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ESSAY

Two Examples of “Quasi-Constitutional Amendments” From the Italian Constitutional Evolution—A Response to Richard Albert

NICOLA LUPO†

In response to Richard Albert’s *Quasi-Constitutional Amendments*,
65 BUFF. L. REV. 739 (2017).

INTRODUCTION

Richard Albert’s theoretical proposal in his article is at the same time innovative and challenging, especially when it aims to define a new category of constitutional phenomena: “quasi-constitutional amendments.”¹ He defines these quasi-constitutional amendments as “sub-constitutional alteration[s] to the operation of a set of existing norms in the constitution.”² Albert analyzes this phenomenon in context of the jurisdiction of Canada, and shows how it derives from the difficulty of formal constitutional amendment there.³ He draws a couple of rather recent examples from that jurisdiction: the Regional Veto Law and the new process for Senate appointment.⁴ Both show the ability to successfully achieve constitutional change through non-constitutional means.

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1. Richard Albert, *Quasi-Constitutional Amendments*, 65 BUFF. L. REV. 739, 740. (2017).

2. *Id.*

3. *See id.* at 739.

4. *See id.* at 745, 748.

Moving beyond the Canadian experience, Albert maintains that the category of quasi-constitutional amendments is potentially transferrable to any legal order, with or without a written constitution, and provides examples from the United States and Australia,⁵ as well as the parallel concept of “constitutional statutes” in the United Kingdom.⁶ According to Albert, moreover, the category seems to be growing, and looks especially well-suited for matters of constitutional structure, where it is more difficult to change the meaning of the constitution through judicial interpretation.⁷

In this contribution, I will respond with some references to the concrete experience of the Italian legal order in different phases of its historical evolution with a flexible as well as rigid constitution. I will quote a couple of examples and an academic debate on similar concepts. The aim is to demonstrate the qualities of Albert’s new category while, at the same time, showing that the phenomena to which it refers are far from recent. Additionally, I seek to demonstrate that Albert’s new category raises, by definition, a number of controversies that Albert himself acknowledges.

Specifically, I will address two examples of quasi-constitutional amendments. The first occurred at the time of the Albertine Statute—which was conceded in 1848 by King Charles Albert of Savoy and considered a flexible constitution—and concerned the form of government. The letter of the Albertine Statute stated in article five that the executive power was vested in the king alone—laying out a constitutional monarchy with a division-of-powers system. Rather soon after its entry into force, however, the influence of the elected Chamber of Deputies and the autonomy of the Prime Minister transformed the form of government, which, mainly due to the influence of parliamentary rules and

5. *See id.* at 743.

6. *Id.* at 744.

7. *Id.* at 744–45.

practices, gradually evolved towards a quasi-parliamentary and then a parliamentary system. The second occurred during the era of the Constitution of the Italian Republic—which took effect in 1948 as a rigid constitution assisted by a centralized system of judicial review of legislation—and concerned ratification and execution of the international treaties of the newly founded European Community and their subsequent reforms. The constitution, as in all the other Member States of the European Union, prevailed over national—even constitutional—norms and deeply transformed the Italian Constitution. In Italy, this ratification—given the impossibility of reaching the high parliamentary majority required for a proper constitutional amendment—did not happen through any constitutional amendment. Rather, it took place through ordinary statutes and reliance on a general clause embedded in article eleven of the Italian Constitution which addressed the openness to the international order and the consequent limitations of sovereignty.

A relevant academic debate among Italian constitutional law scholars on forms of quasi-constitutional amendments had already emerged in the 1950s, although in a slightly different category, defined more generally—especially by Pierandrei and Tosi—as “tacit constitutional modifications.”⁸ This debate focused precisely on the main risks of the category that Albert defines: creating “a mismatch between constitutional design and political practice” and, ultimately, undermining “the constitution itself and the very purpose of codification.”⁹ These risks are why Albert’s category, as well as the similar notion of “constitution in a material sense”¹⁰—very commonly used in the Italian academic and political debate—should be handled with extreme care and caution,

8. FRANCO PIERANDREI, *La Corte Costituzionale e le ‘Modificazioni Tacite’ della Costituzione*, in 4 SCRITTI GIURIDICI IN ONORE DI A. SCIALOJA, 315 (1953).

