Unamendability and Constitutional Identity in the Italian Constitutional Experience

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Abstract

The article explores the historical roots of the explicit unamendable clause(s) in the Italian Constitution. Following, it explores the scholarly debate over the interpretation of unamendable provisions. The article investigates theories of implicit unamendability of the Italian Constitution, and, in particular, it analyses the crucial role played by the Constitutional Court of Italy (ICC) and the principles that characterize Italian constitutional identity. Furthermore, the article explores the other side of constitutional identity, namely the theory of 'counterlimits.' The ICC specified that constitutional identity not only sets a limit to constitutional amendment powers but also sets 'counterlimits' to the entry of external norms (i.e., supranational and international law) in the domestic legal system. Finally, the article draws some conclusions and argues that the two sides of constitutional identity, although legally and logically independent, mutually reinforce each other and, ultimately, reinforce the counter-majoritarian nature of unamendability.

Keywords: Unamendability, constitutional identity, republic, counterlimits, European integration, Italy.

A Introduction

Constitutional rigidity is based on a sort of paradox. In fact, rigid constitutions differ from flexible ones as they provide for the conditions of their own amendment. These conditions consist in higher majorities or other types of procedural mechanisms,[1] which make the approval of a constitutional amendment more difficult than the approval of an ordinary law. However aggravated these procedures may be, the essential feature of a rigid constitution is the presence of formal amendment rules. The amendment process in rigid constitutions "is a method for reconciling the tension between stability and flexibility".[2] In other words, constitutions are rigid as long as they provide for mechanisms for their modification. In

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1 For a convincing classification of constitutional amendments rules, *see* R. Albert, 'The Structure of Constitutional Amendment Rules', *Wake Forest Law Review*, Vol. 49, No. 4, 2014, pp. 913-976.

2 Y. Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers*, Oxford-New York, Oxford University Press, 2017, p. 17.

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fact, a legal system that omits the means of some change, and fossilizes its fundamental provisions, "is without the means of its conservation".[3]

Unamendability posits an exception to this reconciling process by taking some fundamental values out of the hands of constituted powers. Constitutional rigidity is a relatively modern invention in constitutional law; unamendability is even newer. Even though some examples emerged in older times, the "flowering"[4] of the so-called eternity clauses dates back to the post–World War II constitutional wave.[5] The Weimar nightmare made it clear that the denial of liberal constitutionalism could happen through formally legal means.[6] Therefore, many constitutions introduced ultimate limits to their own amendment, thus emphasizing the distinction between primary (and unlimited) constituent power and derivate (limited) constituted amendment powers.

Italy makes no exception to this trend. The 1848 flexible constitution (*Statuto Albertino*) proved itself a weak and ineffective remedy against the fascist threat. The totalitarian regime successfully overwhelmed the liberal regime, without violating any constitutional provisions, but merely setting aside the conflicting norms of the 1848 *Statuto*. After the collapse of the fascist regime in 1943, a process of painful constitutional transition led to the approval of a rigid constitution in 1947, and its entry into force in 1948. The constitution-making process took into account the poor performance of the 1848 Constitution in the process of self-entrenchment.

A remarkable milestone of this transition was the transformation of the form of the state, which was turned from a monarchy into a republic. This transformation was fossilized in the last article of the Italian Constitution (Article 139 Const. It.), which declares the republican form of the state as unamendable. However, unamendability in the Italian constitutional experience goes far beyond the

3 E. Burke, *Reflections on the Revolution in France* [first published 1790], Whitefish Montana, Kessinger, 2004, p. 16. For a detailed study on the relations between the difficulty of amendment and the duration of constitutions, *see* Z. Elkins, J. Melton, & T. Ginsburg, *The Endurance of National Constitutions*, Cambridge, Cambridge University Press, 2009.

4 The post–World War II constitution-making process has been referred to as a 'flowering time' (or. *Blütezeit*) for eternity clauses: *see* K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, Band III/2, München, Beck, 1994, p. 1094.

5 A new wave of 'international eternity clauses' seems to be in the making, at least conceptually, as scholars are increasingly concerned with developments of 'abusive constitutionalism', thus the use of mechanisms of constitutional change to undermine democracy by internal erosion, or 'constitutional dismemberment', thus radical constitutional changes without breaking legal continuity. Against this threat, scholars are dissatisfied with the performances of classic eternity clause and are advocating for international means of entrenchment. For a wide overview and deep analysis of these developments, *see* D. Landau, 'Abusive Constitutionalism', *UC Davis Law Review*, Vol. 47, pp. 189-260 and R. Albert, 'Constitutional Amendment and Dismemberment', *The Yale Journal of International Law*, Vol. 43, No. 1, 2018, pp. 1-84.

6 On the constitutional implication of the Nazi overthrow of the Weimar Regime using constitutional means, *see* D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Oxford-New York, Oxford University press, 1997; F. Scriba, *'Legale Revolution'? Zu den Grenzen verfassungsändernder Rechtsetzung und der Haltbarkeit eines umstrittenen Begriffs*, Berlin, Duncker, & Humblot, 2009; S. Levinson & J.M. Balkin, 'Constitutional Dictatorship: Its Dangers and Its Design', *Minnesota Law Review*, Vol. 94, 2010, pp. 1789-1866.

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Monarchy-Republic debate, and it is certainly not exhausted by the scholarly debate on the interpretation of Article 139 Const. It.

