – while not eliminating every risk, or being a flawless solution - represents the fairest and most sensible accommodation; the body is arguably the one best equipped to strike a balance between stability and change.

[123] Roznai, 2014, 219.
[124] Murphy, Walter F., *An Ordering of Constitutional Values*. Southern California Law Review, Vol. 53, No. 2 (1980), 756-757.
[125] Da Cunha, Paulo Ferreira, '*Les limites du pouvoir de révision constitutionnelle entre le pouvoir constituant et la constitution matérielle. Une illustration dans le contexte lusophone'*. VIIth Constitutional Law Congress – Athens (2007), 3.
[126] Bernal, 2013, 347. It would also evidently run counter to Vedel's *lit de justice* argument (presented in Section 2.1.3).

3.3 The 'Basic Structure' Doctrine

In 1967, the Indian Supreme Court, reversing its earlier jurisprudence, declared in a prospective judgment that Parliament could not use its amendment power to abridge fundamental rights. The latter could not be infringed by "any law" according to article 13 of the Indian Constitution, and since amendments are laws, the prohibition extended to them as well.[127]

After a resounding electoral victory, Prime Minister Indira Gandhi, seeking to reaffirm parliamentary sovereignty, managed to have the 24th and 25th Amendments approved: the former expressly overruled the previous ruling, while the latter proclaimed, more broadly, that the legislature - in exercising its constituent power - could modify *any* provision of the Constitution. Two years later, in 1973, a divided Supreme Court held that, even if the text did not expressly provide explicit limitations, the amendment power could not modify the *basic structure* or framework of the Constitution so as to change its identity. A finite list was not given, but essential features include the supremacy of the constitution, the separation of powers, the republican form of government and the secular and federal character of the state.[128]

In retaliation, Gandhi at first passed in rapid succession two more amendments, the 38th and 39th: the former stated that acts adopted during the state of emergency – which had been declared by the Prime Minister herself - were immune from judicial review; the latter, *inter alia*, modified retroactively the laws under which she had been convicted. A year later, the 42nd Amendment, a mega-revision comprised of 59 sections, was enacted, curtailing various democratic rights, extending the powers of the Prime Minister and of Parliament at the expense of the Supreme Court and including the express declaration that amendments to the Constitution could not "be called in question in any court on any ground".[129]

In 1975, the Supreme Court struck down the 39th Amendment as it violated three basic aspects of the constitutional system: fair democratic elections, equality, and separation of powers. Five years later, the Court invalidated two sections of the 42nd Amendment, while confirming the basic structure doctrine:

> Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge [it] into an absolute power. […] If by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have the power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity.[130]

[127] Murphy, 1980, 757.
[128] Roznai, 2014, 56.
[129] Albert, 2019, 152.
[130] Cited in Roznai, 2014, 57-58.

The doctrine, which soon became enormously influential and was embraced by various jurisdictions around the world, encapsulates well the main components of the theory hitherto expounded. To begin with, the bitter and intricate dispute validated the idea that judiciary intervention may represent the only effective bulwark against usurpation of power from governments – in this case ultimately saving democracy and basic rights.

In addition, the decisions drew a clear line between the original constituent power and the delegated amending authority. The latter should be especially limited when, as in India, a simple majority is sufficient – with few exceptions, and provided that two-thirds of members are present – to amend the constitution, as it increases the risk that the latter is treated and regarded as ordinary legislation;[131] if, as in Italy and France, the text provides for direct consultation of the people, restrictions on revisions could presumably be less stringent.

While the consequent idea of a hierarchy within the same legal source may seem puzzling or perilous, it is based on the intuition that any constitution has some basic elements without which it loses its integrity; it follows that a complete rewriting and overhaul of the text cannot be approved under the disguise of a mere reform. Carl Schmitt maintained the existence of a firm distinction between the sovereign authors of the constitution - i.e. the holders of the constituent power -, entitled alone to engage in constitution-making, and the actors entrusted with changing it: the latter must always preserve "the identity and continuity of the constitution as an entirety".[132] Denying this would mean transforming the fundamental text into an incoherent, disorderly collection of constitutional laws, which would inevitably contradict each other.

