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# The "unwritten" Constitution: reflections on the Italian experience

# *A Constituição "não escrita": reflexões sobre a experiência italiana*

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**Abstract**: The aim of the paper is to look at Italy's invisible Constitution to identify the drivers of informal transformations and create a snapshot of the Italian case in order to make a comparative contribution to the debate. I argue that, in addition to the traditional forces of informal constitutional change – namely constitutional conventions, the role of the judiciary in interpreting the constitution and the role of relevant institutional actors – the Italian case must be seen in the light of the specific constitutional history of Italy, especially two fundamental "moments" of this history: the specific political context in which the Constitution was drafted in 1947 and Italy's participation in the EU integration process. Only by looking at informal constitutional change in the broader context of these historical and political evolutions can we understand the key features of the "Italy's unwritten Constitution".

**Keywords**: Italian Constitution; unwritten constitution; informal constitutional change; EU integration process; Constitutional Court.

**Resumo**: O objetivo do artigo é olhar para a Constituição invisível da Itália para identificar os motores das transformações informais e criar uma fotografia do caso italiano a fim de fazer uma contribuição comparativa para o debate. Defendo que, além das forças tradicionais de mudança constitucional informal – nomeadamente convenções constitucionais, o papel do Judiciário na interpretação da Constituição e o papel dos atores institucionais relevantes – o caso italiano deve ser visto à luz da história constitucional específica da Itália, especialmente dois "momentos" fundamentais desta história: o contexto político específico em que a Constituição foi redigida em 1947 e a participação da Itália no processo de integração na União Europeia. Somente olhando para a mudança constitucional

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informal no contexto mais amplo dessas evoluções históricas e políticas é possível compreender as características-chave da "Constituição não escrita da Itália".

**Palavras-chave**: Constituição italiana. Constituição não escrita. Mudança constitucional informal. Processo de integração da União Europeia. Corte Constitucional.



## 1 Introduction

Constitutions contain a fundamental structural tension: on one side, they aspire to eternity,[1] to stability over time or, to borrow from German, *Ewigkeit*; on the other side, they continuously face contingencies and pressure from societal and historical developments.

Just like the life of a person, the history of modern constitutions is characterized by the succession of a myriad of events - sometimes bigger, sometimes smaller, sometimes practically imperceptible - able to change the fundamental nature of a constitution, even with no changes to the formal text. "Legal change is often the product of reason, but there are occasions where fate or folly forces a sudden change".[2]

In other words, modern constitutions are built on a constitutive tension, insomuch they aspire to establish "a fixed and immutable order" and at the same time they are influenced by the ongoing evolution of history, society and economics. The fundamental issue of a constitution over time is the relationship between change and it keeping its identity.[3]

Modern constitutions respond to this tension by adopting a formal procedural rule for constitutional amendment. Formal revision meets the need to maintain a certain degree of flexibility such that the multiple changes that may happen can be dealt with. Among the most relevant changes, Lutz has identified: "(1) changes in the environment within which the political system operates (including economics, technology, foreign relations, demographics, etc.); (2) changes in the value system distributed across the population; (3) unwanted or unexpected institutional effects;

1 LUCIANI, Massimo, Dottrina del moto delle Costituzioni e vicende della Costituzione Repubblicana. *Rivista AIC* n. 1/2013, p. 1-18.

2 MAGLIOCCA, Gerard N. Constitutional Change. In: Tushnet, Mark; Graber, Mark A.; Levinson, Sanford (eds.). *The Oxford Handbook of the U.S. Constitution*. Oxford, New York: Oxford University Press, 2015. p. 909-920.

3 LONGO, Andrea. *Tempo, interpretazione, costituzione*. Premesse storiche vol. I. Editoriale Scientifica, Napoli, 2013, p. 144.

and (4) the cumulative effect of decisions made by the legislature, executive, and judiciary".[4]

In many cases, though, the formal procedure proves insufficient or incapable of responding to extralegal or political forces that come to bear on constitutional order. Consequently, several changes – perhaps even most changes, especially those linked to technological innovation or an extraordinary and unpredictable event – happen outside the formal boundaries of amendment rules.

Legal scholars across different legal systems have used a variety of terms to define this phenomenon: informal constitutional amendment, material constitution, unwritten constitutional amendment, living constitution, invisible constitution and constitutional mutation. From a comparative and historical perspective, it can be argued the phenomenon of informal constitutional changes is something inherent in the very nature of a constitution. As Giovanni Bognetti said, "explored realistically in the light of its concrete historical development, the law of a system looks like a giant glacier in constant movement, perhaps slow, perhaps swift, depending on the moment, but not simply conforming to pre-established rules of development".[5] Hence, comparative constitutional law also needs to be studied in this light, giving heed to the inevitable influence transformations – material or formal – in the form of the state have on the actual way in which constitutional powers are organized and fundamental rights are protected.

Nevertheless, the constitutional culture, the constitutional history and the political environment may have several, even profound, variations in the phenomenon of informal constitutional change, especially when examining what "drives" such change.