First, this article explores the historical roots of the explicit unamendable clause(s) in the Italian Constitution. Then, it explores the scholarly debate over the interpretation of unamendable provisions. Second, the article investigates theories of implicit unamendability of the Italian Constitution, and, in particular, it analyses the crucial role played by the Italian Constitutional Court (ICC) in identifying implicit unamendable constitutional principles that characterize the constitutional identity of Italy. Third, the article explores the other side of constitutional identity, namely the theory of 'counterlimits.' The ICC specified that constitutional identity not only sets a limit to constitutional amendment powers but also sets 'counterlimits' to the entry of external norms (*i.e.*, supranational and international law) in the domestic legal system. The article argues that the two sides of constitutional identity, although legally and logically independent, mutually reinforce each other and, ultimately, reinforce the counter-majoritarian nature of unamendability.

B "The Republican Form of the State Is Not Subject to Revision"

The entry into force of the Constitution of Italy dates back to 1948. After twenty years of fascism, the Italian State began a process of difficult constitutional transition. The 1948 Constitution replaced the 1848 flexible constitution and departs from it significantly both from a formal and a substantial point of view.[7] As to the latter perspective, the 1948 Constitution is inspired by a constitutional pluralistic choice, while the *Statuto* was a typical nineteenth-century constitution, conceded by the king, with a limited bill of rights and providing for a strongly centralized state organization. As to the formal perspective, the 1948 Constitution establishes a republican form of state, radically departing from the constitutional monarchy designed by the 1848 *Statuto Albertino*.

The decision over the form of the state was one of the most divisive issues in the process of constitutional transition that followed the collapse of the fascist regime in 1943. According to the first act – the so-called first transitional constitution – approved in 1944,[8] the decision over the form of state should have been left to the Constituent Assembly, whose election was regulated by the same act. However, according to the second act (the so-called second transitional constitution), the decision over the form of state was directly entrusted to the people, in the form of a referendum.[9]

7 The path followed in this constitution-making process follows the ideal type of revolutionary outsiders who use the constitution to commit their new regime to the principles proclaimed during their previous struggle. This is one of the paths identified by B. Ackerman, 'Three Paths to Constitutionalism – and the Crisis of the European Union', *British Journal of Political Science*, Vol. 45, No. 4, October 2015, pp. 705-714.

8 Legislative Decree of the Lieutenant of the Realm, 25 June 1944, No. 151.

9 Legislative Decree of the Lieutenant of the Realm, 16 March 1956, No. 98.

The referendum on the form of state was held on 2 June 1946 contextually to the election of the deputies of the Constituent Assembly. A majority of 54.3 per cent voted for the republic, while 45.7 per cent voted for monarchy. The territorial distribution of the vote revealed a dramatically divided country: northern regions overwhelmingly voted for a republican form of state, while southern regions mainly supported the monarchical form. The outcome of the vote was harshly contested: complaints about frauds were lodged, and the Supreme Court of Cassation officially declared the outcome of the vote only on 18 June 1946, sixteen days after the referendum was held.

One week later, on 25 June 1946, the Constituent Assembly summoned for the first time with the historical duty of writing a new constitution for Italy. As an expression of a primary constituent power,[10] its task was unlimited by its nature, with the notable exception of the decision over the form of state. In other words, the Constituent Assembly that drafted the Italian Constitution was limited by the decision of the Italian people that opted for a republican form of state at the same time the Constituent Assembly was voted. The source of authority of the Constituent Assembly was inextricably linked to the republican choice, as the legitimacy of the assembly originated from the same source that settled the question over the institutional form of state.

This historical premise sheds light on the very last article of the 1948 Constitution, stating, "the Republican Form of the State is not Subject to Revision."[11] This provision is a typical example of explicit unamendability. In comparative terms, it is the most typical example: the republican form of the state is (or was) protected by unamendability clauses in more than 100 constitutions[12] worldwide. The provision is coherently located right after the provision regulating the procedure of the amendment of the Italian Constitution. Article 138 Const. It. establishes that a constitutional amendment requires each of the two Houses of the Parliament to vote twice and reach double conformity on the same text twice over a period of no less than three months. The second vote of each chamber requires an absolute majority (50 per cent of the member of each House plus one). If the proposal secures two-thirds approval in each House, the constitutional amendment is promulgated and published. Its entry into force follows. If the majority does not reach that threshold in both Houses, but only the necessary absolute majority is reached, a constitutional referendum may be called on the constitutional amendment proposal. A territorial minority (at least five regional assemblies), a political minority (at least one-fifth of the members of one House), and an electoral minority (at least half million electors) are entitled to request a constitutional referendum within three months from the parliamentary approval.

10 On the distinction of primary and secondary constituent power, I draw from Roznai, 2017, pp. 105-134. The origins of the modern theories of constituent power and the distinction between the *pouvoir constituant* and *the pouvoir constitué* dates back to the famous work of E.J. Sieyès, *Qu'est-ce que le tiers-État?*, Milano, Feltrinelli, 2003 (originally published in 1789).

