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THE "DUE PROCESS" OF CONSTITUTIONAL REVISION: WHICH GUIDANCE FROM EUROPE?

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Summary. This paper deals with the influence exerted by the Council of Europe, notably by the Venice Commission, and by the European Union on constitutional amendments with a special focus on Italy, a founding member state of both organisations. It proceeds as follows: it first provides a quick introduction into the *vexata questio* of the difficult balance between rigidity and flexibility of democratic Constitutions, well-illustrated by the academic debate and by the Venice Commission's Report on constitutional amendments of 2010 (CDL-AD(2010)001). Second, the paper considers which European standards have been set, especially by the Venice Commission, to design an effective and legitimate constitutional amendment procedure, and whether the Italian constitutional provisions and practice have abided to them. Third, the contribution reflects on the influence exerted by the Italian participation in the Council of Europe and in the European Union on the substance of the amendments adopted to the Italian Constitution. It is argued that at least since the mid-Twentieth century constitutional amendments procedures can no longer be treated as purely national phenomena. They are more and more guided by standards set at supranational level, notably by the Venice Commission, as derived by the European common constitutional heritage. The

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influence is exerted both on a procedural level, defining what can be called as the "due process" of constitutional revision, and on a more substantive level.

Keywords: constitutional amendments, Venice Commission, Council of Europe, effective and legitimate constitutional amendment procedure.

„Wzorcowy proces" rewizji konstytucji: jakie wskazówki z Europy? Niniejszy artykuł dotyczy wpływu wywieranego przez Radę Europy, zwłaszcza przez Komisję Wenecką, oraz Unię Europejską na procedury zmiany konstytucji, ze szczególnym uwzględnieniem Włoch, państwa założycielskiego obu organizacji. We wstępie omówiono problematykę trudnej równowagi między sztywnością a elastycznością demokratycznych konstytucji, dobrze zilustrowaną przez debatę akademicką oraz Raport Komisji Weneckiej w sprawie poprawek konstytucyjnych z 2010 r. (CDL-AD(2010)001). W artykule rozważono także, jakie standardy europejskie zostały ustanowione, zwłaszcza przez Komisję Wenecką, w celu zaprojektowania skutecznej i zgodnej z prawem procedury zmiany konstytucji oraz czy włoskie przepisy konstytucyjne i praktyka dostosowały się do nich. Ponadto rozważono wpływ uczestnictwa Włoch w Radzie Europy i Unii Europejskiej na treść poprawek przyjętych do włoskiej konstytucji. Argumentuje się, że co najmniej od połowy XX w. procedury poprawek konstytucyjnych nie mogą być już traktowane jako zjawiska czysto narodowe. W coraz większym stopniu kierują się one standardami ustalonymi na poziomie ponadnarodowym, zwłaszcza przez Komisję Wenecką, wynikającymi z europejskiego wspólnego dziedzictwa konstytucyjnego. Wpływ ten wywierany jest zarówno na płaszczyźnie proceduralnej, określającej to, co można nazwać „należytym procesem" rewizji konstytucyjnej, jak i na płaszczyźnie bardziej merytorycznej.

Słowa kluczowe: nowelizacja konstytucji, Komisja Wenecka, Rada Europy, skuteczna i zgodna z prawem procedura zmiany konstytucji.

1. INTRODUCTION

Over the last decade, many countries in the framework of the Council of Europe and of the European Union have engaged themselves in drafting (Bulgaria)[1] or enacting (Egypt, Hungary, Iceland, Tunisia)[2] new Constitutions or in

[1] See European Commission for Democracy through Law, Bulgaria – Urgent Interim Opinion on the draft new Constitution, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure, Opinion no. 1002/2020, CDL-PI(2020)016-e.

[2] See Venice Commission: Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session, Venice, 17–18 June 2011, Opinion no. 621/2011; CDL-AD(2011)016; Opinion on the Draft New Constitution of Iceland Adopted by the Venice Commission at its 94th Plenary Session, Venice, 8–9 March 2013, Opinion no. 702/2012,

more or less successful attempts to pass constitutional amendments (including Italy amongst the others). Several of those constitutional changes were directly or indirectly inspired and sometimes monitored by these supranational organisations (Tohidipur, 2016, p. 900; Halmai, 2019, p. 1504–1505), as it was the case in Central and Eastern Europe in the aftermath of the collapse of the Soviet Union, supporting democratic transitions (Bartole, 2020, p. 8–10).