The German doctrine has coined the concept of "constitutional mutation",[6] highlighting the constitutional changes prompted by extraconstitutional sources outside the boundaries of the written constitution and with regard to the US legal system, Akhil Amar has developed a theory of the "unwritten constitution".[7]

Although there is no doubt Italy did not witness the same deep and radical transformation that occurred, for example, in the US,[8] the Italian system has been

4 LUTZ, Donald S. Toward a Theory of Constitutional Amendment. *American Political Science Review*, 88, p. 355-370, 1994; see also PREUSS, Ulrich K. The Implications of Eternity Clauses: The German Experience. *Israel Law Review*, Vol. 44, Issue 3, 429 – 448, 2011.

5 BOGNETTI, Giovanni. *Introduzione al Diritto Pubblico comparato*. Padova, Cedam, 1998, p. 45.

6 JELLINEK, Georg. *Verfassungsänderung und Verfassungswandlung. Eine staatsrechtliche-politische Abhandlung*. Berlin, Haring, 1906; DAU-LIN, Hsü. *Die Verfassungswandlung*. Berlin, De Gruyter, 1932; IPSEN, Hans Peter. *Europäisches Gemeinschaftsrecht*. Tübingen, Mohr Siebeck Verlag, 1972.

7 AMAR, Akhil Reed. *America's Unwritten Constitution.* The Precedents and Principles We Live By. New York, Basic Books, 2012.

8 As argued by BARTOLE, Sergio. *Interpretazioni e trasformazione della Costituzione repubblicana*. Bologna, Il Mulino, 2004, p. 408. According to Bartole the Italian Constitution has been changed by the interpretative

affected by several informal changes that have "reshaped" or in some cases "integrated" the constitutional text.

The aim of the paper is to look at Italy's invisible Constitution to identified the drivers of informal transformations and create a snapshot of the Italian case in order to make a comparative contribution to the debate.

I argue that, in addition to the traditional forces of informal constitutional change – namely constitutional conventions, the role of the judiciary in interpreting the constitution and the role of relevant institutional actors – the Italian case must be seen in the light of the specific constitutional history of Italy, especially two fundamental "moments" of this history: the specific political context in which the Constitution was drafted in 1947 and Italy's participation in the EU integration process.

Only by looking at informal constitutional change in the broader context of these historical and political evolutions can we understand the key features of the "Italy's unwritten Constitution".

## 2 Mapping the universe of informal constitutional change in the Italian legal system

In a famous book, "Interpretazioni e trasformazioni della Costituzione repubblicana",[9] Sergio Bartole argued the present constitution is different from the constitution of the past as it has evolved in the light of societal change, albeit not always according to the formal procedure for constitutional amendment established by art. 138 Const.

Similarly, Carlo Fusaro argued that "whatever definition we give to the notion of 'constitution', the Italian Constitution has changed greatly since it entered into force: the constitution as a textual entrenched document has been amended, the constitution as a broader set of constitutional arrangements has been changed, the living constitution [...] has been transformed".[10]

With regard to the formal amendment, the Italian constitution has been formally amended 16 times since 1948. However, the main driver of constitutional change has been that of informal constitutional changes. As a result of these formal and informal constitutional change, it has been argued that "the Italian Constitution [...] is not the Constitution of 1948".[11]

activity of the most relevant actors, but it did not experience the "epochal transformations" that have occurred within the American experience.

9 BARTOLE, Sergio. *Interpretazioni e trasformazione della Costituzione repubblicana*. Bologna, Il Mulino, 2004, p. 408.

10 FUSARO, Carlo. Italy. In: OLIVER, Dawn; FUSARO Carlo (eds.). *How Constitutions Change*. Oxford and Portland, Hart Publishing, 2011, p. 231.

11 FUSARO, Carlo. Italy. In: OLIVER, Dawn; FUSARO Carlo (eds.). *How Constitutions Change*. Oxford and Portland, Hart Publishing, 2011, p. 231.

What are the main forces behind such informal constitutional changes? And what changes have been made informally?

Looking at the history of Italian constitutional change, it is clear that it shares some general features common to informal change in other systems, but the specific historical, societal and institutional features of Italy also mean there are a number of quite specific elements.

Understanding informal constitutional changes in Italy necessitates an examination of the origin of the constitutional text. The Italian Constitution is far from being a harmonious compromise and, despite the common intent of all the political forces involved in its drafting, it was born around deep ideological fractures between the Communist party (PCI), the Socialist Party (PSIUP) on one side and the Christian Democrats (DC), the Liberal Party (PLI) and other political forces on the other. It was these groups that had to conceive a constitution that would – at least in theory – govern Italy in antithetical terms. In other words, from the very beginning, the Italian constitution was marked by a sort of wound: the wound of not being able to be conceived and perceived by society as a whole as the bearer of an overall design or model of state, with definitive value and an expectation of firm stability. It is towards this original sense of precariousness that one should look to detach the seeds of informal constitutional change in Italy.

Given this broader context, informal constitutional changes have occurred in Italy in four main ways.