9. *Id.* at 742.

10. Costantino Mortati, *La Costituzione in Senso Materiale* (1998).

especially by constitutional law scholars.

I. FIRST EXAMPLE: THE PARLIAMENTARIZATION OF THE FORM
OF GOVERNMENT PROVIDED BY THE ALBERTINE STATUTE

The first reported example of quasi-constitutional amendment occurred with regards to the Albertine Statute of 1848's reference to the Kingdom of Sardinia and Piedmont, which lasted for almost a century—though interrupted by a fascist regime—prior to the current Italian Constitution. The Albertine Statute was the only one among the other charters enacted in the Italian peninsula in 1848–49 to survive the repression that came to pass in all the other States since 1849. It permitted the Kingdom of Sardinia and Piedmont to become leader of the “Risorgimento.” In 1861, the unification process, led by the King of Savoy (Victor Emmanuel II, Charles Albert's first son) and his Prime Minister (Camillo Benso, Count of Cavour), was solidified and the Albertine Statute became the fundamental charter of the Kingdom of Italy.

This document was not given the name of “Constitution” because that term evoked the French Revolution and its attendant traumatic events such as the constituent assemblies that were being convened in Paris in those very months. “[S]tatute’ was a more neutral term, which recalled the Italian municipal tradition.”¹¹ However, independently from its name, in all respects the Albertine Statute was a classic example of a constitution of a liberal modern State. It was formally “conceded” on March 4, 1848 by the king “with regal loyalty and fatherly love.”¹² Thus, Italian scholarship

11. Sabino Cassese, *The Italian Constitutional Architecture: from Unification to the Present Day*, Paper delivered at the International Conference on The Unification of Italy and American Independence (Sept. 20, 2011), <http://www.irpa.eu/wp-content/uploads/2011/10/The-Italian-Constitutional-Architecture.pdf>.

12. *Statuto Albertino (It.)*, translated in S.M. LINDSAY & L.S. ROWE, *CONSTITUTION OF THE KINGDOM OF ITALY, TRANSLATED AND SUPPLIED WITH AN INTRODUCTION AND NOTES* 272 (1984) (quoted text translated from Italian).

usually speaks of a “*charte octroyée*” as opposed to those constitutions that are approved by the people by way of popular vote, constituent assembly, or convention.¹³

The Albertine Statute declared itself “perpetual and irrevocable.”¹⁴ However, as it did not provide for any special procedure for its revision, it was soon deemed to be a “flexible” constitution—that is, not hierarchically superior to ordinary legislation—although it probably was originally conceived as an unamendable or petrified constitution.¹⁵ In any case, throughout its rather long history the Albertine Statute has never been amended, although many of its provisions were indeed waived or implicitly repealed.

One of the most relevant cases of implicit constitutional change involves the rules on a key feature of this constitution: the form of government—i.e., the rules regarding the distribution of power—or, more precisely, the allocation of the power of “general political direction” (the so-called “*indirizzo politico*”) among constitutional bodies or branches of the government.

Similar to many constitutions conceded in continental Europe at the beginning of the nineteenth century, the Albertine Statute elaborated a constitutional monarchy which designed, in general terms, a so-called pure constitutional system. This means that the form of government was a “division of power system,” in which the executive depended exclusively on the king, who derived his legitimacy from God. In this system, the legislative power was vested in the Parliament, with a house appointed by the king—i.e., the Government—and another elected by a

13. See PAOLO COLOMBO, *CON LEALTÀ DI RE E CON AFFETTO DI PADRE*: TORINO, 4 MARZO 1848: LA CONCESSIONE DELLO STATUTO ALBERTINO (2003) 49.

14. Statuto Albertino (It.), *translated in* S.M. LINDSAY & L.S. ROWE, *CONSTITUTION OF THE KINGDOM OF ITALY, TRANSLATED AND SUPPLIED WITH AN INTRODUCTION AND NOTES* 274 (1984).