As the European Commission for Democracy through Law (hereinafter, Venice Commission) noted in its famous Report on constitutional amendments of 2010 (CDL-AD(2010)001, p. 3): "The question of constitutional amendment lies at the heart of constitutional theory and practice. Constitutionalism implies that the fundamental rules for the effective exercise of state power and the protection of individual human rights should be stable and predictable, and not subject to easy change. This is crucial to the legitimacy of the constitutional system. At the same time, even quite fundamental constitutional change is sometimes necessary in order to improve democratic governance or adjust to political, economical and social transformations".

The extent to which Constitutions should resist changes or, instead, should accommodate their text to societal, political and economic developments remains a dilemma in constitutional law (see Fusaro, Dawn, 2011, p. 405–434; Ginsburg, 2011, p. 112–126; Albert, 2019) as it was in the Eighteenth century's "dispute" between Madison and Jefferson (see, e.g. Jefferson, [1789] 1958, p. 392–398).

Famously, Constitutions have been depicted as "tie[s] imposed by Peter when sober on Peter when drunk" (Tushnet, 1996, p. 857, who is uncertain on whether the sentence is to be attributed to Ludwig von Hayek or to Francis Bacon) or as "devices for precommitment or self-binding, created by the body politic in order to protect itself against its own predictable tendency to make unwise decisions" (Elster, 2000, p. 88), drawing the famous parallel with Ulysses' attempt to resist the sirens.

In fact, as the Venice Commission has clearly pointed out (2010, p. 16), there are good reasons for both praising constitutional precommitments and supporting the capacity of rigid Constitutions to adapt over time, always within the prescribed procedures. Under the precommitment arguments one can find "political and economic stability and predictability", "protection of democratic

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CDL-AD(2013)010; Opinion on the Final Draft Constitution of the Republic of Tunisia, adopted by the Venice Commission at its 96th Plenary Session, Venice, 11–12 October 2013, Opinion no. 733/2013, CDL-AD(2013)032. On Egypt, see Venice Commission, Recent constitutional developments in Egypt (January–May 2012), Study presented by Hanafy Gebaly, CDL(2012)027, Strasbourg, 11 April 2012.

procedures", "protection of the political opposition", "protection of individual and minority rights and interests", "protection of the independence of certain institutions", "increasing the legitimacy of the constitutional order". Arguments against too strict constitutional amendment rules that the Venice Commission cites are, for example, "democracy in the traditional sense (majority rule)", "improvement of decision-making procedures", "adjustment to transformations in society (political, economical, cultural)", "adjustment to international cooperation", "flexibility and efficiency in decision-making", "ensuring, adjusting or reconfirming fundamental rights".

As it will be further highlighted below, however, the Venice Commission has consistently highlighted its distance from the model provided by the US Constitution, of an extremely rigid constitutional text, almost impossible to amend (Levinson, 2006; Albert, 2021, p. 778–794). At the same time, it should be remarked that the Venice Commission published its report more than a decade ago, before the problem of constitutional and democratic backsliding (re) surfaced in Europe (Closa, Kochenov, 2016, p. 1.12; Pech, Sheppele, 2017, p. 4 et seq.). Indeed, today as ever before within the umbrella of the Council of Europe and of the European Union old and new constitutional democracies are in trouble. The problem does not come only from the complete (Hungary, on which cf Uitz, 2015) or partial (Turkey, on which see Varol, 2018) replacement of Constitutions, but even more so by the practice to void Constitutions from within (Issacharoff, 2018, p. 485 et seq.; Sheppele, 2018, p. 545 et seq.): the text of the Constitution and the amendment procedures formally remains untouched, but the constitutional substance that the precommitment should have served has been stripped or, at best, watered down. Supermajorities and other constitutional hurdles, on which the Venice Commission has typically insisted, by means of soft law instruments, like opinions and recommendations, may not be enough to prevent a constitutional retrogression (De Visser, 2015, p. 1008).