The first path of informal constitutional change developed within the "blanket" pages of the Italian Constitution, on the basis of what the legal scholars have defined as "the elasticity of the constitution".[12]

Indeed, the constituent fathers left to other sources the power to regulate constitutional matters: the standing orders of the chambers or the electoral laws are the main drivers of constitutional change outside the formal constitutional amendment procedure.

The second path for informal constitutional change is constitutional conventions, adopted by institutional actors. This holds true especially for the form of government.

The third fundamental driver of informal constitutional change has been and it still is the jurisprudence of the Constitutional Court. Since the very beginning the case law of the Constitutional Court has fostered constitutional change through its interpretation of the written text - sometimes even beyond it – in the fields of rights protection and the relationship between the State and the Regions.

[12] On the concept of "elasticity" see AMATO, Giuliano. L'elasticità delle Costituzioni rigide. *Nomos*, n.1/2016, available at: https://www.nomos-leattualitaneldiritto.it/nomos/giuliano-amato-lelasticita-delle-costituzioni-rigide/.

Last but not least, the Italian Constitution has seen significant informal changes because of the EU integration process. This relationship goes much further than the influence international law has on the domestic sphere. Indeed, the EU legal order represents a new constitutional legal framework – despite not being technically a federal state – which is strictly intertwined with national constitutional order, inevitably influencing the national constitutional framework and even prompting informal constitutional change. In other words, Italy has transformed itself from an independent sovereign state into a member state of a quasi-federation – a huge event – without the need for a formal constitutional review.

I argue the changes caused by the EU integration process are the most pervasive and relevant in the Italian system, since this process prompted both direct constitutional change and indirect change through other traditional drivers of constitutional change, influencing Italian Constitutional Court case law, political conventions and even sources of law (like the standing orders of the parliamentary chambers).

The EU legal framework acts like a "shadow" constitution, whose presence sheds new light on national constitutional rules, fostering informal, but at the same time extremely important, constitutional changes. This has become even more relevant following the introduction of the European Charter of Fundamental Rights, the EU Bill of Rights, the interpretation of which might influence and even change the fundamental balance of rights at national level, and increase the influence of EU law beyond the explicit sphere of European competence, challenging, as will be seen, the core idea of constitutional identity.

## 3 Constitutional change in the light of the unique genesis of the Italian Constitution

As in many other constitutional systems, in Italy one of the drivers of informal constitutional change is the behavior of influential institutional actors. However, taking into account the unique genesis of the Italian constitution is a fundamental part of assessing most of these informal changes.

Four months after the entry into force of the Constitution, the Christian Democrats and their allies gained the majority of parliamentary seats and from that moment onwards, it was clear that their goal was to preserve the democratic model defined by the constitution, no matter what.

It is in this context that we have to see the so-called *conventio ad excludendum*, according to which the Communist party was prevented from being part of a government coalition until the fall of the Berlin wall. While in other systems antisystem parties are banned by a constitutional provision (e.g. in Germany with art. 49 GG), in Italy

this happened through a convention agreed on by the major moderate forces in the political spectrum. The idea that it was necessary to protect Italian democracy in the midst of a heavily divided society and politics not only led to the exclusion of the Communists from the government for 60 years, but also determined a "re-reading" of some of the most important aspects of the Constitution. It is in this particular development of the Italian system that some of the first informal constitutional changes can be traced.

Indeed, the Christian Democrats "read" the constitution as authorizing the government and parliament to postpone the adoption of some of the key institutions established by the constitutional text: the Constitutional Court was only formed in 1956; the Superior Council of the Judiciary, only in 1958; the Regions (i.e. the regional governments), only in 1970; and the law regulating the function of the Government only in 1988. In the absence of these fundamental institutions, "the institutional system designed by the Constitution was not effective, due to its lacking several checks on the political majorities", a situation that can be defined "as an attempt to modify the Constitution by making it an empty shell".[13]

As has been argued "this long process of implementation of the 1948 provisions of the Italian constitution has indirectly given rise to the continuous transformation of the *de facto* Constitution, bound to change significantly as each major step has been taken towards its application.[14]

In such a context, Italian democracy was a "paralyzed" democracy that lacked a means for a substantial change in government. The small parties that helped government coalitions to remain in power gained undue influence, ultimately leading to an enormous degree of instability in these governing coalitions.

Looking beyond these original features concerning the implementation of the Italian Constitution, one can find other fundamental events, outside the boundaries of the written text, that contributed to the development of the Italian Constitution.

The electoral laws used to elect parliament have played a prominent role. Unlike other Western democracies that have enjoyed largely unchanged rules over quite extensive periods, Italy has a sort of "hyperkinetic" attitude towards changing its electoral law, especially from the early 1990s. In particular, in order to foster a "majoritarian turn", Law no. 270/2005 introduced a kind of direct election of the President of the Council (the Italian prime minister) in so doing potentially transforming the nature of the parliamentary form of government designed by the constituent fathers.

