

25 APRILE 2018

Upper Houses and Constitutional  
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# Upper Houses and Constitutional Amendment Rules. In search of (supra)national paradigm(s) \*

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**Summary:** 1. Introduction. 2. Upper Houses in National Constitutional Amendment Processes: Rationales. 2.1. Legitimacy. 2.2. Checks-And-Balances. 2.3. Self-governance. 3. Upper Houses in National Constitutional Amendment Processes: Mechanisms. 3.1. Representation Paradigm. 3.2. Consent Paradigm. 3.3. Structural Paradigm. 3.4. Procedural Paradigm. 3.5. Normative Paradigm. 3.6. Amendability Paradigm. 4. Ambassadorial Paradigm and Amendment Rules in the European Constitutional Framework. 4.1. The European Paradox: National Units within (No)State, (No)Constitution, (No)Upper House. 4.2. Member States and Treaties' Rules of Revision: Mechanisms and Rationales of Inclusion. 5. Conclusion: Towards Supranational Paradigm(s).

## 1. Introduction

Notwithstanding recent interest in the study of constitutional amendment rules, there is very limited scholarship investigating the structure of formal amendment framework and little doctrinal debate on the role of upper houses, as sub-national units' representatives, played in national amendment process and their capacity to strengthen the rigidity of constitutions.

It is well-known that amendment rules are at the core of constitutionalism,<sup>1</sup> define the conditions under which all other constitutional norms may be legally displaced,<sup>2</sup> and provide mechanisms for societies to refine their constitutional arrangements.<sup>3</sup> It is also confirmed that the commonest form of representation in upper houses – in both federal and non-federal states – is territorial, and, in such systems, members generally represent areas contiguous with sub-national levels of government, provinces, regions or states.<sup>4</sup> From an institutional framework view, this paper emphasizes the rules according to which the upper houses, as sub-national units' representatives, boost constitutional revision processes identifying the

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\* Peer reviewed. I am grateful for helpful comments on earlier drafts to Francesco Palermo, Eduardo Gianfrancesco, G. Alan Tarr, Giuseppe Martinico. This paper was presented at the Second Conference in Memory of Gabriella Angiulli – Bicameralism under pressure, Constitutional Reform of National Legislatures, 2-3 May 2016, organized by the Center for Parliamentary Studies CESP LUISS in cooperation with the University of Milan (Department of National and Supranational Public Law), the International Society of Public Law (ICON-S), and the Younger Comparativists Committee (YCC).

<sup>1</sup> J.L. MARSHFIELD, *Decentralizing the Amendment Power*, in *U. Ark. Research Paper*, n. 15(3)/2015, p. 4.

<sup>2</sup> A.R. AMAR, *The Consent of the Governed: Constitutional Amendment Outside Article V*, in *Colum. L. Rev.*, n. 94/1994, p. 461.

<sup>3</sup> Z. ELKINS – T. GINSBURG – J. MELTON, *The Endurance of National Constitutions*, Cambridge, 2009, p. 81.

<sup>4</sup> M. RUSSELL, *What are second chambers for?*, in *Parliamentary Affairs*, n. 54/2001, p. 444.

patterns typically applied within domestic constitutional space. The analysis of amendment rules and the role of a Second Chamber in these processes in different European legal orders<sup>5</sup> will allow for a comparison of the revision procedures on a higher level – the supranational one.

First, assessing the advantages and disadvantages underpinning the reasons of sub-national units' inclusion in constitutional amendment procedures, it presents some theoretical rationales. Examining the amendment rules and those mechanisms which gradually structure the constitutional rigidity, it identifies some national paradigms which can help to design (a) supranational paradigm(s) and make some remarks on the procedure of Treaty revision which encloses elements of rigidity.

Although the EU is not a State and the Lisbon Treaty is not a Constitution, the comparison with the constitutional revision procedures of certain Member States, especially those with a decentralized structure, consents to analyze whether the mechanism of including national parliaments aggravates the Treaty amendment processes and to assess the impact on the quasi-constitutional configuration of the EU which deserves to be further developed in the perspective of the configuration of national legislatures as 'territorial parliaments' and their more incisive participation in the process of 'formal European constitutional change'.

## 2. Upper Houses in National Constitutional Amendment Processes: Rationales

Bicameral systems include sub-national units by dedicating a legislative chamber to their interests and requiring that constitutional amendments be approved by that chamber.<sup>6</sup> It is not self-evident that sub-national units should be directly included in the processes of national constitutional amendment<sup>7</sup> but, where they exist, it seems most fair, legitimate, and efficient for national suitable chamber to initiative and ratify constitutional amendments considering sub-national communities' interests. There is no space for an in-depth analysis,<sup>8</sup> but for the purpose of the topic there could be identified at least three legitimate and significant rationales for bicameralism allowing sub-national units to participate directly or indirectly in the constitutional amendment processes.

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<sup>5</sup> Especially in those domestic legal systems in which sub-national components are predominant such as Austria, Belgium and Germany as federal states and France, Italy and Spain as non-federal states.