This contribution deals with the influence exerted by the Council of Europe, notably by the Venice Commission, and by the European Union on constitutional amendments with a special focus on Italy, a founding member state of both organisations. It proceeds as follows: it first provides a quick introduction into the *vexata questio* of the difficult balance between rigidity and flexibility[3] of democratic Constitutions, well-illustrated by the academic debate and by the already mentioned Venice Commission's Report. Second, the article considers

[3] By flexibility here it is meant the extent to which a rigid Constitution can be changed, in compliance with a special constitutional amendment procedure different from ordinary lawmaking.

which European standards have been set, especially by the Venice Commission, to design an effective and legitimate constitutional amendment procedure, and whether the Italian constitutional provisions and practice have abided to them. Third, the contribution reflects on the influence exerted by the Italian participation in the Council of Europe and in the European Union on the substance of the amendments adopted to the Italian Constitution.

2. THE "EUROPEAN INFLUENCE" ON THE DESIGN AND PRACTICE OF THE CONSTITUTIONAL AMENDMENT PROCEDURES

There is a whole body of scholarly literature that has elaborated extensively on the notion of "due process" of lawmaking (Ackerman, Egidy, Fowkes, 2015), endorsing effective pre-legislative scrutiny prior to decisions, transparency and openness of the process to the public, involvement of minorities and civil society in law-making, whenever possible, and judicial review on the procedural faults of the legislative process.

The European Court of Human Rights has followed *en suit* emphasising the importance of the quality of the pre-legislative and the legislative scrutiny in Parliament, of the balancing amongst the various interests at play, of a well-pondered parliamentary deliberation as a standard to narrow or, instead, broaden the margin of appreciation left to the member states (Popelier, 2017, p. 79–94, referring to the cases *Hirst no 2*, 2005, *Animal Defenders International v. United Kingdom*, 2013 and *Shindler v. United Kingdom*, 2013). The more far-reaching and inclusive the legislative process in Parliament, the wider the discretion the Court is willing to concede (Donald, Leach, 2016, p. 113 et seq.; Saul, 2016, p. 1077 et seq.).

Are there any European standards envisaging a "due process" of constitutional revision as well? No clear references can be found in EU law, except for the insistence on the need to uphold values like democracy, rule of law, protection of fundamental rights and of minorities (Art. 2 TEU), today very much discussed (see e.g. Von Bogdandy, Antpöhler, Ioannidis, 2017, p. 218–233; Wouters, 2020). Nothing seems to deal with the design of the procedures for changing the Constitution on a general level and Art. 4.2 TEU can been considered as preventing the EU's possibility to directly step in this field: constitutional amendment rules could probably be placed within the „national identities, inherent in […] [the member states'] fundamental structures, political

and constitutional".[4] Yet, and although Italy has not been directly affected as a founding member state, it is well-known that on countries candidate to the EU accession, in particular before and after the big Eastward enlargement, the EU has exerted a considerable influence on the design of constitutional amendment procedures too, as in several states the constitutional transition occurred at the same time as the accession procedure (Albi, 2001 and 2005).

In this field the role of the Venice Commission has been even more patent (even though perhaps not as influential as that of the EU given the leverage the latter possesses). Besides the cited Report of 2010 with a list of recommendations on constitutional amendment procedures, the Venice Commission has also curated a compilation of relevant opinions addressed to various Contracting Parties (CDL-PI(2015)023) – none of them to Italy unlike other founding members such a Belgium.

For instance, the Commission has stressed that "one should be careful in advocating different amendment rules in old and new democracies" (2010, p. 39–40), as instead it was advocated by Holmes and Sunstein (1995). Indeed, the Commission has been keen in promoting a common Europe-wide approach, also relying on existing rules and practices. Confronted with a high degree of variation of constitutional amendment formulas, the common procedural heritage for the European rigid Constitutions sees the Parliament, typically with a qualified majority, as the linchpin of the whole process, with one or more additional requirements, e.g. multiple readings and decisions, time delays, intervening elections, states' ratifications (in federal systems), referendums (Venice Commission, 2010, p. 14). Thus, the fundamental arena for constitutional change is and shall remain the Parliament.