11 Art. 139 of the Constitution of the Republic of Italy (hereafter Const. It.).

12 Roznai, 2017, p. 21.

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The draft constitutional amendment is deemed passed if it is approved by a majority of the voters, with no structural quorum.[13]

Coming back to Article 139 Const. It., the inclusion of an unamendability clause in the 1948 Italian Constitution is not particularly innovative in comparative terms. In fact, the idea of entrenched constitutional laws dates back to the eighteenth century in its very first epiphanies.[14] Constitutional norms providing for the unamendability of the republican form of state already existed in the nineteenth century. In the twentieth century, explicit unamendability has become a popular constitutional design:[15] in the post-war constitutional wave, almost one-third of the newly adopted constitutions included one or more unamendable clauses.[16] In the post–cold war constitutional wave, this figure staggered to 50 per cent approximately.[17] However, even if the unamendable clause of the 1948 Italian Constitution does not represent a significant novelty in the comparative scenario, its historical premises are worthy of attention. In fact, its inclusion in the last article of the constitution is due to a peculiar limitation of the primary constituent power of the Constituent Assembly, whose election was contextual to the referendum on the form of the state. Since the Constituent Assembly had no power to review the decision of the people on the form of state, it decided to eternally bind the constitutional amendment powers on this point.[18]

The formulation of the unamendability clause of the Italian Constitution is rather short and vague when compared with the formulation of unamendability clauses of the same generation. In fact, unamendable provisions grew not only numerically but also in length and complexity, increasingly covering more and more protected values.[19]

The vague and short formulation of the unamendable clause immediately generated many interpretative issues. A first problem concerns the amendability of the provision providing for the unamendability clause. It is not a novel issue in

13 For further details on the constitutional amendment process, *see* C. Fusaro, 'Italy', *in* D. Oliver and C. Fusaro, *How Constitutions Change. A Comparative Study*, Oxford and Portal, Hart Publishing, 2011, pp. 211-234.

14 Roznai, 2017, p. 18.

15 C. Klein, 'On the Eternal Constitution: Contrasting Kelsen and Schmitt', *in* D. Diner and M. Stolleis (Eds.), *Hans Kelsen and Carl Schmitt: A Juxtaposition*, Göttingen, Wallstein, 1999, p. 61.

16 Roznai, 2017, p. 20.

17 *Ibid.* However, it was noted that the increasing frequency of the doctrine of unconstitutional constitutional amendment "does not make it any less extraordinary nor any more reasonable": *see* Albert, 2018, p. 15.

18 Following the theory of delegation (*see* Roznai, 2017, p. 117), one could affirm that the limitation provided by Art. 139 is a logical necessity and would exist even independently from any explicit provision. In fact, the principal (the Constituent Assembly) could not delegate the power to amend the republican form the state to the agent (the constitutional amendment power), as it did have itself this power.

19 It was calculated that before World War II, "the average length of an unamendable provision was 29.4, but since the Second World War, the average number of words in an unamendable provision is 39.5" (*see* Roznai, 2017, p. 21). Article 139 of the Italian Constitution places itself well below the reference average with its 10 words.

constitutional theory[20] and practice.[21] Are clauses providing for unamendability themselves amendable? A minority of authors in the Italian legal scholarship admitted a two-step amendment procedure[22]: in their view, a first constitutional amendment might have repealed Article 139 Const. It., and a second amendment might have amended the republican form of the state.

Disagreement emerged in the scholarly debate on the interpretation of the notion of 'Republic'. According to the narrowest interpretations of this provision, the republican *form* of the state consisted in the mere electivity of the head of the state, or even less: according to an even narrower interpretation, the eternity clause specifically expressed the repudiation of the Savoy Dynasty and its complicity with the fascist regime.[23]

However, expansive interpretations of the unamendability clause prevailed, by insisting on the necessity to read the last article of the constitutional charter systematically and, in particular, in light of Article 1 Const. It., which states "Italy is a democratic republic." In light of this reading, the unamendable core protected by Article 139 Const. It. is not limited to the *form* of the republic but includes its democratic *substance*. In fact, it is assumed that the Italian people not only opted for a republican form of state on 2 June 1946 but also made a "full-fledged democratic decision".[24]

This interpretation shifts the ambiguity of the laconic formulation of the eternity clause from the (formal) notion of the 'republic' to the (substantial) notion of 'democracy': What are the essential characters of a *democratic* republic? Answers may vary significantly, moving on a wide spectrum from universal suffrage, to the principle of equality, popular sovereignty, political pluralism, and so on. However, some further elements of systematical interpretation may be grounded on the text of the constitution, where it puts special emphasis on the protection of certain rights or structural principles. Within this framework, Article 2 Const. It. "recognizes and guarantees the *inviolable* rights of the person"; Article 5 establishes that "the Republic is one and *indivisible*"; Article 13 Const. It. states that "personal liberty is *inviolable*", as Article 14 Const. It. says that "the home is *inviolable*", and Article 15 Const. It. states that "Freedom and confidentiality of correspondence and of every other form of communication is *inviolable*", and, finally, Article 24 Const. It. says that "The right to counsel in judicial proceedings

20 J. Elster, *Ulysses Unbound. Studies in Rationality, Precommitment and Constraints*, Cambridge, Cambridge University Press, 2000, p. 102.

21 In 1989, the unamendable provision of the 1976 Portuguese Constitution was amended and the principle of collective ownership of means of production was removed from the unamendable core. On this amendment, *see* V. Ferreres Comella, *Constitutional Courts & Democratic Values – A European Perspective*, New Haven, Yale University Press, 2009, p. 207.

22 C. Esposito, *La Costituzione italiana. Saggi*, Padova, Cedam, 1954, p. 7; L. Elia, 'Possibilità di un mutamento istituzionale in Italia', in M. Glisenti & L. Elia (Eds.), *Cronache sociali 1947-1951*, Roma, Landi, 1961, pp. 414-418.