<sup>6</sup> N. ARONEY, *Formation, Representation and Amendment in Federal Constitutions*, in *Am. J. Comp. L.*, n. 54(2)/2006, p. 326.

<sup>7</sup> For example, three federal systems constitutionally recognize sub-national government but do not include sub-national units in constitutional amendment process (Venezuela, the United Arab Emirates, and The Federation of Saint Christopher and Nevis)

<sup>8</sup> See paper presented at the same conference by M. ROMANIELLO, *Bicameralism: a concept in search of a theory*, now in *Amministrazione in cammino*, 20 September 2016, available at [www.amministrazioneincammino.luiss.it/app/uploads/2016/09/Romaniello.pdf](http://www.amministrazioneincammino.luiss.it/app/uploads/2016/09/Romaniello.pdf)

## 2.1. Legitimacy pattern

In federal states which are predicated, at least in part, on a joining or union of pre-existing political units, the national constitution represents an agreement between political communities regarding the terms of the federal union.<sup>9</sup> The legitimacy of the national constitution arises from the consent of the sub-national communities that created it. Thus, many early scholars of federalism concluded that federalism demands an amending procedure in which the states as separate entities play a part.<sup>10</sup> National constitutional change can occur only with the consent of the component units because their consent is necessary to legitimate the new conditions of the federal union. Thus, it is important that amendment rules provide a mechanism for ‘eliciting’ that consent from sub-national units.

In reality, this perspective on federalism seems somewhat oversimplified and fails to fully describe the majority of contemporary decentralized states. The Constitution of Switzerland, for example, is the only extant constitution that expressly identifies itself as a ‘(con)federation’ formed by the ‘Swiss People’ and the ‘Cantons’. This suggests that legitimacy derives from both the national community and the Cantons. In general, it is said that bicameralism preserves federalism. Under ‘federal bicameralism’, the lower house is typically apportioned on the basis of population, while the upper house is divided amongst the regional units by providing an equal representation (see USA), or unequally apportion the upper chamber by providing additional representation to the larger units (see Germany).

Other states have constitutionalized sub-national governments but expressly rejected the notion that their national constitutions are based in any way on the union of pre-existing communities. Italy is a prominent example. The Constitution, recognizing the unitary republic<sup>11</sup>, listing the Regions<sup>12</sup>, distinguishing two different degree of their autonomy,<sup>13</sup> and introducing them among the components of the State,<sup>14</sup> does not echo, actually, the pre-existing communities (*Regno* or *Ducato*). The particular historical circumstances of 1948 and fears for secession of some territories<sup>15</sup> contribute to the establishment of sub-national level of government in some pre-existing territories. In order to avoid asymmetries between these and other areas of the country, it was found a solution between federal and unitary state – a ‘quasi-

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<sup>9</sup> See J.L. MARSHFIELD, *Models of Subnational Constitutionalism*, in *Penn. St. L. Rev.*, n. 115/2011, pp. 1151-1558; K. LENAERTS, *Constitutionalism and the Many Facets of Federalism*, in *Am. J. Comp. L.*, n. 38/1990, pp. 205-206; J.A. GARDNER, *Interpreting State Constitutions. A Jurisprudence of Function in a Federal System*, Spring, 2005, pp. 80-143.

<sup>10</sup> J. BRYCE, *Studies in History and Jurisprudence*, New York, 1901, p. 173; C.J. FRIEDRICH, *Constitutional Government and Democracy*, rev. ed., Boston, 1950, p. 209.

<sup>11</sup> Article 5, Italian Const.: “The Republic is one and indivisible. [...]”

<sup>12</sup> Article 131, Italian Const.

<sup>13</sup> Five so-called “special” or “autonomous” Regions enjoy of higher degree of autonomy (Article 116) and the 15 ordinary Regions with limited legislative power in some fields (Article 117).

<sup>14</sup> Article 114, Italian Const.

<sup>15</sup> Especially, Sardegna, Sicilia, Valle d’Aosta.

federal’ regionalism<sup>16</sup> – and an “absurd and cumbersome”<sup>17</sup> bicameralism, “merely looking for trouble”<sup>18</sup>, in which the Senate, “elected on regional basis”<sup>19</sup>, is not a place where the new regions are represented.<sup>20</sup> Moreover, the Const. Law 9 February 1963, no. 2, establishing the same five years term for both chambers, not only had eliminated any residual protecting function of the regional interests in the Senate, but also had asserted the political criteria on which the Upper House foundations is based and its effective role in the pursuit of the integration of the general representation.<sup>21</sup> In any case, in this framework, Regions (more specifically, Regional Councils) enjoy initiating amendment powers as well as represent a subject eligible to submit a referendum proposal on an amendment approved by the chambers. After different waves of bicameralism and constitutional reforms implicating the regional asset of Italian system, the constitutional reform promoted by Renzi Government tried to put an end to the long search of a “bicameralism that makes sense”<sup>22</sup> and a Senate as a ‘Chamber of the Regions’. In this event, the constitutional reform would have introduced an increased element of regional representation into Parliament without sharing the characteristics of the German *Bundesrat* in which the *Länder* are directly represented.<sup>23</sup>