Moreover, constitutional changes should be preferably done according to the prescribed formal constitutional amendment procedure(s). From this follows, for the Venice Commission, that too strict constitutional amendment rules, making a constitutional change almost impossible, should be avoided. If the societal and political forces are strong enough to support a revision, then better to achieve them through the formal constitutional amendment procedure than bypassing the text of the Constitution. If a unitary stance is to be found in (Western) Europe on constitutional amendability, according to the Venice Commission, this is "a balanced approach" between rigidity and flexibility, for example in comparison to the much more rigid US Constitution.

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[4] De Witte (2021, p. 561) argues that this limits was already present in EU law, though implicitly, prior to the entrenchment of Art. 4.2. TEU.

Against the case of too rigid constitutional amendment provisions, which implicitly give to constitutional judges the "burden" to let the Constitution evolve over time, the Venice Commission has held that, at least "for major constitutional changes, a deliberative and democratic political process following the prescribed procedures for constitutional amendment is clearly preferable to a purely judicial approach" (Venice Commission, 2010, p. 23; along the same lines, though from different standpoints, see, for example Tushnet, 2000, p. 154–177; Bellamy, 2007, p. 15–51). The Commission has encouraged not to resort to too cumbersome amendment procedures also because they are at risk of being bypassed by political practice thereby undermining the enduring effectiveness of the constitutional text, as it was advised in the case of Serbia (CDL-AD(2007)004, Opinion on the Constitution of Serbia) and of Belgium (CDL-AD(2012)010, Opinion on the Revision of the Constitution of Belgium).

The Venice Commission also shows a cautious approach vis-à-vis constitutional referendums. For example, in the opinion on the Final Draft Constitution of Tunisia (CDL-AD(2013)032), it admitted that, especially in new democracies they can easily be "turned into plebiscites on the leadership of the country and that such referendums are used as a means to provide legitimacy to authoritarian tendencies". The Commission has recommended to make use of such referendums only when they are expressly provided in the text of the Constitution itself in order not to make it excessively rigid, not to favour an expansion of direct democracy, creating additional risk for political stability, and not to create an incentive for the executive to circumvent the prescribed parliamentary procedure or undermine the role of the Parliament (Report of 2010, p. 36; see also Tierney, 2012, p. 261 et seq.). What appears at first as an attack against the "will of the People"(Albert, 2019, p. 25), however, finds its *raison d'être* in the constitutional limits to the functioning of democratic decision-making and, thus in the need to balance two basic tenets of the rule of law (St-Hilaire, 2021, p. 3–4).

Furthermore, similarly to what has been supported by the ECtHR in relation to the "due process" of lawmaking, the Venice Commission has recommended to ensure enough time for debate during the whole process of constitutional change, avoiding too rigid time constraints and a too tight schedule (CDL-AD(2011)001, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary). The Commission went one step further in the "design" of the "due process" of constitutional revision claiming that it is of the utmost importance for the democratic legitimacy and the ownership of the constitutional amendments that the civil society, the media and the academia are involved in the procedure (CDL-AD(2013)010, Opinion on the

draft New Constitution of Iceland). This "can strongly contribute to achieving consensus and securing the success of the constitutional revision even if this inevitably takes time and effort" (Venice Commission, 2010, p. 40) as the experiences of constitutional crowdsourcing in Iceland and Ireland have tried to pursue (Suteu, 2015, p. 260 et seq.; Abat i Ninet, 2021, ch. 4).

Additionally, the Venice Commission does not seem to sympathise too much with unamendable constitutional clauses (Roznai, 2017, p. 15–37; Suteu, 2021, p. 51 et seq.). It has acknowledged that "a large number of European constitutions do not have any rules on unamendability" and "unamendability is only justiciable in a few of those constitutional systems that have such rules" (Report of 2010, p. 43). Possibly anticipating what would have happened in a few years, with an increasingly abusive use of unamendability linked to the constitutional identity discourse (see Kelemen, Pech, 2018, p. 11 et seq.; Fabbrini, Sajò, 2019, p. 457 et seq.; Faraguna, 2021, p. 427 et seq.), in its Report of 2010, the Commission considered that unamendability is a complex and potentially controversial constitutional instrument, which should be applied with care, and reserved only for the basic principles of the democratic order. A constitutional democracy should in principle allow for open discussion on reform of even its most basic principles and structures of government and such a skeptical approach was extended to judicial review of unamendability too (Venice Commission, 2020, p. 44).[5]

Finally, as a last recommendation, the Venice Commission (2010, p. 35) warned that "national amendment processes have to take into account international legal obligations as well as the legitimate role of national and international courts in developing and protecting human rights" (on this point, see also Motoc, Ziemele, eds., 2016).