23 *See*, for a harsh criticism of this approach, the speech by the secretary of the Italian Communist Party Palmiro Togliatti at the Constituent Assembly meeting on 11 March 1947, published in *La Costituzione della Repubblica nei lavori preparatori della Assemblea Costituente*, Roma, Camera dei deputati – Segretariato Generale, 1970, Vol. I, p. 329.

24 L. Paladin, *Le fonti del diritto*, Bologna, Il Mulino, 1996, p. 158.

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is *inviolable*." Affirming that these rights are inviolable means that the state has no power to annul or withdraw them, not even through the complex procedure of constitutional amendment: at least in their essential content, inviolable rights are definitive and untouchable.[25]

In other words, although no constitutional provision specifically entrenches fundamental rights against the constitutional amendment powers – as it is the case for Article 19, para 2, of the German Grundgesetz – the ICC has interpreted the inviolability clauses in the sense of attributing a special protection to fundamental rights, even beyond the specific identification of the above-mentioned provisions: in fact, the generic clause of Article 2 Const. It. ("the Republic recognizes and guarantees the inviolable rights of the person") has always been regarded as an open-texture provision and therefore certainly including a wider spectrum of rights than the ones explicitly declared inviolable.

The expansive interpretation of the constitutional text in the area of explicit unamendability followed a consolidation of the consensus over the republican regime. In fact, a narrow interpretation of Article 139 Const. It. would have led this provision to an anachronistic fate.[26] A gradual but "irreversible consolidation of the republican feeling"[27] among the Italian people makes the scenario of a monarchical restauration more than unlikely in Italy. This is probably among the factors that support an expansive interpretation of the meaning of the clauses providing for explicit unamendability in the Italian Constitution: the same factors are at the basis of a quick and successful spread of theories of implicit unamendability, both among scholars and – more importantly – in the case-law of the Italian Constitutional Court.[28]

C Implicit Unamendability: The "Supreme Principles" of the Constitutional System and Constitutional Identity

The existence of explicit unamendability clauses in the text of a constitutional charter does not exclude the possibility of the development of implicit unamendability theories within the same framework.[29] On the contrary, the origin of modern implicit unamendability theories occurred in the United States, thus a consti-

25 V. Barsotti, P.G. Carrozza, M. Cartabia, & A. Simoncini, *Italian Constitutional Justice in Global Context*, Oxford – New York, Oxford University Press, 2016, p. 97.

26 G. Volpe, 'Art. 139', *in* G. Branca (Ed.), *Commentario della Costituzione*, Bologna-Roma, Zanichelli, 1981, p. 729, quoting M. Pedrazza Gorlero, *Le variazioni territoriali delle regioni: contributo allo studio dell'art. 132 della Costituzione*, Padova, Cedam, 1979, p. 191.

27 A. D'Aloia, 'Il Consiglio di Stato e la XIII disposizione transitoria e finale della Costituzione', *Quaderni costituzionali*, Vol. 21, No. 3, 2001, p. 535.

28 For an in-depth analysis, *see* P. Faraguna, *Ai confini della Costituzione. Principi supremi e identità costituzionale*, Milano, FrancoAngeli, 2015.

29 Implicit unamendability usually draws from Carl Schmitt's influential theory of constitutional change, where he argues that political actors may amend a constitution with the limit of preserving its identity and continuity: *see* C. Schmitt, *Verfassungslehre*, Berlin, Duncker, & Humblot, 2017, Ch. 1, § 11 (originally published in 1928).

tutional system that provided for explicitly unamendable clauses.[30] The Italian constitutional experience makes no exception, as theories of implicit unamendability have been widely addressed by the scholarly debate and – most importantly – have been welcomed by the Constitutional Court. In fact, in one of its most important decisions, the Italian Constitutional Court stated that:

> 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 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 State (Art. 139) as well as those principles that even though not expressly mentioned among those principles not subject to the procedure of constitutional amendment, belong to the essence of the supreme values upon which the Italian Constitution is founded.
>
> This Court, furthermore, has already recognized in numerous decisions how the supreme principles of the constitutional order prevail over other laws or constitutional norms, such as when the Court maintained that even the prescription of the Concordat, which enjoy particular "constitutional protection" under Art. 7, paragraph 2, are not excluded from scrutiny for conformity to the "supreme principles of the constitutional order" (*see* Judgments 30/1971, 12/1972, 175/1973, 1/1977, 18/1982), and also when the Court affirmed that the laws executing the EEC Treaty may be subject to the jurisdiction of this Court "in reference to the fundamental principles of our constitutional order, and to the inalienable rights of the human person". (*see* Judgments 183/1973, 179/1984)[31]

It is important to note that the court issued this statement as an *obiter dictum*, within a case that was eventually declared inadmissible on procedural grounds. However, the court's firm intention to claim jurisdiction over constitutional amendments to remedy substantial violations of both explicitly and implicitly unamendable provisions was not completely unexpected. The decision was issued in 1988, when political debates over the need of overarching constitutional

30 Roznai, 2017, p. 39. However, studies concerning amendability and unamendability in the United States need to be considered with caution from a comparative angle, as Art. V of the US Constitution establishes an extremely difficult and time-consuming amendment process, thus favouring constitutional change through other means. On the relatively high rigidity of the US Constitution, *see* D.S. Lutz, *Principles of Constitutional Design*, Cambridge, Cambridge University Press, 2006, p. 170; A. Vermeluse, 'Second Opinions and Institutional Design', *Virginia Law Review*, Vol. 97, 2011, p. 1438. On constitutional change beyond constitutional amendments in the United States, *see* B. Ackerman, *We the People: Foundations*, Cambridge MA, Harvard University Press, 1991. Moreover, explicit unamendability through Art. V of the US Constitution was limited in time (precisely until 1808), while "nothing today is formally unamendable" in the US Constitution (Albert, 2018, p. 22). For a detailed study of the so-called sunset clauses as the one provided for in the US Constitution, *see* S. Ranchordás, *Constitutional Sunsets and Experimental Legislation: A Comparative Perspective*, Cheltenham, Edward Elgar Publishing, 2014.