The expressly mention of the sub-national entities in the constitutional text is not always the *ratio* for setting up an Upper House representative of territorial communities. From this viewpoint, Belgium and Austria present an unusual background. Belgian Constitution establishes the federal structure of the State

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<sup>16</sup> See F. PALERMO, *Asymmetric, “Quasi-Federal” regionalism and Protection of Minorities. The case of Italy*, in G. ALAN TARR – R.F. WILLIAMS – J. MARKO (eds.), *Federalism. Subnational Constitutions, And Minority Rights*, Westport, 2004, pp. 109-113.

<sup>17</sup> V. CRISAFULLI, *Incontro democratico e rifondazione dello Stato: atti del convegno di studio svoltosi a Firenze il 17-18 giugno 1973*, Milano, 1973, p. 14.

<sup>18</sup> See K.C. WHEARE, *Legislatures*, London, 1963, p. 200, referring to perfect bicameralism into parliamentary legal system.

<sup>19</sup> Article 57, Italian Const.; concept understood as a geographical area within which to carry out the election of Senators, without implying any effective representation of the Region in the Senate and a tie between the Senate and the regional institutions. See C. FUSARO – M. RUBECCHI, *Articolo 57*, in R. BIFULCO – A. CELOTTO – M. OLIVETTI (cur.), *Commentario alla Costituzione*, Vol. 2, Torino, 2006, pp. 1143-1154.

<sup>20</sup> See P. AIMO, *Bicameralismo e Regioni. La camera delle autonomie: nascita e tramonto di un’idea. La genesi del Senato alla Costituente*, Milano, 1997, pp. 113-168.

<sup>21</sup> F. PALERMO – M. NICOLINI, *Bicameralismo. Pluralismo e limiti della rappresentanza in prospettiva comparata*, Napoli, 2013, p. 99. See also E. CHELI, *Bicameralismo*, in *Digesto delle discipline pubblicistiche*, Vol. 2 Torino, 1987, pp. 318-325; A. BARBERA, *Oltre il bicameralismo*, in *Democrazia e diritto*, n. 3/1981; L. PALADIN, *Per una storia costituzionale dell’Italia repubblicana*, Bologna, 2004; L. CASTELLI, *Il Senato delle autonomie. Ragioni, modelli, vicende*, Padova, 2010.

<sup>22</sup> On different reforms of the Senate, see C. FUSARO, *La lunga ricerca di un bicameralismo che abbia senso*, in A. BARBERA – G. GUZZETTA (cur.), *Il governo dei cittadini: referendum elettorali e riforma della politica*, Soveria Mannelli, 2007, pp. 653-690; S. BONFIGLIO, *Il Senato in Italia. Riforma del bicameralismo e modelli di rappresentanza*, Roma-Bari, 2009.

<sup>23</sup> On the uncertain nature of the new Senate see N. LUPO, *La (ancora) incerta natura del nuovo Senato: prevarrà il cleavage politico, territoriale o istituzionale?*, in *Federalismi.it*, n.4/2016. See also R. BIN, *Le elezioni e il nodo del Senato*, in *Forumcostituzionale.it*, 2013.



composed of Communities and Regions,<sup>24</sup> but the inclusion of these communities into Upper House aims at promoting, in fact, different voices in the amendment process and at improving deliberation.<sup>25</sup> In Austria, despite the Constitution distinguishes the form of State and lists the *Länders*<sup>26</sup>, the representative chamber of the provinces, however, was not designed for replying the federalist composition; from the beginning, Austrian *Bundesrat* was more a ‘forum’ for political debate than a meeting point of territorial interests with those of the Federation.<sup>27</sup> Actually, both chambers were established to perform legislation and exercise control over the executive.

The general rationale for a bicameral system is to ensure the balance competing bases for representation. In fact, two legislative chambers provide a more appropriate and flexible institutional explanation for the representational diversity. A system of proportional representation and representation’s differences result in the membership of Parliament reflecting broader dissimilar interests and a more democratic and reflective legislative branch of the concerns of the people and units it serves.

## 2.2. Checks-And-Balances pattern

In some federal systems, sub-national government exists to provide a ‘check’ on national institutions and government in general and on amendment processes, in particular in informal one.<sup>28</sup> As Madison’s well-known justification for American federalism, by dividing government power between national and sub-national institutions, it is hoped that both levels of government have incentives to monitor each other, which can prevent government abuses and protect liberty.<sup>29</sup> Madison’s design is relevant to amendment rules for a twofold motive. First, through checks-and-balances national government cannot amend the constitution without by-passing or excluding subnational governments. Second, the amendment power, like any government power, can be misused especially if it is consolidated in an institution. In consequence, it makes sense to shape a checks-and-balances system for the amendment processes too. If the amendment power encloses its own checks-and-balances, it is likely to require and involve both national and subnational communities to consider the proposed amendments giving each level of government an effective means of precluding misuse of the amendment power.