Nonetheless, the identification, interpretation and application of supreme principles is indubitably more arduous than that of clear rules. While the evidence seems to point toward almost universally recognized concepts – such as democracy, rule of law, republicanism, human dignity, independence of the judiciary, the secularity of the state -, they can only be drawn and properly understood in the arrangement and jurisdiction in question. Said provisions, in fact, should not be insulated from the rest of the text and be placed on an ideal pedestal; on the contrary, principles should be inferred holistically from a reading of the constitution as a whole, as well as the historical background, the preamble (if present), surrounding values and, obviously, the explicit limitation (again if granted).[133] Either way, *supra-constitutional* principles would derive from within the constitutional order, and never from outside it.

The power of invalidating constitutional amendments is exceptional, and should be employed accordingly. This awareness should lead to judiciary restraint: an intervention in cases of blatant breach is not only desirable but necessary, while the application of an excessively strict standard would be questionable and impractical both politically and legally. Annulment of revisions should be reserved for

[131] Albert, 2019, 151. As a result, the Constitution of India is one of the most frequently amended in the world.
[132] Schmitt, Carl, *Constitutional Theory.* Duke University Press (2008), 150.
[133] Roznai, 2014, 196-197. Not coincidentally, this was the approach adopted by the Indian Supreme Court in the aforementioned 1973 case.

amendments that depart unequivocally from the values of the constitutional order, resulting in the latter's replacement. In making this complicated assessment, the judiciary may be aided by other elements mentioned above, such as the amendment process, the democratic participation and the risk of abuse of power; nonetheless, it should surely act in the most glaring instances of transgression.

Correspondingly, unamendability constitutes an *extrema ratio*:[134] under normal circumstances, the acceptance of shared beliefs and values should be widely shared in society, hence they should theoretically not be menaced by the majority in government; however, if the latter failed to comply with its inherent limits and conform with its basic duty, the constitutional court would represent the ultimate, eventual guarantee of safety.

[134] Ragone, 2014, 161, 164.

Conclusions

The thesis presented responds affirmatively to the question of whether constitutional amendments can ever be unconstitutional. The overcoming of the apparent paradox and the identification of both explicit and implicit limits is enabled especially by the recognition that the amending authority constitutes a *sui generis* power: it is more than an ordinary law-making faculty, as proven also by the frequent participation in it of other constituted powers besides the legislature, and yet it is delegated and not unlimited like the primary constituent power.[135]

The latter in particular continues to be a fiercely debated concept. Some of the criticism levied against it – e.g. denouncing it as "an essentially rhetoric formulation", an abstraction - is, to an extent, warranted, most notably when a purely transcendent understanding of it is propounded. The notion that constitutions are not metaphysical, but political human constructions, and accordingly that the citizenry may always reassume a responsibility intrinsically and exclusively belonging to them, seems more sensible.[136] That said authority rests with the people is one of the few claims on the subject that is almost unanimously endorsed, and is not irreconcilable with its resurfacing occurring historically mostly during revolutions, declarations of independence or other extraordinary changes. Relatedly, a document produced by a person or group only should be considered an invalid and unauthorized act of appropriation, in violation of the normative prescriptions of the constituent power.[137]

Still, in practice, just as the distinction between primary and secondary constituent power is not always neat, so it is conceivable to imagine that a section or majority of the population may be subjugated and succeed in imposing its will on the rest, such usurpation being justified as an act in the name of "the people". To avert this, it could be argued that the constituent power should itself respect at least some basic limits, e.g. to be found in natural law. Accepting the content arising from undemocratic proceedings, possibly with the additional, aggravating requirement of granting special protection to part of it, would not differ from acquiescing to a text decreed by a dictator or a tyrant. The primary constituent power should entail some procedural or substantial rights or preconditions, such as free speech; otherwise, either the undemocratic text would be legitimate, or the constitution would be someway unconstitutional.[138] Furthermore, the original constituent power should be exercised in a way that, as was remarked above - and consistently with an *immanent* conception of it -, does not preclude its preservation and reappearance in the future, better yet through equally inclusive and democratic mechanisms.