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[13] GROPPI Tania. Constitutional revision in Italy. A marginal instrument for constitutional change. In: CONTIADES, Xenophon (ed.). *Enginnering Constitutional Change*, Routledge, 2013, p. 281.

[14] FUSARO, Carlo. Italy. In: OLIVER, Dawn; FUSARO Carlo (eds.). *How Constitutions Change*. Oxford and Portland, Hart Publishing, 2011, p. 221.

Other fundamental sources with a transformative effect on the form of government have been the standing orders to the chambers regulating fundamental constitutional matters, such as the relationship between parliament and government. Italian legal scholars have assessed the transformative impact of standing orders on the Italian form of government.[15] This approach has been used to introduce the power of the government to ask for a vote of confidence for each chamber on any issue of relevance for the cabinet and also the possibility to issue a vote of no-confidence against a single cabinet minister (while the Constitution provides for a vote of no-confidence for the cabinet as a whole). This latter provision has been also recognized by the Italian Constitutional Court. In decision no. 7/1996, the Court affirmed the option of an individual vote of no-confidence, despite the wording of art. 94 of the Constitution. This represents an interesting case of an informal constitutional change which has been affirmed by constitutional convention, ratified by parliamentary standing orders and ultimately confirmed by the Constitutional Court.

## 4 The role of the constitutional court (1): constitutional change through constitutional interpretation

One of the most influential actors in "re-interpreting" specific Italian Constitutional provisions has been the Constitutional Court. This is not unlike the US, where "the most clear-cut modification of constitutional rules outside Article V has been worked by the courts in the course of constitutional litigation".[16] In Italy, the Constitutional Court has also made significant changes through its interpretation of constitutional provisions, although such changes did not occur in the period immediately following the adoption of the Constitution. Initially, the Court was more focused on purging the legislation approved before 1948 that was inconsistent with the new constitutional regime. Only from the 1970s did the Court begin to review more recent legislation, looking to adapt the Italian constitutional system to the new needs of a changing society. Through this, the Court came to play an active role in the development of the legal system, even beyond the original design of the constituent fathers. This new role of the Court has been interpreted both substantially and procedurally.

With regard to the substantial impact of the Court, mention must be made of the fundamental decision recognizing that the rights protected by art. 2 Const. are not only those entrenched in the constitutional text, but can be interpreted as a way to identify new rights that emerge in society. Such an interpretation of the catalogue

[15] See TOSI, Silvano. *Modificazione tacite della Costituzione attraverso il diritto parlamentare*. Milano. Giuffrè, 1959.

[16] KAY, Richard. Formal and Informal Amendment of the United States Constitution. *The American Journal of Comparative Law*, vol 66, p. 245-268, 2018.

of rights - called "open interpretation" - has paved the way for the recognition of the right to housing, right to sexual identity, right to privacy and so on.[17] In particular, as Bartole argues, through the jurisprudence on the right to housing the Constitutional Court definitively endorsed the theory of the open interpretation of art. 2 Const., despite legal scholars still being divided on this issue.[18]

As Justice Saja stated, the Court decided to recognize the open character of art. 2 in the light of the fact that constitutional jurisprudence, in a historical and evolutive interpretation, would be able to identify other, new inviolable rights.[19]

Moreover the Court has recognized the existence of a minimum core of fundamental rights, strictly interconnected with the principle of human dignity (despite the fact the latter is not explicitly mentioned in the Italian constitution) and it has adopted a quite interventionist approach in the case of social rights. It has also identified "implicit" limits to the constitutional revision, even beyond the written text of art. 139 Const.[20] In this sense, the Italian constitution has proved to be an elastic text, that can be modelled by the continuous interpretation of judges.

Within the field of the economic constitution, as Bognetti argued, the Court has substantially accepted the interventionist model, with a predominant role of State-owned companies in crucial industrial sectors, even though such a model was not the one conceived by the constituent fathers – a liberal market model with moderate State intervention.[21] The advent of the EU integration process – as I will argue in section 5 – was fundamental in re-shaping the Court's jurisprudence in the light of a more market-oriented approach, despite its continuing mitigation by the principle of "social utility" enshrined in art. 41 Const.

The role of the Constitutional Court is also pivotal in the definition of the relationship between the State and the Regions. This is not the place to summarize the complex evolution of the Italian model of center – periphery relations, but it does provide an interesting example of the interrelation between constitutional amendments, interpretation and informal constitutional change.

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17 IC Decision no. 561/1987.

18 Bin argued for example that the recognition of the right to housing under art. 2 was just a mean in order to foster an evolutive approach of the law under scrutiny: BIN, Roberto. Giudizio in astratto e delega di bilanciamento in concreto. *Giurisprudenza Costituzionale*, 1991, p. 3574.

19 SAJA, Francesco. La giustizia costituzionale nel 1987. *Il Foro Italiano*, Vol. 111, part. V, p. 125-138, 1988.

20 In a famous decision, n. 1146/1988 the ICC affirmed that the Italian Constitution contains a set of supreme principles which cannot be subverted or modified in their essential content even by a constitutional law revising the text of the Constitution. [...] Such are those principles which the Constitution itself established as absolute limits to the power of amending the Constitution, such as the republican form of the State (art. 139 Const.), as well as those principles which albeit not listed among those which cannot be revised, do still pertain to the very essence of the supreme values on which the Constitution is based".