15. See ALESSANDRO PACE, *LA CAUSA DELLA RIGIDITÀ COSTITUZIONALE: UNA RILETTURA DI BRYCE, DELLO STATUTO ALBERTINO E DI QUALCHE ALTRA COSTITUZIONE* (1996).

limited popular suffrage. Indeed, according to article five of the Albertine Statute, the executive power was vested in the King alone.¹⁶

Nevertheless, the form of government very soon evolved towards a parliamentary one, usually defined as one in which the executive is responsible to the legislature through a confidence relationship. To be more precise, the executives during the Albertine Statute were still appointed by the king, but they needed also, and probably first and foremost, the confidence of the elected Chamber of Deputies.¹⁷ Similar to what had happened a couple of centuries earlier in the evolution of the British form of government, the king stopped presiding over the executive's meetings, thus granting a special role to the emerging figure of the Prime Minister and at the same time opening the space for deriving the executive's legitimacy also, and then exclusively, from the elected Parliament.

Therefore, the influence of the elected Chamber of Deputies and the autonomy of the Prime Minister changed the form of government, which gradually evolved towards parliamentarism, or, as some authors classified it, pseudo-parliamentarism.¹⁸ The direction of this evolution and the *de facto* replacement of the norm elaborated by the Albertine Statute is undisputed. More debated is the moment at which the system should be qualified as parliamentary.¹⁹ Also debated is the question whether this form of government could be classified as fully parliamentary at least at the end

16. Art. 5 Statuto Albertino (It.), *translated in* S.M. LINDSAY & L.S. ROWE, CONSTITUTION OF THE KINGDOM OF ITALY, TRANSLATED AND SUPPLIED WITH AN INTRODUCTION AND NOTES 276 (1984).

17. See CARLO GHISALBERTI, STORIA COSTITUZIONALE D'ITALIA (1848–1994) 49 (2d ed. 2002); Vittorio Di Ciolo, *Modificazioni “tacite” dello Statuto Albertino (1848–1943)* XXIII *Rivista di Studi Politici* 93–132 (2011); GIORGIO REBUFFA, LO STATUTO ALBERTINO 83 (2003).

18. The reference is to GIUSEPPE MARANINI, STORIA DEL POTERE IN ITALIA (1848–1967), AT 25 FF. (1st ed 1967) (seeing it as a synonym for assemblearism).

19. For a synthesis of the debate, see CARLO GHISALBERTI, *supra* note 17, at 49; Vittorio Di Ciolo, *supra* note 17, at 93–132; REBUFFA, *supra* note 17.

of its evolution, that is, at the beginning of the twentieth century. Those who oppose this reading and prefer to talk of a pseudo-parliamentary regime remark that both the entry into World War I and, even more clearly, Mussolini's rise to power, took place in ways that were more consistent with a separation-of-powers system than with a parliamentary form of government, that is, by relying on the will of the King more than on that of the parliamentary majority.

One last element needs to be examined, regarding the sources of law through which this evolution took place. The most important are parliamentary rules and practices, especially those non-written procedures through which the Chamber of Deputies should vote in favor of the initial confidence in Government.²⁰ Also relevant are some pieces of legislation, approved at the turn of the century, regarding the role of the President of the Council—especially royal decree n. 466/1901, the so-called “Zanardelli decree.”²¹

II. CONSTITUTIONAL AMENDMENT PROCEDURE IN THE CONSTITUTION OF THE ITALIAN REPUBLIC

To better understand the second example, drawn from the experience of the Italian Republic started in 1946, it is necessary to quickly recall the main feature of its constitutional amendment procedure. In fact, the origins of the Italian Republic and the need to avoid a repetition of the fascist experience help to explain Italian Constitution's rigidity, assisted by a centralized system of judicial review of legislation—similar to other constitutions approved in the

20. FABRIZIO ROSSI, *SAGGIO SUL SISTEMA POLITICO DELL'ITALIA LIBERALE: PROCEDURE FIDUCIARIE E SISTEMA DEI PARTITI FRA OTTO E NOVECENTO* (2001); ROMANO FERRARI ZUMBINI, *La Torino del 1848-49 come Laboratorio Costituzionale: La Nascita Spontanea della Fiducia Parlamentare*, in *LE CARTE E LA STORIA*, 2, 75–85 (2016).