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[135] Schmitt, 2008, 150.
[136] Kalyvas, 2005, 233.
[137] Ibidem, 239.
[138] Acar Ali, *On Yaniv Roznai's Theory of* Substantive Unamendability. European Constitutional Law Review, Vol. 13, No. 4 (2017), 843.

The crucial role assigned by this theory to the judiciary represents a distinct concern, which was widely addressed throughout the text; in particular, France exemplified the most rooted and resolute opposition to the institution of judicial review of constitutional amendments.

First of all, it may be premised that the solution suggested is merely an "imperfect response to imperfections".[139] To mitigate the unavoidable, connected risks, alongside accusations of judicial activism, a rather restrained form of review is advised. To a degree, societies ordinarily tolerate this prospect, as constitutional interpretations can bring about critical variations. Trivially, the yardstick used here by constitutional courts will always be narrower than that employed against ordinary legislation, since every amendment deviates from the original source and would otherwise be unconstitutional.[140]

The reforms in 2001 in Italy and in 2003 in France - referred to above - constitute examples of far-reaching changes which nevertheless fell within the prerogatives of the amending authority, as the respective judiciaries recognized. However, while the Italian *Corte costituzionale* had left open the possibility to annul amendments in the future, the French *Conseil constitutionnel* refused to do so, placing full trust and responsibility in the hands of electors. The latter choice may perilously neglect the constitutional, legal and political history – and, in many cases, reality - of countless countries, including France and Italy themselves.

A pivotal element of the theory of unamendability depends on the conviction that there are principles that "make up the spirit of [every] constitution"[141] and whose contravention means the collapse and disintegration of the order: without certain pillars, or axes, which underpin the entire order, the latter would be rendered unrecognizable and irremediably altered. That this may be true for all texts at all times seems supported by Aristotle, who held that a *polis* loses its identity whenever "its constitution is altered as a result of an interruption of its essential commitments", which amounts to the birth of a new regime.[142]

Said identity, along with the principles protected and the constitution as a whole, which is a living instrument, is nevertheless likely to evolve over time rather than be static, and constitutional courts are properly empowered to reconstruct and reinterpret it in a modern way if needed. Fears of constitutional immobility and stagnation in a society are therefore overstated, provided that the appropriate cautions are taken and that the judiciary, in line with its regular demeanor, correctly performs and understands its delicate function.

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[139] Garlicki, Lech and Garlicka, Zofia A., *Review of Constitutionality of Unconstitutional Amendments (An Imperfect Response to Imperfections?).* Anayasa Hukuku Dergisi – Journal of Constitutional Law, Vol. 1 (2012), 186.
[140] Ragone, 2019, 331.
[141] Huber, Ernst Rudolf, 'Constitution', in *Weimar – A Jurisprudence of Crisis*. Arthur J. Jacobson and Bernhard Schlink eds. (2002), 328.
[142] Cited in Colón-Riós, 2010, 220.

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The English translation of the 1958 French Constitution and of the decisions of the Constitutional Council quoted throughout this thesis is taken from the website of the French Constitutional Council, https://www.conseil-constitutionnel.fr/en.

The English translation of the 1948 Italian Constitution quoted throughout this thesis is taken from Appendix 1 of *Italian Constitutional Justice in Global Context* (cited above), 244-275.

Riassunto

La maggior parte delle costituzioni moderne impone dei limiti di tipo *procedurale* al potere di revisione costituzionale, prevedendo un *iter* più oneroso di quello applicato all'approvazione della legislazione ordinaria e aventi l'effetto di caratterizzare il testo costituzionale come "rigido". Più controverso, tuttavia, è il riconoscimento di limitazioni *sostanziali* (o *materiali*), che può avvenire a seguito o meno di esplicite disposizioni nel testo in tal senso. Ambedue le tipologie sono state immesse inizialmente negli Stati Uniti, prima a livello statale e successivamente federale; in Europa, uno dei primi Paesi a ricorrere ad un limite materiale fu la Francia, che nel 1884 consacrò la propria forma di governo – repubblicana – a rimarcare come immodificabile e definitiva l'affermazione della stessa sulla monarchia. In ambito dottrinale, diversi autori, francesi e non, si spinsero a sostenere che, anche in assenza di limiti espliciti, la costituzione non potesse essere modificata nel suo nucleo essenziale, propugnando l'idea che ogni ordinamento constasse di alcuni principi supremi immutabili; conseguentemente, riforme totali del testo sarebbero parimenti da considerarsi illegittime, per lo meno nella misura in cui ledessero il suddetto nucleo fondamentale. Tale ragionamento deriva dalla nota distinzione tra potere costituente e potere costituito, il primo scevro di alcun limite e preposto all'instaurazione dell'assetto costituzionale, il secondo legalmente stabilito e delimitato e quindi subordinato ad esso.