3. THE VENICE COMMISSION'S RECOMMENDATIONS AS YARDSTICK FOR THE ITALIAN CONSTITUTIONAL AMENDMENT PROCEDURE?

The Italian Constitution has been amended 17 times since 1948,[6] but many more have been the unsuccessful attempts at reforming it.

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[5] In contrast to the diffusion of constitutional unamendability via judicial review as a European (and global) practice: see Garlicki, Roznai, 2019, p. 217–225.

[6] Though many consider that also constitutional law no 1/1953, despite not formally modifying the text of the Constitution, as it deeply impacts on Arts. 134 and 135 Const., on the composition and functions of the Constitutional Court, is somewhat a "masked" constitutional

The constitutional revision procedure, set in Art. 138 It. Const. (on which see, e.g. Barile and De Siervo, 1968, p. 788 et seq.; Cicconetti, 1989, p. 135 et seq.; Cerri, 1991, p. 1 et seq.), is perfectly in line with the European standards detected by the Venice Commission from within the "common constitutional heritage" (De Visser, 2015, p. 999), being anchored to the Parliament, with a minimum time interval set in between parliamentary deliberations, qualified majorities, and a non-mandatory constitutional referendum. Indeed, the Constitution is revised with the support of the absolute majority of the members in each House of Parliament, in two subsequent deliberations, occurring with no less than three months of distance from one another. Within three months since the publication of the constitutional amendment, a constitutional referendum on the act passed by the Parliament can be requested by the Government, one tenth of the members of one of the two Houses, by at least five regional legislatures or 500.000 voters, provided that no qualified majority of two-thirds has been reached in each House during the second deliberation[7] and no quorum is set for its validity.

Article 139 It. Const. enshrined the unamendable clause (see, in detail, Pizzorusso, 1981, p. 721 et seq.; Grosso, Marcenò, 2006, p. 2731 et seq.): The Republican form of state, chosen by the people at the institutional referendum of 2 June 1946, when also the Constituent Assembly was elected, cannot be changed. Since judgment no. 1146/1988 the Italian Constitutional Court has elaborated on this clause to derive further implicit limits to constitutional revision (see Piccirilli, 2021; Grosso, Marcenò, 2006, p. 2742–2743, amongst others), also in relation to the Italian participation in the EU (see Lupo, 2021; Barsotti, Carozza, Cartabia, Simoncini, 2016, ch. 7).

As per the Venice Commission's cautious approach toward judicial review on unamendability, though in principle entitled to adjudicate on constitutional laws, the Italian Constitutional Court has never been asked to check the compliance of a constitutional amendment with the Constitution, neither with regard to the procedure used to pass it nor on the substance. That said, however, the Constitutional Court has acknowledged itself, in principle, the power to review the

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amendment (e.g. Groppi, 2006; Carnevale, 2018). Many more are the constitutional laws approved through the same procedure, including those embedding the Statutes of the regions with special autonomy and their amendments (Cicconetti, 1973, p. 933). While some insist on the differences between constitutional amendment acts and (simple) constitutional law (e.g. Modugno, 2005, p. 616 et seq.); others consider that all constitutional laws are, to some extent, constitutional amendment acts insofar as they affect the systemic relationships amongst constitutional norms and their interpretation (Ruggeri, 1993, p. 227).

[7] Also the qualified majority of two-thirds is meant to apply to the second deliberation only.

compliance of constitutional amendments with the supreme constitutional principles of the legal systems (see e.g. Faraguna, 2015, p. 63 et seq.; Zagrebelsky, Marcenò, 2018, p. 77; Piccirilli, 2019, p. 109 et seq.). By the same token, the Constitutional Court is not involved in the amendment process. Unlike the case of the abrogative referendum, in which the Court checks the admissibility of the referendum question (its clarity and lack of ambiguity, in particular), under law no. 352/1970, such an assessment, for obvious reasons, lacks with regard to constitutional amendments (Groppi, 2006, p. 2714–2715). At the referendum, the constitutional amendment act has to be approved in its entirety in a unique vote, regardless of its scope and reach; an issue that has triggered a lively academic debate in the cases of constitutional amendment bills reforming entire Titles or Parts of the Constitution and paving the way to inherently heterogeneous referendum questions (see, e.g. Griglio, 2021, and, for example, Cerri, 2000, p. 6; Ainis, 2016).