21 BOGNETTI, Giovanni. Per una storia autentica e integrale della Costituzione repubblicana e della sua evoluzione (appunti a margine di un libro di S. Bartole). *Associazione dei Costituzionalisti Italiani*, p. 1- 94, available at: https://www.associazionedeicostituzionalisti.it/old_sites/sito_AIC_20032010/materiali/speciali/interpretazioni_costituzione/interpretazioni_trasformazioni_bognetti.pdf.

The regional model and the legislative powers of the State and the Regions are enshrined in art. 117 of the Italian Constitution. However, the original model was substantially modified through ordinary legislation, the so-called "Leggi Bassanini". Such changes were in the end ratified by the constitutional amendment of Title V of the Constitution in 2001. But soon after the constitutional amendment, which modified the text of several articles, and in particular art 117 Const., the reform was almost entirely "re-interpreted" by the Constitutional Court. In a landmark decision, no. 303/2003, the Court ruled that in some cases, in the name of national interests, the State can derogate the division of legislative competences, exercising those reserved to the Regions by art. 117, upon an agreement with the Regions in the name of another unwritten constitutional principle: the principle of loyal cooperation. In the same vein, the Court applied the principle of subsidiarity, which is a principle governing administrative competences, to legislative competences, thus legitimizing the intervention of parliament in certain areas reserved to the Regions.

The case of the interpretation of the amended constitution clearly shows what Pinelli defined as the "dialectical relation between constitutional interpretation and constitutional amendment procedures, to the extent that their effects consist of achieving shifting balances between stability and change. While courts are empowered to afford interpretations of the text as far as amendments on the matter are not enacted, the meaning of these might in turn be shaped by judicial decisions over time. Such process should be presumed as open-ended, since constitutions fail to designate a depositary of the final word".[22] However, looking at the Italian case, it can be argued that "Courts that are the guardians of the constitution clearly do not have unlimited freedom to determine the content of constitutional values at will. In practice, they are constrained by the 'political formula' that is most widely accepted by public opinion at a given time in history".[23]

## 4.1 The role of the constitutional court (2): constitutional change through the procedural way

The role of the Constitutional Court in fostering informal constitutional change has occurred not only through the traditional and, I would say, "physiological" way of constitutional interpretation, but also through the use of procedural tools, certain legal reasoning and even inventing new procedural rules.

[22] PINELLI, Cesare. Variazioni su stabilità e mutamento nel diritto costituzionale. *Rivista AIC*, n. 1, p- 1-11, 2014; HASEBE, Yasuo; PINELLI, Cesare. Constitutions. In: TUSHNET, Mark; FLEINER, Thomas; SAUNDERS, Cheryl (eds.). *Routledge Handbook of Constitutional Law, New York*. Routledge, 2013, p. 9-19.

[23] BOGNETTI, Giovanni, *Dividing Powers. A theory of the separation of powers*. Padova, Wolters Kluwer-Cedam, 2017, p. 59.

The most famous drivers of the transformation of the Italian constitution through the judiciary are the so-called "*additive decisions*". Such decisions have been used by the Court to declare the unconstitutionality of legislative provisions because they did not provide certain content that would have been required by constitutional interpretation. In so doing, the Constitutional Court "suggests" that the legislator fills the gap of constitutionality and it "manages to insert new norms into the legal system that cannot be found in any statutory text and transforms itself – or so it would appear – into a creator of legal rules, thereby playing a role that in the Italian system belongs almost exclusively to Parliament".[24]

It has been argued that through such manipulative decisions, the Constitutional Court has become one of the actors in its "silent transformation and accommodation" through informal constitutional changes.

Indeed, these additive judgments may represent an instrument the Constitutional Court can use to reveal the invisible meaning of the Constitution.[25]

The Constitutional Court has developed other procedural rules that have had a transformative effect on the constitution. A case in point is the recent case on assisted suicide, in which there was interaction between substantial and procedural issues, in a decision with a major transformative impact. On a substantial level, the Constitutional Court argued that, in certain circumstances, assisted suicide – which is prohibited under the Italian Criminal Code – may be admitted, since it helps the patient excise his or her right to reject medical treatment – a constitutional right protected by art. 32 Const. Through this interpretation the Court is expanding the meaning of art. 32 Const to cover certain cases of assisted suicide and even crossing "the border between refusal of treatment and euthanasia that the legislature was unwilling to cross".[26]

This decision is also interesting from a procedural point of view. Following such reasoning, one might have expected a declaration of the unconstitutionality of the criminal provision at stake, where it does not provide exemption to the criminal prosecution of assisted suicide pointed out by the Court. Surprisingly, however, the Court crossed the border of the procedural rules of the constitutional process, introducing a new type of decision. Never before had the Court issued a decision of deferment of its judgment of unconstitutionality after the intervention of the

[24] SPIGNO, Irene. "Additive Judgments": A Way to Make the Invisible Content of the Italian Constitution Visible. In: DIXON, Rosalind; STONE Adrienne (eds). *The Invisible Constitution in Comparative Perspective*. Cambridge: Cambridge University Press, 2018, p. 457- 481.