21. PIETRO BARRERA, *The First Institutional Reform: New Discipline in Government Activity*, in 4 *ITALIAN POLITICS* 20 (remarking how till the approval of law no. 400/1988 this has been the only normative act devoted to regulating the powers of the President of the Council).

same years, for example in Germany.²² In the same way, the procedure for constitutional amendment, as provided by Article 138,²³ mirrors the main features of the Italian Constitution's approval process.²⁴ Two elements of the constitutional amendment procedure recall the making of the Italian Constitution. The constitution was approved by a high majority of the Constituent Assembly in December 1947 without need for any further constitutional referendum following that of June 1946 on the choice between a republic and a monarchy; this took place simultaneously to the elections of the same Constituent Assembly.²⁵

First, the main and fundamental requirement for writing as well as for amending the constitution is a wide consensus within Parliament among the political parties. The procedure for amending the constitution requires twice as much approval from each parliamentary House as that required for passing ordinary statutes.²⁶ This means that each House must vote twice on the very same bill to revise the constitution. Whereas the first approval follows the ordinary rules, the second prohibits any further modification to the bill and requires higher majorities. As long as a constitutional amendment receives a favorable vote in the second deliberation—two-thirds of the members of each of the two Houses—held at least three months after the first

22. VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 4, 6–8 (2009); MAARTJE DE VISSER, CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE ANALYSIS (2015); VITTORIA BARSOTTI, PAOLO G. CAROZZA, MARTA CARTABIA & ANDREA SIMONCINI, ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT 11–35, 88, 217 (2016).

23. Art. 138 Costituzione [Cost.] (It) *translated in* BARSOTTI ET AL., *supra* note 22, at 270.

24. *See* TANIA GROPPÍ, FEDERALISMO E COSTITUZIONE: LA REVISIONE COSTITUZIONALE NEGLI STATI FEDERALI 26 (2001) (indicating that this is rather normal).

25. John Clarke Adams & Paolo Barile, *The Implementation of the Italian Constitution*, 47 AM. POL. SCI. REV. 61, 61 (1953).

26. Art. 64, 72, 138, Costituzione [Cost.] (It) *translated in* BARSOTTI ET AL., *supra* note 22, at 254, 255, 270.

after the two houses have agreed on the same text, the amendment is promulgated and enters into force without any other requirement.²⁷

Second, the possibility of a referendum is envisaged, but only in the case where a wide parliamentary consensus is not achieved. The constitutional referendum occurs upon request, and only when a simple majority, but not two-thirds of both houses is attained.²⁸ So, in any case, the constitutional amendment must be approved by a higher standard than the simple majority of both houses required for the approval of ordinary legislation. A referendum can be requested within three months following the completion of the parliamentary process by parliamentary minorities (at least one-fifth of the members of each house), the citizens (500,000 voters), or the Regions (five Regional Councils).²⁹ If correctly requested, the constitutional referendum must take place within the subsequent three months.³⁰ The constitutional referendum, either accepting or rejecting the amendment, is valid irrespective of the percentage of the voters that go to the polls.³¹ The same rule applied for the aforementioned referendum of 1946. In part because it took place concurrently with the first democratic elections after the fascist regime, that referendum obtained a very high turnout of eighty-nine percent of the electorate.

The necessity and sufficiency of a wide parliamentary consensus were even clearer between 1948 and 1970, that is, before the legislation required to implement all the kinds of referendums provided by the constitution was enacted.³² This means that all the constitutional amendments before

27. Art. 138, Costituzione [Cost.] (It) *translated in* BARSOTTI ET AL., *supra* note 22, at 270.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Legge 25 maggio 1970 n.352, G.U. June 15, 1970, n.147 (It.).

1970 needed to attain a two-thirds vote in both Houses in the second vote because the other way—absolute majority followed by a requested constitutional referendum—was not available.

The aforementioned procedures have not impeded a certain number of constitutional amendments, aimed at revising some specific provisions of the Constitution. By these procedures, sixteen constitutional amendments have been approved since 1948. The procedures have amended twenty-nine articles (some of them more than once) and suppressed four articles (all of them included in the Fifth Title of the Second Part, on territorial autonomies), while no brand-new article has been added into the text of the constitution.