More questionable is whether the constitutional amendment procedure displayed in Art. 138 It. Const. has always been respected as per the Venice Commission's consistent advice. For example, it should be borne in mind that, despite the possibility envisaged there to request a constitutional referendums, under certain requirements, until the adoption of the general law on the referendums, law no. 352/1970, such referendums could not be held lacking detailed conditions and the ad hoc procedure. However, given the then political dynamics, of consensual-consociational inspiration in Parliament, and the awareness of this legal vacuum on referendums, in the cases of the few constitutional revisions passed before 1970,[8] it was not difficult to reach the qualified majority – two thirds majority – set to conclude the amendment process without a referendum request (Manzella, 2003, p. 375).[9]

The possibility to derogate from the Art. 138 Const. procedure has been repeatedly debated (see Di Folco, 2021; Pizzorusso, 1999, p. 62 et seq.; Siclari, 2000, p. 27 et seq.; Cervati, 2001, p. 60 et seq.; Carnevale, 2018, p. 17). This is not a purely theoretical dispute: it has happened on a few occasions – see, for example, constitutional laws no. 1/1993 and 1/1997, and the constitutional amendment bill A.S. 813, XVII term, never approved – that, in addition to the procedure set in Art. 138 It. Const., further procedural steps have been introduced ad hoc in order to approve a constitutional amendment, in particular for the preliminary study of the proposal that was meant to introduce wide revi-

[8] Constitutional Laws no. 2/1963, 3/1963, 2/1967.

[9] Even after 1970, there have been only four constitutional referendums, two successful, in 2001 and in 2020, and two unsuccessful, in 2006 and in 2016.

sions of the constitutional text. The attempts to build a "special" constitutional amendment procedure, on a case-by-case basis, has not been very successful in the practice, not leading to the eventual entry into force of the proposed revision and, in any event, have never been reviewed by the Venice Commission. Most likely, however, these derogations may have not been praised by the Commission (should it have been asked for an opinion), which have always emphasised the importance to stick to the amendment procedure codified into the Constitution. Indeed, the above mentioned constitutional laws no. 1/1993 and 1/1997, meant to fulfil an organic revision of the Constitution, foresaw the approval of the following constitutional amendments by absolute majority, questionably ruling out the possibility of supermajorities that instead the text of the Constitution itself (Art. 138) always allows, and made the referendum mandatory (see Arts. 3 and 3–4, respectively). Art. 4 of constitutional law no. 1/1997 went even one step further in that it also established a quorum for the validity of the referendum, which is lacking under the ordinary constitutional amendment procedure. Even though the aim was to let the people directly "express themselves" on such broad constitutional changes (which never occurred as the relevant bills remained stuck in Parliament), these ad hoc procedures definitely deviated from the benchmark of the European "due process" of constitutional revision in terms of legal certainty and protection of legitimate expectations (Pizzorusso, 1999).

An issue that the Venice Commission has not addressed in this framework and that, instead, is a crucial problem in Italy is the implementation of the constitutional amendments once enacted. Italy does not have a good track record when it comes to the follow-up of constitutional revisions. Some of them have remained dead letter, even years after the enactment of the amendment, while the faithful execution of a constitutional revision can possibly be seen in an ideal continuation with the constitutional amendment procedure itself. For instance, one can cite the case of the persistent lack of integration of the parliamentary committee on regional affairs with representatives of the regional and local autonomies (Art. 11, constitutional law no. 3/2001: Gianfrancesco, 2015–2016, p. 261 et seq.; De Martin, 2016, p. 6; Bifulco, 2018, p. 217 et seq.); or the case of the reduction of the number of deputies and senators starting from the next parliamentary term, which has remained without follow-up despite the need to adapt the parliamentary organisation and procedures (constitutional law no. 1/2020: Gianniti, Lupo, 2020, p. 559 et seq.).[10]

[10] The number of deputies will be decreased from 630 to 400 and that of senators from 315 to 200 plus the senators for life.