Generalmente, sono le corti costituzionali ad applicare i limiti espliciti, ed eventualmente ad identificarne di impliciti. Una prima obiezione, nondimeno, eccepisce che le corti costituzionali si arrogherebbero così facendo di una funzione non espressamente conferita loro, dato che la *judicial review* solitamente non è estesa alle riforme costituzionali. Queste ultime, infatti, godrebbero da un punto di vista giuridico di una posizione paritetica al resto della costituzione, e da un punto di vista politico di una legittimità comprovata proprio dalla impegnativa procedura superata. D'altro canto, l'intervento delle corte costituzionali viene visto non come l'imposizione di un potere costituito sui suoi equivalenti, ma piuttosto come unico meccanismo per garantire la supremazia della costituzione, e avvalorato dal loro ruolo di supremi interpreti e guardiani del testo. Ciò si rivelerebbe vieppiù necessario onde evitare il rischio di una "dittatura della maggioranza", in quanto nemmeno un vasto consenso parlamentare o popolare potrebbe logicamente giustificare l'entrata in vigore di una norma che prevaricasse i diritti della minoranza e al contempo fosse palesemente in contrasto con l'ordinamento costituzionale.

All'interno di questo dibattito, Francia e Italia costituiscono due esempi idonei, anche in virtù delle innegabili somiglianze tra i due sistemi, a partire dalla clausola a salvaguardia della forma di governo.

Nell'esperienza francese, l'accettazione dell'istituzione della *judicial review* e di un organo assimilabile a una moderna corte costituzionale è stata graduale e travagliata. La prima Costituzione post-bellica, del 1946, stabiliva un *Comité constitutionnel* di carattere decisamente più politico che giuridico e dotato di poteri estremamente limitati. La sua inevitabile inefficacia portò gli autori della Costituzione del 1958, che diede

vita alla Quinta Repubblica francese, a sostituirlo con un organo più efficace, il *Conseil constitutionnel* (Consiglio costituzionale). Quest'ultimo è espressamente incaricato di esaminare la validità delle *lois organiques* (leggi organiche) e delle *lois ordinaires* (leggi ordinarie); le prime regolano il funzionamento e l'organizzazione dei poteri pubblici, ragion per cui vengono sottoposte al controllo automatico del Consiglio, mentre le seconde potevano essere contestate inizialmente solo dal Primo Ministro, dal Presidente della Repubblica e dai Presidenti delle due Camere. La verifica, inoltre, era esclusivamente *ex ante* – fino al 2008 - e completamente distaccata da qualsivoglia procedimento giudiziario; ciò si univa ad altre peculiarità – come la composizione dell'organo, affidata a quelle stesse istituzioni che potevano invocarlo, o l'assenza di espressi requisiti di una formazione legale per i suoi nove membri – che contribuivano a far dubitare della presunta natura giuridica e imparziale del Consiglio.

Da un punto di vista dottrinale, numerosi autori francesi avevano contribuito a creare un clima di scetticismo, se non di aperta ostilità, intorno al potere giudiziario, che Montesquieu aveva relegato a "bocca della legge". Al contrario, un intervento volto a invalidare una norma approvata dal Parlamento avrebbe significato contrastare la volontà popolare, nonché la sua incontrovertibile sovranità. Contestualmente, il Consiglio costituzionale aveva il compito principale di coadiuvare l'esecutivo e disinnescare lo strapotere esercitato dalla legislatura durante la Quarta Repubblica, assicurandosi che non assumesse competenze indebite.