[25] SPIGNO, Irene. "Additive Judgments": A Way to Make the Invisible Content of the Italian Constitution Visible. In: DIXON, Rosalind; STONE Adrienne (eds.). *The Invisible Constitution in Comparative Perspective*. Cambridge: Cambridge University Press, 2018, p. 457- 481.

[26] PARIS, Davide. I-CONnect Symposium: The Italian Constitutional Court on Assisted Suicide—The Italian Constitutional Court and the Recent Decision on Assisted Suicide: The Guardian of the Constitution or the "Guardian" of the Parliament? *Int'l J. Const. L. Blog*, December 7, 2018.

legislature, upon which the Court itself passed a duty to enact a new regime for assisted suicide by a fixed deadline. Usually, in similar cases, the Court issues a decision of inadmissibility of the question of constitutionality, sending the legislator a kind of "warning" to correct the constitutional violation. However, here, the Constitutional Court considered the case of assisted suicide as somehow a unique, specific case. Declaring the inadmissibility of the question and invoking the intervention of the legislator would have had the effect to keep in place (and therefore applicable in new concrete cases) the criminalization of assisted suicide – which is, as it is, considered unconstitutional – for an indefinite period of time, waiting for the possible intervention of the legislator or, in case of parliamentary inertia, for a new case being brought before the Court. In front of this possible scenario of uncertainty, the Court decided to place a more stringent constraint on parliament, giving it a fixed deadline to comply with the Court's assessment.[27] This is a new technique, introduced by the Constitutional Court, which goes much further than the limit of art. 136 Const. which affirms that "When the court declares a law or an act with force of law unconstitutional, the norm ceases to have effect from the day following the publication of the decision".

In the face of this transformative use of the constitutional adjudication procedure, one can see a radical transformation of the constitutional position of the Court and a new meaning of the constitutional provision governing the judicial review of legislation.

## 5 The role of the EU integration

As already argued, the most powerful instrument of informal constitutional change in Italy has occurred due to its membership of the European Union, which involved profound changes to the form of state and government in Italy. The substantial constitutional modification of the content of the national constitutions determined by the European integration process has been called by Hans Peter Ipsen "constitutional mutation".[28] This concept, coined with regard to the German constitutional order may be used also to describe the impact of the EU integration process within the Italian Constitutional system. Indeed, since the first phase of the EU integration, the competence to set the rules, in several field of public policy – especially the economy – shifted from national powers to European Institutions, whose decisions prevail over national decisions. Moreover, the Treaties "define the respective rights

[27] BARAGGIA, Antonia. Introduction to I-CONnect Symposium–The Italian Constitutional Court on Assisted Suicide. *Int'l J. Const. L. Blog,* December 5, 2018.

[28] IPSEN Hans Peter. Als Bundesstaat in der Gemeinschaft. In: HALLSTEIN, Walter; CAEMMERER, Ernst von; SCHLOCHAUER, Hans Ju□rgen; STEINDORF, Ernst (eds.). *Probleme des europa□ischen Rechts. Festschrift für Walter Hallstein zu seinem 65 Geburtstag.* Frankfurt, Vittorio Klostermann, 1966, p. 248.

and duties of the citizens, of the Member States and of the European Institutions, representing a new kind of "social contract".[29]

As noticed by Pernice, constitutional law in Member States cannot, consequently, be read from the text of the Constitution alone anymore, "it must be construed in its "context", formed by the constitution and legislation of the EC or, in future, the EU. Both legal orders, although autonomous regarding their origin, legitimacy and law-making procedures, are interlaced, interrelated and complementary, sometimes even intertwined, both, institutionally and in substance".[30]

Looking at this interrelation, one of the most interesting phenomena when it comes to constitutional change is the effect of the integration process on the Italian economic constitution. There is little doubt about the transformative effect of the new economic order on the Italian "economic constitution". However there is little agreement on the effect of such transformation, although there are two main – conflicting – readings of the consequences of the EU integration process on the Italian economic constitution.

According to Giovanni Bognetti,[31] the new economic framework posed by the EU has restored the original meaning of the constitutional provision, after the transformation during the '60s in our economic constitution. According to this narrative, the implementation of the economic constitution – in particular of art. 41 – has been characterized by a departure from the original model of economic relations. During the 1960s, the Italian economic system witnessed large-scale intervention of the State in the economy, informally changing constitutional provisions based on a more liberal model. With the advent of the European Union, the principles of the Community treaties introduced a binding economic constitution model which returned to and re-evaluated the original directions of the Italian Constitution, contrasting with the directives and plans – the backbone of our economic system in the 1960s and 1970s – that had been introduced based on a 'reinterpretation' of the Constitution. Adhering to such a narrative, it is possible to argue that informal change the informal change brought about by EU membership resulted in a further layer of informal change, on top of the informal change already in place, that ultimately

[29] PERNICE, Ingolf. Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and „Multilevel Constitutionalism". In: RIEDEL, Eibe (ed.). *German Reports on Public Law. Presented to the XV.* International Congress on Comparative Law, Bristol 26 July to 1 August 1998, Baden-Baden, Nomos, 1998, p. 40-66.