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<sup>24</sup> Articles 1-4, Belgian Const.

<sup>25</sup> See G. CONTI, *Il procedimento di revisione costituzionale in deroga all'art. 195 della Costituzione belga. Dall'Accordo Papillon alla nuova riforma dello Stato*, in *Osservatorioaic.it*, February 2014.

<sup>26</sup> Article 2(1) and (2), *Bundes-Verfassungsgesetz* (B-VG).

<sup>27</sup> See F. PALERMO, *Riforme e proposte di riforma del Bundesrat in Germania e Austria*, in *Rass. Parl.*, n. 49(1)/2007, pp. 131-149.

<sup>28</sup> See R. DIXON, *Constitutional Amendment Rules: A Comparative Perspective*, in T. GINSBURG – R. DIXON (eds.), *Comparative Constitutional Law*, Cheltenham-Northampton, 2011, pp. 96-103.

<sup>29</sup> See *The Federalist Papers Nos. 46, 47, 51*, in *The Federalist Papers*, Penguin, 1987. See also R. DEHOUSSE, *Il paradosso di Madison: Riflessioni sul ruolo delle camere alte nei sistemi federali*, in *Le Regioni*, n. 17/1989), pp. 1365-1400.

A rationale reason for having a bicameral system is to ensure the role of Parliament in holding the government to account and checking or restraining its power. In most instances, and in legal orders as highlighted before – Belgian and Austrian –, a Second Chamber with broadly equal powers to the first affords a more effective check on government conduct. This kind of ‘contestatory federalism’ describes a “conception of divided power that justifies federalism as a method of protecting liberty through the institutionalization of a permanent contest for power between national and subnational units of government.”<sup>30</sup>

This checks-and-balances system fails, however, if national institutions can unilaterally amend the national constitution to circumvent (or eliminate) sub-national government. Under those conditions, national government would have less incentive to respect sub-national government, and sub-national government would have less incentive to challenge the national government. Even if entrenchment of constitutional provisions provides some protection for sub-national government in this regard, a stronger protection is to include sub-national government in the amendment process. If sub-national government is included, it can confidently challenge national action without fear of a unilateral constitutional response by the national government.

Although this rationale may justify inclusion of sub-national units in amendment processes in some systems, it does not explain those systems that have adopted cooperative principles but nevertheless included sub-national units in the amendment process. A valid example is represented by German ‘cooperative federalism’<sup>31</sup> in which the rules of constitutional amendments include the approval of *Länders’* executives represented in the Upper House (*Bundesrat*), set a ‘bicameral’ procedure, similar to that required for federal ordinary laws (*Zustimmungsgesetze*), but aggravated by the qualified majorities necessary for the deliberation of the amendments in both chambers. Despite weakened intervention powers of the *Bundesrat* in order to prevent from becoming an obstacle into decision-making process, this chamber rests the primary instrument of check and veto exercised over central government. To the extent that it is difficult to avoid improper political use of this chamber, there should be a broad consensus at the political level, a sort of cooperation between government majority and opposition forces, which, at the expense of the same governing majority, is all the more evident as the composition of the *Bundesrat* is altered.<sup>32</sup>

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<sup>30</sup> J.A. GARDNER – A.A. ININET, *Sustainable Decentralization: Power, Extraconstitutional Influence, and Subnational Symmetry in the United States and Spain*, in *Am. J. Comp. L.* 59/2011, p. 491.

<sup>31</sup> A.B. GUNLICKS, *The Länder and German Federalism*, Manchester&New York, 2003, p. 61.

<sup>32</sup> F. PALERMO – M. NICOLINI, *Bicameralismo*, *op.cit.*, p. 261.

### 2.3. Self-governance pattern

Some systems decentralize political power to promote self-governance by sub-national communities<sup>33</sup> which can exercise a degree of political self-determination.<sup>34</sup> Sub-national government can allow communities to enact their own policies (through sub-national legislatures) enforce their own laws (through sub-national executives), and resolve their own disputes (through sub-national tribunals). This kind of representation could be met in the divided societies comprising many diverse subnational groups. A particular example is given by Spain, a unitary state in which Catalonia asked in many occasions for its independence invoking self-determination. In theory, the people of Catalonia - respecting the rules on the constitutional amendment procedure - could propose either a total or partial revision of the constitution. Given the unitary framework of the system, the question is whether they could ask for a more regional autonomy and a constitutional change of their status without compromising the state as a political unit. But, as stated by the Article 138(2) of Spanish Constitution “differences between Statutes of the different Self-governing Communities may in no case imply economic or social privileges”. Moreover, it should be considered that any initiative regarding their self-governing should be approved by the *Cortes Generales*, which can take over the initiative any time if the conditions of Article 143 are not satisfied.