31 Corte costituzionale, sentenza 29 December 1988, No. 1146.

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reforms were at the centre of the political agenda.[32] Even though the debates on overarching institutional and constitutional reforms continued for decades (and are partially still ongoing), they mostly remained dead letter and did not lead to any formal amendment of the constitution. In most cases, constitutional reforms were abandoned because of fragile and volatile political support.[33] In other cases, a wide package of constitutional reforms had been approved by the parliament but rejected by the electorate in a constitutional referendum.[34]

However, the relatively small number of successfully approved constitutional amendments (many of which touched specific issues with a very large consensus) made it very unlikely for the Constitutional Court to have the opportunity to review the constitutionality of constitutional amendments.[35] To date, the Court has never had this opportunity. In two cases,[36] it reviewed parts of an autonomy regional statute, which the constitution entails constitutional force. However, these acts were drafted before the entry into force of the constitution itself and therefore implied quite specific legal issues that are unrelated to the ones we are considering here.

In many other cases, the Constitutional Court referred to the supreme principles of the Italian Constitution, when the constitutional question concerned ordinary laws.[37] Therefore, the reference to 'supreme principles' of the constitution was not necessary to decide the case at hand but played a reinforcing – if not ornamental – role in the reasoning of the Constitutional Court.

However, the court always refrained from identifying a precise list of supreme principles of the Italian Constitution. These principles emerged "one case at a time",[38] and even if some of them are recurrent in this stream of case-

32 S. Bartole, 'La Corte pensa alle riforme istituzionali?', *Giurisprudenza costituzionale*, Vol. 32, No. 1, 1988, p. 5570.

33 On the ill-fated drafts of constitutional reforms of the 1990s, *see* G. Pasquino, 'Reforming the Italian Constitution', *Journal of Modern Italian Studies*, Vol. 3, No. 1, 1998, pp. 42-54: C. Fusaro, 'The Politics of Constitutional Reform in Italy: A Framework for Analysis', *South European Society and Politics*, Vol. 3, No. 2, 1998, pp. 45-74.

34 For further details on the drafts of constitutional reforms approved by the parliament, but rejected by means of constitutional referendums in 2006 and 2016, *see* P. Blokker, 'The Grande Riforma of the Italian Constitution: Majoritarian versus Participatory Democracy?', *Contemporary Italian Politics*, Vol. 9, No. 2, pp. 124-141; B. Draege & J. Dennison, 'Making Sense of Italy's Constitutional Referendum', *Mediterranean Politics*, Vol. 23, No. 3, 2018, pp. 403-409; G.M. Salerno, 'Implementation and Revision of the Italian Constitution since the 1990s', *International Journal of Public Administration*, Vol. 34, No. 1-2, 2011, pp. 114-122; P. Passaglia (Ed.), 'The 2016 Italian Constitutional Referendum: Origins, Stakes, Outcome' (Special Issue), *Italian Law Journal*, Napoli, ESI, 2017, available at: www.italianlawjournal.it (accessed 21 March 2019).

35 Since 1948, only fifteen constitutional acts have modified the text of the constitution so far. Most of these acts only modified delimited provisions of the constitution, with the notable exception of the constitutional reform of the territorial articulation of the republic, occurred in the early 2000s. For further details on these constitutional amendments acts, *see* C. Fusaro, 2011, pp. 213-220.

36 Corte costituzionale, sentenza 9 March 1957, No. 38; Corte costituzionale, sentenza 15 January 1970, No. 6.

37 For an overview of these cases, *see* Faraguna, 2015, pp. 91-99.

38 C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, Cambridge MA, Harvard University Press, 1999

law (the right to judicial relief,[39] the right to eligibility,[40] the right to life,[41] the principle of pluralism,[42] the principle of secularism,[43] etc.), the category seems to be open-ended. The Constitutional Court, by claiming its exclusive competence in unrevealing the supreme principles of the Italian Constitution, does carefully preserve the pluralistic nature of the Italian Constitution. Even though the category designs a sort of intra-constitutional hierarchy, where supreme principles are located above 'ordinary' constitutional law, supreme principles are always referred to in plural: the court never relies on a single supreme principle but always refers to a bundle of principles.[44]

This is a highly significant feature of the Italian constitutional identity, as the plurality of supreme principles admits possible clashes among them. It follows that supreme principles are themselves subject to delicate balancing operations and do not design a pyramidal intra-constitutional hierarchy. The classification of certain principles as 'supreme' means that they may not be entirely neglected in favour of other interests, even if these interests are endowed with constitutional authority. However, the supremacy of any single supreme principle finds its limits in the supremacy of other possibly conflicting supreme principles. The court has asserted this concept very clearly in a recent decision, by stating that it is not possible to identify whether any of the fundamental rights protected by the constitution predominates absolutely over others, as fundamental rights mutually supplement one another. The Constitutional Court clarified that a rigid hierarchy between fundamental rights and principles is unconceivable, as a democratic and pluralist constitution "requires continuous reciprocal balancing between principles and fundamental rights, without claiming absolute statues for any of them".[45]

D The Other Side of Constitutional Identity: Unamendability and Counterlimits

The supreme principles of the legal system characterizing the constitutional identity of Italy did not emerge only within the framework of unconstitutional constitutional amendments. On the contrary, as mentioned, this ground was tested very rarely, as the Constitutional Court did not have many occasions to review constitutional amendments.