[30] PERNICE, Ingolf. Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and „Multilevel Constitutionalism". In: RIEDEL, Eibe (ed.). *German Reports on Public Law. Presented to the XV.* International Congress on Comparative Law, Bristol 26 July to 1 August 1998, Baden-Baden, Nomos, 1998, p. 40-66.

[31] BOGNETTI, Giovanni. Per una storia autentica e integrale della Costituzione repubblicana e della sua evoluzione (appunti a margine di un libro di S. Bartole). *Associazione dei Costituzionalisti Italiani*, p. 1- 94.

resulted in restoring the original Constitutional provisions" (i.e. the system returned to how it was meant to be).

The second - and probably prevailing - narrative recognizes the impact of European economic rules, especially those promoting freedom of competition, on the Italian constitution to the degree that they resulted in a "desuetude" of art. 41 Const., which explicitly imposes "socially oriented limits to the freedom of enterprise".[32]

There is no dispute, though, that such deep transformation occurred without a formal amendment of the Italian constitution, but through a contested use of art. 11 Const., which was drafted to legitimize Italy's membership of the UN. The boundaries of art. 11 were forced in order to include Italy's participation in the Community. Although it is often said the purpose for which the Community was established was to keep peace between European states, the Treaty of Rome and successive treaties have aimed at far broader, more ambitious goals. In essence, they have sought to create a single economic system, inspired by the principles of the free market, with only some correction dealing with the social dimension, in order to promote the development of the economy and the well-being of European people. Consequently, the Treaties have gradually imposed a series of transfers of sovereignty and constitutional functions (legislatives, executives and judiciaries) from the authorities of national states to those of the Community.

Despite the fact art. 11 was not conceived to provide constitutional grounds for the EU integration process and despite the fact it speaks about "limitation" of sovereignty, which seems to be a narrower concept than "transfer" of sovereignty, it has been interpreted, well beyond its original meaning, to become the only constitutional basis for Italy's membership of the EU, fostering profound change to the Italian system.

But why did such profound transformation occur without a formal amendment through the process in art. 138 Const.? Even in this story one can see the influence of the political and ideological divide in the constitutional history of Italy. Indeed, when the first step was completed (ratification of the Treaty of Rome by ordinary law) there were serious reasons not to go down the path of formal revision. Art. 138 requires a two-thirds majority vote in both chambers and there was no such majority at the time in parliament (the communists were against it; the socialists were for abstention). Of course there was the possibility to approve the revision of the Constitution merely with an absolute majority, but this would have exposed membership of the Community to the risk of a referendum sought by its opponents.

[32] GROPPI Tania. Constitutional revision in Italy. A marginal instrument for constitutional change. In: CONTIADES, Xenophon (ed). *Enginnering Constitutional Change*, Routledge, 2013, p. 220.

Moreover, at the time, the legislative procedures for a referendum had not been adopted yet, meaning it would have caused significant practical problems.

For all these reasons, Italy entering the Community was accompanied by an original informal transformation of the Constitution; however, the impact of Italian participation in the EU legal framework continuously imposed constant informal transformations on the legal order that were not limited to the economic constitution, but affected more generally the form of state, the relationships between political powers, the sources of law and the protection of fundamental rights.

Among the transformations fostered by the EU integration process I will discuss here two very recent developments: the first one is related to the impact of the Eurozone crisis at national level and the second is related to the transformation of the role of the President of the Republic in the light of the EU legal and political context.

The first one deals with the transformations brought during the economic crisis by the new European economic governance. Although Italy has not received financial assistance and cannot be considered a debtor country involved in an assistance program, its constitutional order has been deeply influenced by the crisis-related measures, such as the Fiscal Compact Treaty, and by extraordinary sources of pressure, as the well-known 5 August 2011 letter signed by Mario Draghi and Jean-Claude Trichet.[33] Moreover, in 2012, a constitutional amendment was approved, modifying art. 81 Const. on the basis of the Fiscal Compact Treaty. The new article 81 Const. contains the provision of the so called balance budget rule, according to which "The State shall balance revenue and expenditure in its budget, taking account of the adverse and favorable phases of the economic cycle".

This formal change has introduced a new principle - the balance budget principle - whose interpretation in the light of the European legal framework has deeply influenced both the relations among the State and the Regions and the protection of fundamental rights. Indeed, the balance budget rules has been interpreted not just as an external limit to be considered in the balancing of rights, but as a "super-principle" itself to be balanced with other fundamental constitutional principles, as the ICC did in several controversial decision dealing with crisis related measures.[34] It has been argued that the constitutional status of social rights in Italy has witnessed a kind of "institutional twist" since they are now the object of a shared responsibility between national and supranational institutions (directly or indirectly through the lever of the budget process).[35]

[33] The letter suggested to the Italian government several reforms to be implemented, such as the deregulation of economy, privatizations, more work flexibility, and the pension system's reform.