However, for political self-determination to be meaningful, sub-national government must have some degree of independence. Implicitly, in such a system, sub-national governments would operate without interference from national institutions.<sup>35</sup> Although this ‘space’ can be preserved through a variety of different mechanisms, a particularly effective method of ensuring that sub-national communities retain a degree of independence is to guarantee that they can participate in any amendments to the national constitutional structure. Including sub-national units in that process helps ensure that community rights, which might implicate only a minority of citizens in the aggregate national community, are not infringed by national political institutions representing majoritarian preferences.

This may explain why some decentralized systems concerned with protecting sub-national political communities include sub-national government in the amendment process. As explained in more detail below, this rationale is most obvious if the sub-national government is included in only those amendments that affect their rights and duties. These subject-matter limitations on sub-national

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<sup>33</sup> See Spanish Const., Ch.3.

<sup>34</sup> See G. ALAN TARR, *Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism*, in *Rutgers L.J.*, n. 40/2009, pp. 767-783.

<sup>35</sup> See R. WILLIAMS – G. ALAN TARR, *Subnational Constitutional Space: A View From the States, Provinces, Regions, Lander and Cantons*, in G. ALAN TARR – R.F. WILLIAMS – J. MARKO (eds.), *Federalism, op.cit.*, pp. 15-16.



involvement aim to ensure that sub-national communities retain a degree of control over their status in the constitutional structure.

### 3. Upper Houses in National Constitutional Amendment Processes: Mechanisms

This part delivers a summary of national paradigms, identifying different approaches to including (directly or indirectly) sub-national components in the process of formal constitutional change, and presenting a preliminary assessment of each method.

#### 3.1. Representation Paradigm

The most common way that sub-national units are included in national amendment processes is by providing them with representation in the national legislature, which is responsible for initiating or ratifying proposed amendments. This method can take many different forms and provide for varying degrees of representation for sub-national units through a separate ('upper') legislative chamber.

'Federal bicameralism' has fulfilled two essential tasks: on the one hand, that of representing the federated states of federal nations; and on the other, that of identifying a political body of the central government within which compose unity/political-territorial pluralism dialectics governing constitutional order. However, what does it mean the representation of federated states by a suitable branch? First, there is a *political* sense of representation according to which members of Upper House are directly elected by the federated communities, represent the specific community of those sub-national units, are accountable to the electorate, and are required to shape their will autonomously from the federated communities which they represent or their governments. Second, the representation in its *judicial* meaning refers to the nomination of the federal chambers' members by the constituent units' executives, namely federated governments delegate their members who are toughly accountable to their communities and who express the will of their executives that they represent and only indirectly those of the electorate.<sup>36</sup>

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<sup>36</sup> See H. PITKIN, *The Concept of Representation*, Berkeley, 1967, making a distinction between delegates and representatives which correspond to the distinction made by G. Sartori between representatives in the juridical and in the political sense (see G. SARTORI, *Elementi di teoria politica*, Bologna, 1987, p. 285). The distinction between political and judicial representation allows to identify two different models of federal bicameralism: the Senate model which corresponds to the political representation as long as the chamber is similar to a regular parliamentary assembly and its members act as normal legislators (e.g. Austria and Belgium); and Council model related to judicial representation and pursuant to which the members of the Upper House are completely different from regular legislators (e.g. Germany). See T.O. HUEGLIN – A. FENNA, *Comparative Federalism. A Systematic Inquiry*, Toronto, 2015, 2<sup>nd</sup> ed., p. 207 (defining the Council model); G. DORIA, *The Paradox of Federal Bicameralism*, in *European Diversity and Autonomy Papers*, n.5/2006, available at [www.eurac.edu/edap](http://www.eurac.edu/edap), pp. 8-16; F. PALERMO – M. NICOLINI, *Bicameralismo*, *op.cit.*, pp. 156-162; R.L. WATTS, *Comparing Federal Systems*, Montreal, 2008, p. 141 (referring to senatorial model, and ambassadorial model instead of council model). On the meaning of ambassadorial solution of the European Union see *infra* 4.

Scholarship and constitutional studies have accused federal chambers of failing in performing their duty, and of having evolved into party-dominated institutions, barely distinguishable from their popular counterparts.<sup>37</sup> Where political representation gathers prominence, Senators “tend to vote along party lines rather than strictly for the regional interest they represent”.<sup>38</sup>

However, a peculiar political framework of sub-national representativeness in Upper House can be traced also in legal systems dominated by a judicial representation, such as Germany, where, although it was structured to represent the federated states as institutions (according to the rule that the *Länder* representatives delegated in *Bundesrat* must vote “as a unit”<sup>39</sup>) and represented a ‘very federal house’<sup>40</sup>, *Bundesrat* has ended up assuming an incontestable party-political role, conditioning, through the legislative powers constitutionally conferred, the action of the *Bundestag*, including constitutional amendment processes.<sup>41</sup>

Interestingly, territorial representation is met also in a few systems that are formally unitary. In such models of ‘non-federal’ bicameralism, different ways of designation of sub-national entities’ representatives in the Upper House and, consequently, their inclusion in the amendment process, have proven valuable in promoting pluralism; it is the *represented pluralism* (or better, *political-territorial pluralism*),

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<sup>37</sup> See M. RUSSELL, *The Territorial Role of the Upper House*, in *J. Leg. St.*, n. 7(1)/2001, pp. 105-118; W. SWENDEN, *Federalism and Second Chambers*, Brussels, 2004.