Tale subalternità fu confermata quando, nel 1962, il *Conseil* determinò di non potersi esprimere sulla riforma costituzionale desiderata dal Presidente della Repubblica Charles de Gaulle, nonostante questi avesse mancato di adottare la procedura richiesta dal testo; al contempo, la decisione – successiva a un referendum favorevole alla revisione - confermava la tesi secondo cui le scelte effettuate dal popolo non potessero essere sottoposte al vaglio di alcun giudice.

Ciononostante, a partire dal decennio successivo, il Consiglio iniziò a guadagnare autorevolezza e autonomia. Nel 1971, nonostante varie indicazioni e argomentazioni in senso opposto, l'organo proclamò di avere il potere di valutare la conformità delle leggi anche nei confronti del Preambolo della Costituzione del 1946 e della Dichiarazione dei Diritti dell'Uomo e del Cittadino del 1789, i quali, a differenza del testo costituzionale, tutelano estensivamente diritti e libertà fondamentali. A testimonianza del rinnovato ruolo ricoperto, nel 1974 un emendamento costituzionale permise a sessanta membri dell'Assemblea Nazionale o del Senato – ossia esponenti della minoranza parlamentare – di rinviare leggi al Consiglio, determinando immediatamente un aumento di casi ad esso sottoposti. Nel 1992, il *Conseil* emise tre sentenze relative al Trattato di Maastricht, fondante l'Unione Europea, occasioni nelle quali sottolineò che l'unico limite sostanziale a cui è assoggettato il potere di revisione costituzionale è dettato dall'impossibilità di modificare la forma di governo.

Nel 2003, sessanta parlamentari sottoposero al Consiglio una questione di legittimità di un emendamento costituzionale che prospettava l'organizzazione decentralizzata della Repubblica. Il rinvio opinava che il *Conseil in primis* avesse giurisdizione in merito in quanto si trattava di una legge approvata dal Parlamento e in secondo luogo che dovesse necessariamente adottare un'interpretazione estensiva dell'espressione "forma repubblicana", la quale presuppone intrinsecamente il rispetto di libertà e principi basilari su cui si fonda

l'intero ordinamento. Il Consiglio rifiutò laconicamente entrambe le ipotesi, constatando di non poter desumere da alcuna disposizione del testo che la sua funzione di scrutinio si estendesse alle riforme costituzionali e asserendo di non potersi opporre al potere di revisione costituzionale, costituente e sovrano. La sentenza si basava, *inter alia*, sulle teorie esposte da Georges Vedel, secondo le quali l'emendamento costituzionale è il modo in cui i cittadini possono oltrepassare un'eventuale ostruzione giudiziaria: nel caso in cui una legge ordinaria fosse dichiarata incostituzionale, una super-maggioranza può assicurarsene il passaggio tramite adozione di emendamento costituzionale, inoppugnabile strumento democratico per eccellenza. Allo stesso tempo, la deresponsabilizzazione del Consiglio implica inevitabilmente che, nel caso dell'approvazione di una revisione in contrasto con i principi fondamentali dello Stato, o finanche con la forma repubblicana, nessun organo potrebbe impedirla.

In Italia, la Costituzione del 1948 sostituì lo Statuto Albertino, entrato in vigore un secolo prima e incapace, principalmente a causa della propria flessibilità, di arginare la deriva fascista; il testo fu composto dalla Assemblea Costituente, la quale sancì come immodificabile esclusivamente la forma repubblicana di governo (articolo 139), come riconoscimento del voto popolare espresso in tal senso nella medesima occasione in cui erano stati nominati a suffragio universale i costituenti. Questi ultimi raggiunsero un accordo per stabilire una forma centralizzata di *judicial review* affidata a un organo inedito, la Corte costituzionale, accessibile in via diretta tramite reclamo da parte dello Stato o delle Regioni o in via incidentale tramite rinvio del giudice *a quo* durante un processo. Sebbene due terzi dei componenti siano nominati dal Parlamento e dal Presidente della Repubblica, per fugare i dubbi che si trattasse di un organo prevalentemente politico un terzo è designato dalle magistrature supreme ordinaria e amministrativa, e ai quindici membri sono richieste determinate qualificazioni professionali. Nonostante, analogamente alla Francia, l'organo e le sue funzioni – così come la stessa Costituzione *rigida* – non avessero precedenti nel panorama giuridico del Paese, la Corte costituzionale poté godere fin da subito di un vasto consenso e di un'insperata legittimità, persino da parte di quelle forze politiche inizialmente più critiche e diffidenti.