Nonetheless, theories of unamendability risk being partial if they only consider formal amendments as sources of constitutional change. Therefore, a larger sight on this matter requires the consideration of further sources of constitutional change. All over Europe, and Italy makes no exception to this trend, one of

39 Corte costituzionale, sentenza 22 January 1982, No. 18 and Corte costituzionale, sentenza 22 October 2014, No. 238.
40 Corte costituzionale, sentenza 3 March 1988, No. 235.
41 Corte costituzionale, sentenza 30 January 1997, No. 35.
42 Corte costituzionale, sentenza 29 January 1996, No. 15.
43 Corte costituzionale, sentenza 11 April 1989, No. 203 and Corte costituzionale, sentenza 20 November 2000, No. 508.
44 Faraguna, 2015, pp. 151-188.
45 Corte costituzionale, sentenza 9 April 2013, No. 85.

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the most impacting sources of constitutional change beyond constitutional amendments has been international and supranational law. The Italian Constitution is characterized by a remarkable openness to international and supranational law.[46] Among its first 12 articles, providing for 'fundamental principles', three of them are explicitly spelling out different declinations of the principle of openness. Article 7 Const. It. concerns the relations of the state with the Catholic Church, by giving constitutional tone to the Lateran Treaties. Article 10 Const. It. provides for a permanent and automatic mechanism of adaptation of the internal legal system to customary international law. Article 11 Const. It. permits limitations on sovereignty, under conditions of equality with other states, deemed necessary to create an order that ensures peace and justice between nations and requires the promotion and facilitation of international organizations pursuing that purpose. Article 11 Const. It. founded the participation of Italy in the European integration process, which later found a further constitutional anchor in Article 117 Const. It. (as amended in 2001), stating that legislative powers shall be vested in the state and the regions in compliance with the constitution and with the constraints deriving from European Union (EU) law and international obligations.

In light of this, the Constitutional Court derived from the internationalist vocation of the Italian Constitution a special status to EU law, Concordatarian law (regulations derived from the Concordat with the Catholic Church), and customary international law. Provisions under these categories may derogate not only Italian law but also Italian constitutional law, with the only limit of the supreme principles of the constitutional order. The core of Italian constitutional identity is not subject to amendment through the formal constitutional amendment process and is coherently protected by other sources of derogation or change.

Although the counterlimits doctrine has been first developed in some cases dealing with concordatarian law,[47] the judicial *manifesto* of the counterlimits doctrine was included in a landmark judgment that posited on the milestones of the European path of the Italian Constitutional Court. In 1973, the court stated that:

> On the basis of Art. 11, limitations of sovereignty have been allowed solely for the attainment of the goals indicated there; and it must therefore be ruled out that those limitations concretely delineated in the Treaty of Rome – adopted by Nations with legal systems that are inspired by the rule of law and that guarantee the essential liberties of their citizens – may in any case entail for the organs of the Community an inadmissible power to violate their fundamental principles of our constitutional order or the inalienable rights of the human person. And it is obvious that in the event that Art. 189 should

46 *See* N. Lupo, G. Piccirilli, 'Conclusion: "Silent" Constitutional Transformations: The Italian Way of Adapting to the European Union', *in* Ea. (Eds.), *The Italian Parliament in the European Union*, Oxon, UK, Portland, Oregon, 2017; P. Faraguna, 'Costituzione senza confini? Principi e fonti costituzionali tra sistema sovranazionale e diritto internazionale', *in* F. Cortese, C. Caruso, S. Rossi (Eds.), *Immaginare la Repubblica. Mito e attualità dell'Assemblea Costituente*, Milano, FrancoAngeli, 2018, pp. 63-95.

47 Corte costituzionale, sentenza 24 February 1971, No. 30.

> ever be given such an aberrant interpretation, the guarantee of the jurisdiction of this Court to decide the enduring compatibility of the Treaty with the aforesaid fundamental principles will always be assured.[48]

In other words, supranational (and customary international[49]) law must respect the supreme principles of the constitutional system from a substantive point of view, and in case of a violation of those principles, the Constitutional Court claims jurisdiction.

For a long time, the claim of jurisdiction by the Constitutional Court has mainly been considered a mere dissuasion: counterlimits played the role of "a gun on the table",[50] and the Constitution Court itself specified that a violation of the supreme principles of the constitutional system via supranational law was "extremely unlikely, but nonetheless possible".[51] This scenario became even more unlikely after the entry into force of the Treaty of Lisbon in 2009, which made legally binding and brought under the jurisdiction of the Court of Justice of the European Union the so-called identity clause in the Treaty on the European Union. Article 4, paragraph 2, of the Treaty on European Union specifies,

> The Union shall respect the equality of Member States before the treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.[52]

The clause represents a European reaction to the concerns of several Member States' supreme and constitutional courts – including the ICC – regarding their constitutional identities.[53] However, the introduction of this clause did not erase possible chances of clashes between EU law and national constitutional law and

48 Corte costituzionale, sentenza 27 December 1973, No. 183.

49 The application of the same reasoning in the field of customary international law was specified six years later by the ICC: *see* Corte costituzionale, sentenza 18 June 1979, No. 48.