<sup>38</sup> R.L. WATTS, *op.cit.*, p. 141. See also M. RUSSELL, *What are Second Chamber for?*, in *Parl. Aff.*, n. 54(3)/2001, p. 445. For instance, in Austria, the tie between the *Bundesrat* and *Länder Diets* is both elective, as long as the members of Federal Council are elected by sub-national parliaments, both personal, as long as the eligibility to *Landtag* is a prerequisite for the passive electorate to the Federal Council, and political, as long as the composition of the Federal Council depends on the composition of the sub-national parliaments but also because of the “safeguard clause” ensuring that “at least one seat [in the *Bundesrat*] must fall to the party having the second largest number of seats in a Provincial Parliament” (Articles 34 and 35). This structural tie is mitigated by the fact that it is allowed, but not due, that the members of the Federal Council are members of sub-national parliaments and because elected Senators do not represent the *Landtag* interests in *Bundesrat* as long as they respond to the needs of parliamentary group to which they belong. Conversely, an election of Senators on regional basis can favor it (see A. D’ATENA, *Finalmente un Senato “federale”*, available at [www.issirfa.it](http://www.issirfa.it)). Hence, there is a parliamentary and political representativeness of the *Länder* in the Federal Council; in this regard, the *Bundesrat* reflects more a political composition rather than a purely territorial one (See F. PALERMO, *Il federalismo austriaco: un cantiere sempre aperto*, available at [www.issirfa.it](http://www.issirfa.it)).

<sup>39</sup> Article 51(3), GG. See R.L. BORTHWICK, *Methods of Composition of Second Chambers*, in N.D.J. BALDWIN – D. SHEIL (eds.), *Second Chambers*, London, 2001, p. 22; F. PALERMO – J. WOELK, *Germania*, Bologna, 2006, p. 31. See also F. PALERMO, *Germania e Austria: modelli federali e bicamerali a confronto. Due ordinamenti in evoluzione tra cooperazione, integrazione e ruolo delle seconde camere*, Trento, 1997; M. KOTZUR, *Federalism and Bicameralism - The German « Bundesrat » (Federal Council) as an Atypical Model*, in J. LUTHER – P. PASSAGLIA – R. TARCHI (eds.), *A World of Second Chamber. Handbook for Constitutional Studies on Bicameralism*, Milano, 2006, pp. 257-292.

<sup>40</sup> W. PATZELT, *The Very Federal House: The German Bundesrat*, in S. PATTERSON – A. MUGHAN (eds.), *Senates: Bicameralism in the Contemporary World*, Cleveland, 1999, pp. 59-92.

<sup>41</sup> See F. PALERMO – M. NICOLINI, *Bicameralismo*, *op.cit.*, pp. 154-155, 234.

rooted in the democratic principle and popular sovereignty, that legitimizes the competences and powers of the upper houses in exercising the will of the State.<sup>42</sup>

The representation of various sub-national interests could motivate the design of legislative institutions. The framework of ‘political-territorial’ model have to be considered alongside mechanisms of differentiation based on constituencies and electoral formulas.<sup>43</sup> Mechanisms of Senators’ designation combined with the principle of pluralism offer a consistent pattern that complies with the purposes of bicameralism, namely the Upper House, besides the oppositional function with respect to any ‘drift’ of the Lower House, ensures the respect of the State components’ identities. Thus, while pluralism derives from popular sovereignty echoed in an autonomous body of representation and participation, different selection criteria of the Second Chamber components have proven to be the most appropriate to integrate the general representation and to attain the effective representation of pluralism in decision-making bodies.

Though many bicameral systems structure their upper houses around representation of sub-national components, this focus was diminished by including representatives of other various interests. For instance, in Italy and France, the Senate is elected not only on a territorial basis: the Constitution reserves

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<sup>42</sup> See G. VOLPI, *Autonomia locale e garantismo. Le separazione delle competenze tra Stato e Regioni*, Milano, 1972, p. 113.