La Corte costituzionale dovette affrontare due eccezioni alla regola generale secondo cui i trattati internazionali non usufruiscono di posizione privilegiata all'interno della gerarchia delle fonti, anche in virtù della loro adozione abitualmente compiuta tramite legge ordinaria. Innanzitutto, il Concordato, parte dei Patti Lateranensi conclusi nel 1929 tra Stato e Chiesa, è racchiuso nell'articolo 7, il quale stabilisce la reciproca indipendenza e sovranità delle due entità e che l'accordo non può essere modificato *sua sponte* dal governo italiano. La Corte costituzionale, pertanto, giudicò ripetutamente lecita la giurisdizione dei tribunali ecclesiastici in materia di annullamento di matrimoni canonici trascritti agli effetti civili; tuttavia, nel 1982, conformemente a quanto dichiarato in ipotesi nella giurisprudenza precedente, confermò che anche i suddetti tribunali, pur rispondendo a uno Stato a sua volta autonomo e sovrano, devono sottostare a e garantire i principi supremi dell'ordinamento costituzionale italiano, ivi compresi il diritto alla tutela giurisdizionale e l'effettivo rispetto del contradditorio.

In secondo luogo, in assenza di disposizioni costituzionali in tale direzione, la Corte costituzionale si era inizialmente rifiutata di conferire ai trattati costitutivi della Comunità Europea uno status diverso da qualsiasi altro accordo internazionale; viceversa, la Corte di Giustizia dell'Unione Europea aveva dichiarato, nel 1964, la supremazia del diritto comunitario su quello nazionale. Inoltre, i due tribunali erano divisi dalla diversa concezione del rapporto tra i due ordinamenti, sostenendo l'uno – l'organo europeo – la visione monista, secondo cui il Trattato di Roma aveva dato vita a un unico sistema legale, e l'altro – la Corte costituzionale – la dottrina dualista, secondo cui i due sistemi legali, pur coordinati, rimanevano separati. L'ente italiano si mosse progressivamente verso la posizione del tribunale sovranazionale, riconoscendo infine la piena supremazia e diretta applicabilità del diritto comunitario; al contempo, così come nei confronti del diritto canonico, ribadì l'impossibilità anche per quell'ordinamento di violare i principi fondamentali della Costituzione, i quali la Corte costituzionale, in ottemperanza al proprio ruolo, avrebbe sempre garantito (elaborando così la teoria dei "contro-limiti").

Nel 1988, la Corte costituzionale chiarì che tali limitazioni si estendono anche alle leggi costituzionali, essendo il suo intervento doveroso a tutela tanto della forma di governo repubblicana quanto di quei principi supremi che, pur non essendo esplicitamente protetti dal testo, formano l'essenza su cui si basa la Costituzione. La posizione accoglieva peraltro una tesi già maggioritaria nella dottrina, secondo cui l'espressione contenuta nell'articolo 139 doveva intendersi in senso lato, abbracciando implicitamente determinati valori fondamentali; tra questi ultimi, la Corte ha riconosciuto *in primis* – in un elenco comunque non esaustivo – la laicità dello Stato, la sovranità popolare, l'indipendenza della magistratura, i diritti inviolabili dell'uomo, l'uguaglianza dei cittadini di fronte alla legge. Nel 2004, il Tribunale ha confermato che tale salvaguardia non opera distinzioni tra leggi costituzionali e leggi di revisione costituzionale (ovverosia recanti modifiche dirette al testo), indicando al contempo che la sua azione è riservata a violazioni esplicite ed eclatanti del nucleo della Costituzione. Tale orientamento, d'altronde, concorre a diffidare di tesi secondo cui qualsiasi riforma eccessivamente ampia tradirebbe *ipso facto* l'identità del testo, risultando incostituzionale; un simile cambiamento, invece, non può essere scartato a priori, pena una sproporzionata e contro-indicativa restrizione sul potere di revisione costituzionale.