4. THE "EUROPEAN INFLUENCE" ON THE SUBSTANCE OF CONSTITUTIONAL AMENDMENTS IN ITALY

In its Report of 2010, the Venice Commission has stressed a lot that "in many countries in recent years the process of European integration, as well as fundamental rules and principles developed by international and European courts and organisations, have served not only as indirect inspiration but even as a direct driving force for national constitutional reform" (p. 6). Today more than ever constitutional amendments are an issue of European concern in order to abide to supranational standards for democracy, rule of law and human rights. Not only have the ECHR and EU law, as well as the case law of the respective supranational courts, deeply influenced the constitutional interpretation of fundamental rights provisions in the Constitutions (Torres Peréz, 2010; Gerards, Fleuren, 2014, p. 333 et seq.; Tega, 2020, p. 184–257), but to some countries constitutional amendments have been somewhat "requested" in order to join the Council of Europe and/or the European Union (Albi, 2001, p. 433 et seq.; Bartole, 2020).

Only to a marginal extent the latter has been the case of Italy, whose Constitution nonetheless has become much more visibly affected by its participation in the Council of Europe and, notably, in the EU over the last two decades.

For what concerns the Council of Europe, it appears that there has been an indirect influence of the debate occurring within that organisation as well as in others, at the global level (like the United Nations), on the protection of fundamental rights and the balancing between competing public interests triggered by revisions of the Italian Constitution. Yet, it is difficult, not to say impossible, to draw a clear link between the two. Examples include constitutional law no 1/2007, modifying Art. 27 Const., on the abolition of death penalty and, even more indirectly, the reform of Art. 79 Const., on the granting of amnesty and pardon (constitutional law no 1/1992), and of Art. 68, on the immunities of MPs (constitutional law no. 3/1993) – the latter two being very much linked to the political turmoil occurring a domestic level (with the collapse of the party system and the criminal investigation and charges against the political élites due to corruption: see, e.g. Fasone, 2019, p. 146). If an exception can be identified to this lack of a patent connection between the ECHR and constitutional change in Italy, this is certainly the revision of Art. 111 Const., on the requirements to ensure the due process before courts.[11] A push toward the constitutionalisation of this principle and of the related judicial safeguards had emerged clearly in

[11] Constitutional law no. 2 of 23 November 1999.

the text of the constitutional bill approved on 2 November 1997 by the parliamentary committee on constitutional reforms – a bill that never completed the parliamentary *iter* – and the need to go straight in the same direction came from the Constitutional Court's judgment no. 361/1998 soon after (Fois, 2000, p. 569 et seq.; Cecchetti, 2001, p. 37–41). It is undeniable, however, that a crucial influence for the Art. 111 Const.'s amendment to be put forward had been exerted by the case law of the European Court of Human Rights' case law whereby Italy had been repeatedly condemned for violation of Art. 6 of the ECHR due to the unsustainable length of the judicial proceedings (Focarelli, 2001); an issue that has not been effectively addressed in the Italian constitutional system even after the constitutional amendment.[12]

In general, much more evident is the link between the European integration process and amendments of the Italian Constitution.[13] Since the constitutional reforms adopted in 1999 and in 2001, there is an expressed acknowledgment of the Italian participation in the EU in the constitutional text (with references, in Art. 122 Const., to the European Parliament and, in Art. 117 Const., to EU obligations, respectively: see Lupo, 2021). Moreover, the adoption of constitutional law no. 1/2012, introducing, amongst other things, a balanced budget clause into the Italian Constitution (Arts. 81, 97 and 119 Const.), has been triggered by a rather explicit political pressure exerted by EU institutions, notably the European Central Bank, to calm the then ongoing speculative attack on the financial markets and in exchange for financial support.[14]

Also the attempt at reforming the Second Part of the Constitution, failed at the constitutional referendum on 4 December 2016 (A.S. 1429, XVII term), was supported by the declared aim (even in the accompanying report) to favour a more effective participation of the Italian system in the EU affairs, to devise

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[12] See the Interim Resolution CM/ResDH(2007)2 concerning the problem of excessive length of judicial proceedings in Italy (Adopted by the Committee of Ministers on 14 February 2007, at the 987th meeting of the Ministers' Deputies).