<sup>43</sup> The French Senate, as an institution where the general political representation is integrated by the national sovereignty through the particular territorial decentralization of the Nation, is indirectly elected through a voting system that combines majority rule with the proportionality representation, by *grands électeurs* (including regional councilors, department councilors, mayors, city councilors in large towns, and members of the National Assembly), ensuring the representation of the territorial communities of the Republic constitutionally recognized (Articles 24(3) and 74). See F. PALERMO – M. NICOLINI, *Bicameralismo*, *op.cit.*, p. 95; P. ARDANT – B. MATTHIEU, *Institutions politique et droit constitutionnelle*, Paris, 2009, pp. 549-550. Conversely, at least, until the new reform will enter into force (on the new Italian Senate, see e.g. P. PASSAGLIA, *Qualche considerazione sulla disciplina della composizione del Senato contenuta nel progetto di revisione costituzionale in corso di approvazione*, in *Osservatoriosullefonti.it*, n.3/2014) the Senate is directly elected by the sub-national communities on a proportional representation basis. In Italian legal system, the election of the Senate is only tied to the regional organization of the State (Article 57; see e.g. T. MARTINES, *Il Senato eletto “a base regionale”, sub Article 57*, in G. BRACA (cur.), *Commentario della Costituzione. Le Camere*, Bologna-Roma, 1984, pp. 90 ss) because territorial entities are seen as constituencies for the purpose of allocating seats and introduce only an “organizational criteria” differentiating the representation as regards the Chamber of Deputies. Spain implements a mixed system of direct and indirect election. The Senate reflects the territorial organization of the (indivisible) popular sovereignty (see P. FÉRNANDEZ SEGADO, *Article 69*, in O. ALZAGA VILLAAMIL (dir.), *Comentarios a la Constitución española de 1978. Tomo VI. Artículos 66 a 80*, Madrid, 1998, p. 201). There are two types of Senators: constituent units’ Senators (legislative assemblies of the Autonomous Communities nominate one Senator and a further Senator for each million inhabitants in their respective territories, guaranteeing adequate proportional representation (Article 69(2), (3) and (4)); and provincial Senators (elected by popular vote in each peninsular and insular provinces, and cities of Ceuta and Melilla (Article 69(5)). The Spanish bicameralism envisages political, ethnic-linguistic and territorial cleavages. Considering that each political party is spread also on territorial basis, giving voice to the linguistic and ethnic communities. See E. AJA, *El Estado Autonomico. Federalismo y hechos diferenciales*, Madrid, 2003; J.M. CASTELLÀ ANDREU, *The Spanish Senate after 28 years of constitutional experiences*, in J. LUTHER – P. PASSAGLIA – R. TARCHI (eds.), *A World, op.cit.*, pp. 859-910.

some seats to overseas citizens.<sup>44</sup> Moreover, Italian Senate also contains permanent (non-elected) members: the Constitution allows each President of the Republic to appoint up to five senators who have live tenure "for outstanding patriotic merits in the social, scientific, artistic or literary field. Former Presidents of the Republic are *ex officio* senators for life".<sup>45</sup> Thus, these upper houses are not exclusively dedicated to sub-national interests, and the designation method generally appears to be ineffective at including sub-national units, especially in those systems in which the structure of the Second Chamber is compromised by the presence of other interests.

### 3.2. Consent Paradigm

Mechanisms for approval of constitutional changes by upper houses as representatives of sub-national units vary, but no European legal system states a model similar to Swiss Cantons' consent.<sup>46</sup> The European sub-nationalism is characterized by the involvement of the sub-national communities in the constitutional amendment process through the Upper House. Both federal<sup>47</sup> and non-federal 'territorial'<sup>48</sup> systems incorporate sub-national entities into constitutional amendment process by requiring them or their representative institutions directly deliberate and ratify proposed amendments. In this perspective, they participate in constitutional change processes carrying by a supermajority the amendments proposed.

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<sup>44</sup> If in Italy the overseas constituencies are represented in both chambers, in French, citizens living outside the Republic are represented and elected only in the Senate.

<sup>45</sup> Article 59(2), Italian Const. The new reform preserves the nomination of five Senators for seven-year terms by the President of the Republic. There is no reference to the former Presidents of the Republic as permanent members on the Senate.

<sup>46</sup> Article 195, Swiss Const.: "The totally or partly revised Federal Constitution comes into force when it is approved by the People and the Cantons". Thus, the legitimacy derives from the Swiss people as a whole and Swiss Cantons as constituent units and the amendment rules reproduce this framework establishing a ratification method based on both nation-wide referendum and the Cantons. (Article 140 (a)).

<sup>47</sup> See e.g. N. ARONEY, *op.cit.*, p. 326. German and Austrian amendments rules provide for complicity of both political actors with legislative competences – one of which represents the constituent units (*Bundesrat*) –, and the same procedure required for simple federal laws for which it is necessary the consent of both legislative chambers. The only difference consists of the two-thirds majority requested for the approval of amendments (Germany, Article 79(2)). In Austria, the Constitution expressly states that the approval must be imparted in the presence of structural (at least half the members) and deliberative quorums (two-thirds majority of the votes cast (Article 44(2))). Moreover, the Austrian Constitution specifies that the laws relating to the rights of the Federal Council should also obtain in Federal Council the majority of the representatives from at least four provinces has approved the amendment (Article 35(4)). There is one exception: the presence of at least one third of the members and an absolute majority of the votes cast is requisite for a resolution by the Federal Council in case of an "ordinary" revision. In Belgian system the third step of the amendment process represents the revision *stricto sensu* and only this is subject to a two-thirds majority of the new elected chambers. The first step of the process, namely the Declaration of revision, should be approved by an absolute majority of votes in each chamber.