Pur esemplificando conclusioni opposte, entrambi i casi inducono a rivisitare la dicotomia tra potere costituente e potere costituito: se da un lato la facoltà di modificare la costituzione è assimilabile al primo e può intervenire sugli stessi poteri costituititi, dall'altra è, come il secondo, vincolata e subordinata alla costituzione. È perciò preferibile concepirla come un potere *sui generis,* definibile come potere costituente derivato (o secondario), distinto dal potere costituente originario (o primario). Quest'ultimo è esercitato dal popolo nella propria assoluta e incondizionata sovranità, in un contesto pre- ed extra-costituzionale; ad ogni modo, ciò non ne implica obbligatoriamente una visione *trascendentale*, né preclude che tale volontà si concretizzi in un contesto istituzionalizzato quale è frequentemente l'assemblea costituente. Per converso, il potere costituente secondario è inferiore poiché rappresenta un'autorità solamente *delegata* dalla facoltà originaria, e quindi costretta ad adempiere alle condizioni ad esso imposta dal potere da cui scaturisce.

In ragione di ciò, nulla vieta che il potere di revisione costituzionale debba sottostare a requisiti sostanziali oltre che procedurali; all'opposto, anche qualora il testo non lo prevedesse espressamente, la principale limitazione per il potere in delega, conformemente al proprio ruolo di *fiduciario*, sarebbe in ogni caso quella di non tradire e alterare irrimediabilmente i pilastri del testo costituzionale così da renderlo totalmente irriconoscibile. La distinzione rimane per giunta valida in presenza di strumenti di democrazia diretta come il referendum – previsto, ad es., sia dalla Costituzione francese che da quella italiana - dato che il contenuto è solitamente decretato dai soggetti politici e può solo essere confermato o respinto *in toto* dal popolo, che dunque opera in questo caso come organo legalmente prestabilito e limitato.

Questa rilettura non è esente da critiche. Prima di tutto si rileva il carattere arbitrario della scelta con cui le decisioni della generazione costituente vengono cristallizzate, interdicendone contestualmente – e in maniera antidemocratica – la ridiscussione tra i discendenti. Un rischio inerente riguarda l'evenienza che il potere di revisione, privo di mezzi legali per portare a compimento la riforma desiderata, sia involontariamente sospinto ad adoperare metodi rivoluzionari o comunque illeciti. Una distinta apprensione concerne l'eventualità che le corti costituzionali abusino delle proprie funzioni e ostacolino ogni tentativo di cambiamento significativo, nella peggiore delle ipotesi sfociando – utilizzando la terminologia francese – in un "governo dei giudici".

Il rischio di un attivismo giudiziario è, dall'altro lato, contrappesato da quello di una maggioranza transitoria che reprima libertà e diritti fondamentali senza alcuna supervisione, come illustra, in India, la disputa nel corso degli anni Settanta tra legislatura e Corte Suprema, e la determinazione di quest'ultima ad annullare atti che avrebbero compromesso la democrazia e pregiudicato l'equilibrio istituzionale e costituzionale. La Corte elaborò contemporaneamente, con riferimento alla Costituzione indiana, l'influente teoria della *basic structure* (struttura fondamentale), la quale dimostra oltretutto come certi principi – come la laicità dello Stato, la forma di governo, la separazione dei poteri - siano riconosciuti come irrinunciabili da giurisdizioni diverse e distanti tra loro.

Pur finalizzato a garantire il rispetto di valori imprescindibili, la relativa astrattezza di questi ultimi potrebbe lasciare un eccessivo margine d'azione al potere giudiziario, motivo per cui quest'ultimo dovrebbe scongiurare non riforme che si limitino a discostarsi del testo, ma piuttosto solo quelle che ne stravolgano completamente l'identità o lo spirito. Una rivoluzione extralegale - che non potrebbe essere sventata né dalla corte costituzionale, né da qualsiasi altro organo -, infine, non è ineluttabile se si ritiene che il potere costituente appartenente al popolo sia *immanente*, ossia che non per forza abbia espletato definitivamente la propria funzione nell'atto originario, ma al contrario possa sempre riaffiorare in futuro e dar vita a un nuovo sistema costituzionale.