[34] See ICC decision n. 10/2015.

[35] MORRONE, Andrea. I mutamenti costituzionali derivanti dall'integrazione europea. *Federalismi.it*, n. 20, p. 1-27, 2018.

The influence of the EU legal framework on the separation of powers at national level has been also tested in the so called "Savona affaire", in which the President of the Republic vetoed the appointment of Prof. Savona as Minister of Economy and Finance due to Savona's criticisms, expressed in the past, concerning the monetary Union, with a particular emphasis on his proposal to abandon the Euro. This case, that cannot be discusses in detail here, has shown clearly the relevance of the European dimension and the intertwined nature of national and European political issues. Despite the controversial nature of Mattarella's behavior under a strictly constitutional point of view (art. 92 Const.) with regard to the discretionary power of the President within the formation of the government, it made clear that the commitment to the European integration project represents a fundamental issue for the Italian constitutional dimension, able to reconfigure and change the role and the functions of the most traditional actors, as the President of the Republic. In particular, the evolution of the context and the specific circumstances of the Savona case, have led to emphasize the "political" component of the role of Head of State over his "neutral" component, called to speak his part in the management of certain special pressing emergencies.[36]

In general, the EU integration process and the transformations that this has produced place national member states in front of an ultimate, fundamental question: can constitutional identity be a limit to integration or does it represent a line that may be crossed under certain conditions?

The tensions that occurred in the EU legal framework, starting from the Solange decision of the Bundesverfassungsgericht, to the Taricco saga[37] and even in the light of the recent cases of Poland and Hungary, may be read in the light of the never-ending debate about the extension and the nature of the EU integration process in relation to the national sphere.

## 6 Conclusion

Although informal constitutional change is common to most constitutional systems, it is also deeply influence by the historical and societal context in which a specific constitution has been drafted and interpreted. Looking at the Italian case, the original ideological and political fracture between the main political players

[36] RUGGERI, Antonio. Le modifiche tacite della Costituzione, settant'anni dopo. *Rivista del Gruppo di Pisa*, n.2, p. 1-26, 2018.

[37] Among many comments, see AMALFITANO, Chiara; POLLICINO, Oreste. Jusqu'ici tout va bien… ma non sino alla fine della storia. Luci, ombre ed atterraggio della sentenza n. 115/2018 della Corte costituzionale che chiude (?) la saga Taricco. *Diritti comparati*. 5 June 2018, available at: https://www.dirittocomparati.it/jusquici-tout-va-bien-ma-non-sino-alla-fine-della-storia-luci-ombre-ed-atterraggio-della-sentenza-n-115-2018-della-corte-costituzionale-che-chiude-la-saga-taricco/.

deeply influenced the adoption of the Constitution and its interpretation over time. The Italian Constitutional Court has played a major role in the process of informal constitutional change, through its creative jurisprudence, both on substantive and procedural grounds.

In addition to the role of the judiciary, another event has been fundamental in fostering informal constitutional change and even a transformation of the Italian legal landscape: the EU integration process. This paper has tried to sketch the main features - although without pretending to cover all the changes – of such influence and of the ongoing process of the redefinition of the meaning of the national constitutional in the light of EU constitutional order.

Both the Italian Constitutional Court case law and the EU integration process have fostered constitutional transformation of the Italian legal order, and sometimes these two drivers of transformation have also worked on the same ground, as the recent Taricco saga has shown.

In the face of these transformative forces, which presumably will continue, there are some fundamental questions to be still addressed concerning the limits and boundaries of informal constitutional changes. Are the changes in the Italian system normal events in the life of a constitution or do they represent the outcome of a progressive delegitimization of the constitutional text? Is the specific predisposition to informal change an expression of a decision by the constituent fathers to leave open the text of the constitution, is it the result of the interpretative activities of the main institutional players or is it a feature common to all constitutions? What are the limits of such informal transformations?

Drawing the boundaries of the limit to informal constitutional change is an ongoing effort in Italian legal scholarship, an attempt that, I argue, cannot be done in abstract terms but has to take into account the history, the developments and the transformations of any given legal context.

Indeed, if a lesson can be drawn from the history of Italian informal constitutional change, it is that "there is no one Constitution ideal existing entity, separate from the acts of its users; there are only interpretations of the Constitution, distributed in time (the initial one of its authors and those of the various subsequent applicators), and that, to know them in their consistency, a methodical investigation by legal scholars and historians is needed, aiming to describe the informal transformations according to the truth".[38]

[38] BOGNETTI, Giovanni. Per una storia autentica e integrale della Costituzione repubblicana e della sua evoluzione (appunti a margine di un libro di S. Bartole). *Associazione dei Costituzionalisti Italiani*, p. 1- 94.

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