At the same time, through these procedures the approval of a constitutional amendment aimed at more systematically revising some elements of the constitutional structure has been substantially impossible. The supermajority required for the parliamentary approval of the amendment strengthens the veto power.³³ Additionally, the outcome of the constitutional referendum is a further unknown. Constitutional referendums have been held on three occasions: in 2001 with the approval of a constitutional revision on territorial autonomies proposed by a center-left majority, in 2006 with the repeal of reform on the entire second part of the constitution proposed by the Berlusconi Government and its center-right majority, and in 2016 with the rejection of the reform aiming at changing Parliament's structure proposed by the Renzi Government.³⁴

33. Cf. Carlo Fusaro, *Italy*, in *HOW CONSTITUTIONS CHANGE. A COMPARATIVE STUDY* 211, 211–234 (Dawn Oliver & Carlo Fusaro eds., 2011); Tania Groppi, *Constitutional Revision in Italy: A Marginal Instrument for Constitutional Change*, in *ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA* 203, 208 (Xenophon Contiades ed., 2013).

34. See QUIRINO CAMERLENGO, *LA COSTITUZIONE ITALIANA: COMMENTO ARTICOLO PER ARTICOLO* (Francesco Clementi et al. eds.) (forthcoming 2018).

III. SECOND EXAMPLE: THE RATIFICATION BY ORDINARY LEGISLATION OF THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITY

Consistent with Albert's thesis, the difficulties in achieving constitutional amendments—especially due to the high parliamentary majority required—help explain the recourse to sub-constitutional sources of law for objectives that also would have required a constitutional provision. Arguably, the main changes of the Italian Constitution did not happen through formal constitutional amendments. Deep and informal constitutional changes, *inter alia*, on the sources of law, economic relations, and balance between Parliament and Government, derived indeed from Italy's membership first in the European Community and then in the European Union (EU).

As clearly stated by the Court of Justice of the EU, EU treaties and EU law more generally prevail over national law and even national constitutional norms since the 1960s.³⁵ It is well-known that this same principle has been accepted by most Member States, mainly through the case law of constitutional courts recognizing the primacy of EU law,³⁶ and in some cases keeping the possibility of invoking “counter-limits” where EU law infringed upon the supreme principles of the national legal order.³⁷

35. See the landmark *Costa* judgement (Case 6/64) of the European Court of Justice (“the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.”).

36. See ALFONSO CELOTTO & TANIA GROPPI, *Diritto UE e diritto nazionale: primauté vs. controlimiti*, RIV.IT.DIR.PUBBL.COM 1309 (2004).

37. The expression “counter-limits” (“controlimiti”), although widely used in scholarly debate has been used by the Italian Constitutional Court just once. See Cass., 22 Ottobre 2014, Race. Uff. Corte Cost. 2014, CL, 1 169, 187; Paolo Barile, *Il Cammino Comunitario della Corte*, in GIURISPRUDENZA COSTITUZIONALE 2406 (1973) (commenting on the decision no. 183/1973). On the “controlimiti” doctrine, see MARTA CARTABIA, *PRINCIPI INVIOLABILI E INTEGRAZIONE EUROPEA* 130–313 (1995), and recently, PIETRO FARAGUNA, *AI CONFINI DELLA COSTITUZIONE: PRINCIPI*

Different from what happened in many other EU Member States,³⁸ in Italy the ratification (and the execution) of the international treaties founding the European Communities and all their subsequent reforms from the 1950s until the Treaty of Lisbon did not require any constitutional amendment and took place through ordinary legislation. The effect of national legislation giving way for EU law was obtained, indeed, through constitutional interpretation. Both the legislature, in ratifying founding treaties, and the Constitutional Court, in ruling on the compliance of EU law with constitutional principles, relied on the general clause embedded in Article 11 of the Italian Constitution on openness to the international order and the consequent limitations of sovereignty.³⁹

The choice not to amend the constitution or to include a “European clause,” instead relying on the general clause embedded in Article 11 was originally taken by the legislature based on the argument that the European integration process achieved international peace and justice among nations.⁴⁰ Essentially, it is derived from political reasons; the opposition of the communist and socialist parties made it practically impossible to reach the supermajority then necessary to amend the Constitution.⁴¹

Thus, under the wide umbrella of Article 11, Italy’s

SUPREMI E IDENTITÀ COSTITUZIONALE 72–113 (2015).