50 G. Martinico, *L'integrazione silente*, Napoli, Jovene, 2008, p. 198. Similarly, the position held by the German Constitutional Court before the principle of primacy was called the one of the "dog that barks, but never bites": *see* C.U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's "Banana Decision"', *European Law Journal*, Vol. 7, No. 1, 2001, pp. 95-113 and J.H.H. Weiler, 'The "Lisbon Urteil" and the Fast Food Culture', *European Journal of International Law*, Vol. 20, No. 3, 2009, pp. 505-510.

51 Corte costituzionale, sentenza 13 April 1989, No. 232.

52 On the identity clause, *see* J. Sterck, 'Sameness and Selfhood: The Efficiency of Constitutional Identities in EU Law', *European Law Journal*, Vol. 24, No. 4-5, 2018, pp. 281-296; P. Faraguna, 'Constitutional Identity in the EU – A Shield or a Sword?', *German Law Journal*, Vol. 18, No. 7, 2017, pp. 1617-1640; P. Faraguna, 'Taking Constitutional Identities Away from the Courts', *Brooklyn Journal of International Law*, Vol. 41, No. 2, 2016, pp. 492-578; E. Cloots, *National Identity in EU Law*, Oxford-New York, Oxford University Press, 2015; F-X. Millet, *L'Union européenne et l'identité constitutionnelle des États membres*, Paris, L.G.D.J., 2013; A. Saiz Arnaiz and C. Alcoberro Llivina (Eds.), *National Constitutional Identity and European Integration*, Cambridge, Intersentia, 2013.

53 A. von Bogdandy & S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', *Common Market Law Review*, Vol. 48, No. 5, pp. 1417-1453.

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generated new interpretative problems: Who is the final arbiter over constitutional identity-related controversies in Europe?[54]

The jurisprudence of the Italian Constitutional Court demonstrates this assessment: it was only recently, and after the introduction of the identity clause in the European Treaties, that the Constitutional Court made concrete use of its counterlimits doctrine in a concrete case. In fact, it was in the so-called Taricco saga[55] that the Constitutional Court explicitly referred to the concept of constitutional identity. By submitting a reference for preliminary ruling to the Court of Justice of the European Union (CJEU), the ICC clarified that the former

> cannot be encumbered by the requirement of assessing in detail whether it is compatible with the constitutional identity of each Member State. It is therefore reasonable to expect that, in cases in which such an assessment is not immediately apparent, the European court will establish the meaning of EU law, whilst leaving to the national authorities the ultimate assessment concerning compliance with the supreme principles of the national order. It then falls to each of these legal systems to establish which body is charged with this task. The Constitution of the Republic of Italy vests this task exclusively in this Court.[56]

In light of this exclusive competence in assessing the compliance of a certain law with the supreme principles of the Italian Constitution, the Constitutional Court submitted a reference for preliminary ruling that substantially found such a violation but left room to the CJEU to neutralize the conflict. The Constitutional Court held that the challenged interpretation of the treaties by the CJEU violated the principle of legality in criminal matters, which was held as a 'supreme principle'. Instead of declaring the challenged interpretation inapplicable, the ICC offered the chance to neutralize the conflict through the reference for preliminary ruling. In this way, the CJEU was given the opportunity to fine-tune its previous interpretation of the treaties in compliance with the constitutional identity of Italy, as interpreted by the ICC. The CJEU did so, and the constitutional question was finally dismissed by the Constitutional Court, as the only eventual application of the counterlimits persuaded the CJEU to re-calibrate its interpretation of EU law.

This 'renaissance' of the supreme principles of the constitutional system was anticipated a few years earlier in a judgment concerning international customary

54 M. Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice', *Common Market Law Review*, Vol. 36, No. 2, 1999, pp. 351-386.

55 For a detailed description of the saga, *see* G. Piccirilli 'The "Taricco Saga": The Italian Constitutional Court Continues Its European Journey: Italian Constitutional Court', Order of 23 November 2016 No. 24/2017; Judgment of 10 April 2018 No. 115/2018 ECJ 8 September 2015, Case C-105/14, Ivo Taricco and Others; 5 December 2017, Case C-42/17, M.A.S. and M.B.', *European Constitutional Law Review*, Vol. 14, No. 4, 2018, pp. 814-833.

56 Corte costituzionale, order 26 January 2017, No. 24.

law. In its judgment no. 238 of 2014,[57] the ICC held that the rule of international customary law on jurisdictional immunities of states, to the extent that it is incompatible with the inviolable right of counsel in judicial proceedings, which is a supreme principle of the Italian Constitution, is inapplicable in Italian Courts.

Actually, the right of counsel in judicial proceedings was the parameter of the very first declaration of unconstitutionality based on the 'counterlimits' doctrine. In a judgment dating back to 1982, the ICC declared a norm of Concordatarian law regulating the civil effects of catholic marriage inapplicable in the Italian legal system, as it violated the right of counsel in judicial proceedings.

In conclusion, the theory of counterlimits has ancient roots in the case-law of the ICC but experienced a recent outburst. This trend has important implications as for theories of implicit unamendability: in fact, the ICC has carried out its theory of implicit unamendability in parallel to the theory of counterlimits. However, it has recently clarified that the two theories are protecting the very same values, thus the supreme principles characterizing the constitutional identity of Italy.