[13] To some extent also constitutional law no. 1 of 30 May 2003 revising Art. 51 Const. and dealing with the promotion by the Italian Republic of equal opportunities between men and women, in particular for the access to public offices, is a legacy of EU law and of the then recently proclaimed Charter of fundamental rights of the EU. While it will enter into force only in 2009, Art. 23 of the Charter already displayed clearly the commitment to ensure equal opportunities between women and men "in all areas, including employment, work and pay".

[14] The text of the letter addressed to the then President of the Council of Minister Silvio Berlusconi al allegedly strictly confidential in 2011 has been subsequently published by Italian newspapers and eventually by the European Central Bank itself: https://www.ecb.europa.eu/ecb/access_to_documents/document/pa_document/shared/data/ecb.dr.par2021_0001lettertoItalianPrimeMinister.en.pdf.

streamlined decision-making procedures – with the confidence relationship in place between the Chamber of Deputies and the Government only, in place of the present symmetric bicameralism (see AA.VV, 2016, p. 219–356) – and to make an effort at better coordinating the Italian position vis-à-vis the EU, with a reformed Senate to fine-tune the relationship between the various levels of government (Baraggia, 2016, p. 93–112).

Much more disputed is whether the most recent constitutional reform procedures have been somewhat driven by the EU influence: in particular, constitutional law no. 1/2020 leading to a reduction in the number of MPs (in force), constitutional law no. 1/2021 lowering the voting age for the election of the Senate from 25 to 18 years old and the constitutional amendment bill ensuring an enhanced recognition to the protection of the environment and of the ecosystem in the Constitution (A.S. 83-212-938-1203-1532-1627-1632-2160-B, still underway). There is no immediate proof of such a connection. It can be indirectly inferred, however, as has also been claimed by the proponents,[15] that, on the one hand, a lower number of MPs can make the decision-making procedure less cumbersome and, thus more prompt to react to EU inputs and the implementation of EU law, while certainly lowering the representative capacity of parliamentary institutions (*ex multis*, Ferrajoli, 2020, p. 167). On the other hand, the promotion of inter-generational solidarity and of the youth in the EU, environmental protection and sustainability are primary goals on the European Commission's agenda as confirmed by the European Green Deal[16] and the conditionality attached to the implementation of the national recovery and resilience plans.[17]

5. CONCLUSION

At least since the mid-Twentieth century constitutional amendments procedures can no longer be treated as purely national phenomena. They are more and more guided by standards set at supranational level, notably by the Venice Commission, as derived by the European common constitutional heritage. The

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[15] See the Report accompanying the constitutional amendment bill tabled by the senators D'Uva, Molinari and Spadoni, A.S. no. 1172, „Modifiche agli articoli 56 e 57 della Costituzione in materia di riduzione del numero dei deputati e dei senatori".

[16] See Communication from the European Commission on The European Green Deal, COM(2019)640 final, 11 December 2019.

[17] See Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility, OJEU L 57, 18 December 2021, p. 17–75.

influence is exerted both on a procedural level, defining what can be called as the "due process" of constitutional revision, and on a more substantive level.

This is true also for a country, like Italy, whose constitutional revision procedure and amendments have never been the target of opinions of the Venice Commission. Except for a few, ad hoc, derogations from the prescribed procedure set in Art. 138 Const., the Italian constitutional system as abided to its consistent implementation over time, ensuring a significant level of stability, even when the political system has witnessed important shift and turbulence. As such, overall, it has remained faithful to the "due process" of constitutional reform, even though the country has traditionally lacked effective implementation and enforcement mechanism once constitutional amendments have been enacted, thereby causing huge delays in the adaptation of the institutional system to such constitutional changes.

As for the substance of the reforms, the link between European developments and demands and Italian constitutional amendments is not that straightforward, perhaps with the exception of a few reforms passed over the last twenty years, the clearest example being the 2012 revision on the constitutionalisation of the balanced budget clause.

It has to be seen, however, whether in Italy and beyond the role of such non-binding European standards remains effective in the future or if, as it has been claimed (De Visser, 2015, p. 1008), a more proactive, systematic and far-reaching role should be envisaged for supranational monitoring bodies, like the Venice Commission, when it comes to the linchpins of the "constitutional building" as the design and practice of constitutional amendment procedures certainly are.

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