38. See Fusaro, *supra* note 33, at 223 (stating that “Italy is the only European nation with a textual Constitution which has never been amended in order to allow the ratification of any European Treaty . . .”). For a wider comparative analysis, see generally National Constitutional Avenues for Further EU Integration, PARL. EUR. DOC. (PE 493.046) 263 (2014) [hereinafter EU Integration Study].

39. Fusaro, *supra* note 33, at 225

40. SERGIO BARTOLE, INTERPRETAZIONI E TRASFORMAZIONI DELLA COSTITUZIONE REPUBBLICANA 276 (2004).

41. AUGUSTO BARBERA, COSTITUZIONE DELLA REPUBBLICA ITALIANA *in* 8 ENCICLOPEDIA DEL DIRITTO: ANNALI 263–358, at 352 (2015); ANTONIO VARSORI, LA CENERENTOLA D’EUROPA? L’ITALIA E L’INTEGRAZIONE EUROPEA DAL 1947 AD OGGI 34 (2010).

participation in the EU has relied essentially on legislative means alone, starting from the authorization of the ratification of the first European treaties,⁴² soon confirmed by the Italian Constitutional Court. Even though it took some time to find a way to combine the dualist approach of the Italian legal order with the Court of Justice's early affirmation of the primacy and direct effect,⁴³ the Italian Constitutional Court never called for constitutional reform in order to participate in the integration process, affirming the possibility of coping with it by interpreting the constitution in force.⁴⁴

The same model was then followed for authorizing the ratification of all further treaty revisions.⁴⁵ A bill was submitted by the Government and approved as quickly and plainly as possible by a large parliamentary majority—which enlarged even more as the parties of the left became gradually more in favor of European integration—and no referendum or prior check of compatibility with the Italian Constitution was required.⁴⁶ This happened again with the Treaty of Lisbon, but this was also because the Italian Parliament had been among the first to ratify the constitutional treaty three years earlier.⁴⁷ This helps to explain why there was no negative vote cast or abstention on the bill authorizing its ratification in the Senate (on July 23, 2008) or the Chamber of Deputies (on July 31, 2008). If no

42. Legge 14 Ottobre 1957, n. 1203, G.U. Dec. 23, 1957, n.317.

43. See Barile, *supra* note 37. See also Federico Sorrentino, *La Costituzione Italiana di Fronte al Processo di Integrazione Europea*, 13 *Quaderni Costituzionali* 71–112, at 73 ff. (1993); Marta Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union*, in *THE EUROPEAN COURT AND NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT*, 133–46 (Ann-Marie Slaughter et al. eds., 1998).

44. BARSOTTI ET AL., *supra* note 22, at 205.

45. *Id.* at 208.

46. *Id.* at 206.

47. Nicola Lupo & Giovanni Piccirilli, *Conclusion to THE ITALIAN PARLIAMENT IN THE EUROPEAN UNION* 317, 326 (Lupo-Piccirilli ed. 2017).

constitutional amendment was needed to ratify the constitutional treaty, the same held for a treaty like Lisbon, which, at least formally intended to downgrade the constitutional impact (as well as some constitutional rhetoric) of its immediate predecessor.

In more general terms, this example seems to confirm that the recourse to quasi-constitutional amendments might be driven by the difficulty of formal amendment procedures. However, this difficulty should be measured not just in a contingent way at a certain moment in constitutional history, but as a permanent feature of legal order. Otherwise, it would be hardly understandable why Italy, even with extremely high consensus on EU membership and its transformation into a federal state,⁴⁸ has never ratified a European treaty through a constitutional amendment.

IV. THE ITALIAN DEBATE ON “TACIT CONSTITUTIONAL MODIFICATIONS” AND THE “NON-TRIVIAL RISKS” OF “QUASI-CONSTITUTIONAL AMENDMENTS”

The two examples from the Italian constitutional experience above confirm that the new proposed classification of quasi-constitutional amendments is very useful and clarifying.