E Conclusions

This article explored the approach to unamendability in the Italian constitutional experience. Although the text of the constitution provides for a rather narrow, explicit unamendable clause, the article showed how this narrowly drafted clause has been subject to a process of expansive interpretation. The interpretative expansion of unamendability first passed through an expansive interpretation of explicitly unamendable clause, also by combining its interpretation with the declaration of inviolability of fundamental rights. In parallel, the expansion process passed through the elaboration of a theory of implicit unamendability. The ICC took centre stage in this process, by claiming jurisdiction over constitutional review of unconstitutional amendments (*i.e.*, the internal side of constitutional identity), on the one hand, and by claiming exclusive jurisdiction over the counterlimits, *i.e.*, the 'external side' of the same constitutional identity coin, on the other hand.

57 Corte costituzionale, sentenza 22 October 2014, No. 238. On this much debated judgment, *see inter alia* G. Boggero, 'The Legal Implications of Sentenza No. 238/2014 by Italy's Constitutional Court for Italian Municipal Judges: Is Overcoming the "Triepelian Approach" Possible?', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2016, Vol. 76, pp. 203-224 (2016); Karin Oellers-Frahm, 'A Never-Ending Story: The International Court of Justice – The Italian Constitutional Court – Italian Tribunals and the Question of Immunity', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 76, 2016, pp. 193-202; Francesco Francioni, 'Access to Justice and Its Pitfalls: Reparation for War Crimes and the Italian Constitutional Court', *Journal of International Criminal Justice*, Vol. 14, No. 3, 2016, pp. 629-636; Micaela Frulli, '"Time Will Tell Who Just Fell and Who's Been Left Behind": On the Clash between the International Court of Justice and the Italian Constitutional Court', *Journal of International Criminal Justice*, Vol. 14, No. 3, 2016, pp. 587-594; Riccardo Pavoni, 'Simoncioni *v.* Germany', *American Journal of International Law*, Vol. 109, 2015, pp. 400-406.

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It is not coincidence that the success of this expansive interpretative trend coincided with the inception of the public debate over extensive constitutional reforms in Italy. The Constitutional Court might have decided to draw a clear line in protection of constitutional identity, when the capacity of the constitution to address new social challenges started to be put into question.

To conclude, it may be intellectually challenging to test one Yaniv Roznai's core arguments in the field of Italian constitutional experience. He normatively suggests that limits to constitutional amendments should be narrow if the adoption of constitutional amendment is comparable to the constituent process from a formal perspective.[58] Italy proves a good test for this fascinating theory.

In fact, the constitution was approved following a procedure that profoundly differs from the one established to approve constitutional amendments. The main differences concern the decision-making body (Constituent Assembly *v.* 'ordinary Parliament') and the procedural mechanisms (one single vote with no plebiscite in 1948 *v.* a dual parliamentary vote, possibly followed by a confirmative referendum for constitutional amendments). Therefore, Roznai's theory works fairly well within a constitutional experience where unamendability was progressively expanded by the judicial activism of the ICC in this field.

However, Roznai seems to assume that the popular participation is, by definition, a benefit of the amendment process, which makes it more similar to the constituent power. This may be not true by definition, and empirically it is denied by the Italian constitutional experience. In fact, we the people may play a more crucial role – at least in terms of direct participation – in the process of constitutional amendment, if compared with the role directly played by we the people in the constitution-making process. In other words, the direct involvement of the people in the Italian constitutional experience is possibly stronger for constitutional amendments than it was in the constituent process. In fact, the constitution-making power followed a representative path, with the election of a Constituent Assembly, which drafted and voted the new constitution. No referendum was ever held on the final draft of the constitution. On the contrary, the involvement of the people in the constitutional amendment process is relatively intrusive. A confirmative referendum may be avoided only in case constitutional amendments are approved with a very large majority in both houses (more than two third of each House members) or when constitutional actors legitimated to call upon a referendum decide not to act.

In the recent constitutional experience, constitutional referendum proved a fatal mechanism for constitutional amendment drafts of comprehensive nature: in fact, both in 2005 and in 2016, the Parliament approved two different constitutional acts, aimed at introducing comprehensive constitutional reforms. In both cases, the approved drafts of constitutional amendment passed to fail the referendum. The popular rejection of the constitutional amendment drafts cleared the field of any hypothetical constitutional review of the rejected constitutional reforms, as the Italian Constitutional Court has no jurisdiction *a priori*. However, the idea that the constitutional reforms in question violated the

58 Roznai, 2017, p. 162.

supreme principles of the Italian Constitution circulated not only in the political arena but also in the scholarly debate.

It may be arguable that the Constitutional Court could have had the authority to review a constitutional amendment, which had been voted in favour by the people. Counter-factual history and speculative scenarios are beyond the capacity of constitutional law: however, the idea that a large popular support expressed through referendum would legitimize any constitutional modifications is intrinsically incompatible with the core of constitutional law, which is setting legal limits to political power, however this power is expressed. Unamendability is the quintessence of constitutionalism, and therefore, no majority, not even unanimity, and no referendum might legitimize a violation of the unamendable core of the constitution. Unamendability, as "the most extreme of counter-majoritarian acts",[59] does not fear any width of popular support expressed through parliamentary votes or referendums. In fact, unconstitutional constitutional amendments remain such even if approved by the unanimity of the parliament and/or approved by a large majority of citizens through a constitutional referendum.

59 G. Jacobsohn, 'The Permeability of Constitutional Borders', *Texas Law Review*, Vol. 82, 2004, p. 1799.

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