Even the current situation—subsequent to the rejection of the constitutional amendment aimed at reforming the Italian symmetrical bicameralism by the constitutional referendum held on December 4, 2016—could pave the way

48. EU Integration Study, *supra* note 38, at 157 (discussing an advisory referendum held in 1989 that showed the high level of consensus around the European integration process. Through it, Italian citizens were asked—on the same day in which they were called to elect the European Parliament—whether they wanted to transform the European Communities into a Union, with a Government responsible before the European Parliament, and to confer to the European Parliament a mandate to draft a project of a European Constitution. The result confirmed the wide pro-European orientation of the Italian public opinion at that time, as 88.1 percent of the voters gave a positive reply (with the high turnout of 81 percent)).

to further quasi-constitutional amendments.⁴⁹ The rejection clearly showed the great difficulty of any constitutional reform of the current Italian Parliament: in the final referendum, veto powers could easily ally with each other and defeat any attempt of constitutional reform, especially when it deals with a controversial issue such as the design of a Senate with different powers than the lower house. After such a defeat and the unresolved debate on a constitutional reform of the symmetrical bicameralism that has lasted since the 1980s, with all the main political parties recognizing the need of a series of institutional changes, constitutional innovation processes must follow in ways other than the procedures for constitutional amendments in Article 138 at least in the short-term and probably also in the medium-term.⁵⁰

It is best to conclude by summarizing an academic debate that developed in Italy in the 1950s to confirm not only that the phenomena that the category of quasi-constitutional

49. In classifying this attempted constitutional reform as a “constitutional amendment,” I am dissenting from Albert’s view that it is a case of “constitutional dismemberment.” See Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT’L L. 3 (forthcoming 2018). For a discussion that shares Albert’s opinion, see Lorenza Violini & Antonia Baraggia, *The Italian Constitutional Challenge: An Overview of the Upcoming Referendum*, INT’L J. CONST. L. BLOG (Dec. 2, 2016), <http://www.icconnectblog.com/2016/12/the-italian-constitutional-challenge-an-overview-of-the-upcoming-referendum>. In fact, to use Albert’s definitions, it would not have altered “the identity, the fundamental values or the architecture of the constitution,” but could be assessed—at least according to its promoters and supporters—as “an arrangement made to better achieve the purpose of the existing constitution.” Albert, *supra*. Although it would have modified a high number of constitutional provisions (most of them just to coordinate them with the reform of symmetrical bicameralism), it would have left untouched the whole first part of the Constitution (on the rights and duties of the citizens) and would not have directly touched upon the relationships between Government and Parliament.

50. See generally Quaderno 2015–2016 IL FILANGIERI 1–331 (2017) (which is a special issue on *Il Parlamento dopo il Referendum Costituzionale*); Giuditta Brunelli, *Lo “Spazio” dei Regolamenti Parlamentari nelle Riforme Costituzionale* (2016), in OSSERVATORIO SULLE FONTI 11–12 (2017), www.osservatoriosullefonti.it (citing SILVANO TOSI, MODIFICAZIONI TACITE DELLA COSTITUZIONE 39–40, 94 (1959).); Nicola Lupo, *On the Failed Reform of the Italian Senate in Constitutional Issues and Challenges in Hungary and Italy* (forthcoming).

amendment aims at describing are indeed far from new as they were already taking place then, but also that scholars have already reflected somewhat on the features of these phenomena.

In Italy the debate focused on a slightly different category called “tacit constitutional modifications” (“modificazioni tacite della Costituzione”).⁵¹ The category, introduced by Pierandrei, was defined as including “acts or facts able to in some way vary the function of constitutional bodies, although leaving formally unaltered the norms that rule them.”⁵² However, Tosi then profitably applied this category to the so-called parliamentary law (the parliamentary rules and procedures already discussed), but also sharply criticized its features.⁵³ The main criticism focused on the positivist argument that in a system with a rigid constitution it would not be proper to speak of tacit modification: these phenomena, he argued, are either outcomes of interpretative evolution of the constitution, and therefore legal, or else they are violations of the constitution, which are always illegal.⁵⁴

Some of these same scholars’ discussions also concerned the possibility of applying the category to flexible constitutions, with obvious reference to the U.K. legal order, admitted by Pierandrei and normally excluded by Tosi.⁵⁵ Tosi, however, recognized tacit modifications to a certain extent, especially in the relations between Government and Parliament as they require some dynamic elements so long as they do not alter the constitution’s guarantees and the

51. FRANCO PIERANDREI, *La Corte Costituzionale e le ‘Modificazioni Tacite’ della Costituzione*, in 4 SCRITTI GIURIDICI IN ONORE DI A. SCIALOJA, 315 (1953).

52. FRANCO PIERANDREI, *La Corte Costituzionale e le ‘Modificazioni Tacite’ della Costituzione*, in 4 SCRITTI GIURIDICI IN ONORE DI A. SCIALOJA, 315 (1953).

53. TOSI, *supra* note 50, at 5

54. *Id.* at 5 (adding that theft, even when reiterated under the sleepy guardianship of the policemen, is something different from the repeal of the property right).

55. PIERANDREI, *supra* note 51, at 332; TOSI, *supra* note 50, at 12.

equilibrium.⁵⁶

This debate, often referenced in the following decades,⁵⁷ was also explicitly linked to the one regarding the use of other concepts that similarly aimed at considering elements of political dynamics arising outside of the constitutional text, such as the elasticity of the constitution,⁵⁸ and, most of all, the constitution “in a material sense” (sometimes called the “material constitution”).⁵⁹ That category, proposed by Mortati during the fascist era and then again with the constitution (to which he significantly contributed as a member of the Constituent Assembly), has been by far the most successful, not only among legal scholars, but also among historians and political scientists, and even in public debate, although it is extremely controversial.⁶⁰

CONCLUSION

In synthesis, the Italian academic debate on these very similar concepts testifies to the emergence of what can probably be considered the two main “non-trivial risks” of quasi-constitutional amendments. As Albert defines them: first, to create “a mismatch between constitutional design and political practice that constitutional actors can in turn

56. TOSI, *supra* note 50, at 38.

57. See, e.g., CLAUDIO DE CESARE, *Le Modificazioni Tacite della Costituzione Nell'attuale Sistema Parlamentare Italiano*, in 1 RASSEGNA PARLAMENTARE 121–50 (2010); RENATO IBRIDO, L'INTERPRETAZIONE DEL DIRITTO PARLAMENTARE: POLITICA E DIRITTO NEL “PROCESSO” DI RISOLUZIONE DEI CASI REGOLAMENTARI 127 (2015). More recently, see generally Brunelli, *supra* note 50.

58. Luigi Rossi, *La “Elasticità” dello Statuto Italiano*, in 1 SCRITTI GIURIDICI IN ONORE DI SANTI ROMANO 70 (1940). For a more recent discussion, see GIULIANO AMATO, L'ELASTICITÀ DELLE COSTITUZIONI RIGIDE, 1–2 (2016), http://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2016/05/Amato_Nomos1-2016.pdf.

59. COSTANTINO MORTATI, *LA COSTITUZIONE IN SENSO MATERIALE* (1998).

60. See Gustavo Zagrebelsky, *introduction to LA COSTITUZIONE IN SENSO MATERIALE* *supra* note 59 (recalling the applause with which an assembly of Italian constitutional law scholars in 1994, at the beginning of the Berlusconi years, reacted to the proposal by Paladin to abandon *in toto* the concept of the constitution in a material sense).

exploit for political expedient purposes” and secondly, to “undermine[] the constitution itself and the very purpose of codification.”⁶¹

These risks are why this category, as well as the similar notion of the “material constitution,” should be handled with extreme care, especially by constitutional law scholars. It is clear that the use of similar categories risks encouraging politics and politicians to diminish the role and the weight of the constitution, or at least of the constitutional text, which would be in contrast with what is often seen as one of the methodological guidelines of constitutional law scholarship⁶²: interpreting the constitution *magis ut valeat*, that is, in a way that maximizes its relevance and its effectiveness.

61. Albert, *supra* note 1, at 742. The first “nontrivial risk” identified by Albert seems indeed slightly less dangerous and consists of blurring “the line separating the constitutional from the non-constitutional.” *Id.* at 742.

62. VEZIO CRISAFULLI, 11 LA COSTITUZIONE E LE SUE DISPOSIZIONI DI PRINCIPIO (1952); GUSTAVO ZAGREBELSKY, 5 LA VIRTÙ DEL DUBBIO (2007).