<sup>48</sup> Two-thirds majority is requested in Italy, Spain, and Belgium. In Spain, bills on constitutional amendment must be approved by a majority of three-fifths of the members of each House (Article 167(1)). In France, the Government Bill not submitted to referendum shall be approved by a three-fifths majority of the Parliament convened in Congress (Article 89(2)).

Different voting thresholds are established in some systems, such as Germany<sup>49</sup> and Spain<sup>50</sup>, where, if the requested two-thirds majorities are not reached, a joint commission of the legislative chambers could be convened in order to achieve a unanimous consent on the text of the law amending the constitution. If in Germany the ‘Joint Committee’ demanded by *Bundesrat* is optional, in Spain, a ‘Joint Commission of Deputies and Senators’ is mandatory if the proposed amendments do not obtained the approval by a majority of three-fifths of the members of each national legislative chamber. The new common text should be approved by an absolute majority of the members of the Senate and by two-thirds majority of the Congress.

The consent of the Upper House could not reflect the communities’ will because of their obsolete interests whether this legislative branch was formed as a result of the direct election of the territories’ representatives. Whether this chamber is composed of representatives appointed by sub-national legislatures, the approval of constitutional amendments corresponds more strongly to the consent of sub-national units because of the narrower approach to the community and its interests. Hence, the approval of amendments by the same supermajorities in both chambers implies a broad consensus at the political level or a sort of collaboration among government majority and opposition forces, which results more evident as much as altered is – at the expense of the same governing majority – the composition of the Upper House.<sup>51</sup>

In any case, the sub-national components’ will, expressed through their representation in the Upper House, risks to be overcome and overturned by the new chamber (in those systems which provide for the dissolution of the chambers<sup>52</sup>) or by the people itself (when a further consent through a popular referendum is required<sup>53</sup>)

Moreover, supermajority approval, higher quorum requirements or delays due to the establishment of a joint commission complicate formal amendments and makes constitutions more difficult to amend.

It is also difficult to assess a more complex method of direct inclusion in the constitutional amendments process, as in Switzerland, which seems to support its effectiveness at including sub-national units.<sup>54</sup> This unique example suggests that requiring sub-national units to directly endorse amendments can be a particularly potent method of including sub-national units because provides them with an effective means of protecting their interests through the ‘negative’ action of vetoing amendments endorsed by national

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<sup>49</sup> Article 77(2), GG.

<sup>50</sup> Article 167(1), Spanish Const.

<sup>51</sup> Especially in Germany, where *Bundesrat* became an opposition “tool” in order to prevent government action within parliamentary majority–executive axis. See F. PALERMO – M. NICOLINI, *Bicameralismo*, *op.cit.*, p. 234.

<sup>52</sup> Belgium, Spain.

<sup>53</sup> Austria, Spain, Italy and France.

<sup>54</sup> See W.S. LIVINGSTON, *Federalism and Constitutional Change*, London, 1956, pp. 234-237; 312-313.

institutions (and even sometimes popular national majorities). This suggests a degree of independent judgment by the sub-national communities that presumably reflects their interests not apprehended by national institutions.

### 3.3. Structural Paradigm

In order to understand the degree of involvement of the second chambers in the constitutional amendment process, it is necessary to shape the framework of constitutional changes and to distinguish diverse revision formulas embedded in the written democratic constitutions.

Formal constitutional changes must be considered in the light of fundamental conceptual distinction between ‘amendment’ and ‘revision’ pursuant to which different procedures are applied to amend or revise the constitutional text. From this point of view, different conceptual meanings allow to assess the classical distinction between total and partial revision; but not always the conceptual distinction could be found in the constitutional text, which makes difficult to distinguish between two forms of revisions<sup>55</sup> or to identify, especially, a total revision through a constitutional pre-ordained procedure as long as this can only take place in the presence of a revolution.<sup>56</sup>

Thus, this distinction allows to (re)evaluate the different typologies of revisions and mechanisms of constitutional changes and use a diverse taxonomy.

First, within the classical framework of formal constitutional revisions, different degrees of rigidity are outlined in some constitutions that adopt a distinction between formal amendment, as ‘*normal revision*’ which aims to modify or integrate parts or single provisions of the constitutions, and constitutional revision, as ‘*qualified revision*’ implemented in order to totally change the constitutional text.<sup>57</sup> For instance, Spanish Constitution states both the normal procedure, related to the substantial reform of some parts of the constitution, and the special one, concerning total revisions of the constitutional text or partial revision of provisions affecting fundamental rights and public liberties.<sup>58</sup>

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<sup>55</sup> P. BISCARETTI DI RUFFIA, *Introduzione al diritto costituzionale comparato: le "forme di Stato" e le "forme di governo", le costituzioni moderne*, Milano, 1984, p. 631. See also R. ALBERT, *The Structure of Constitutional Amendment Rules*, in *Wake Forest L. Rev.*, n. 94/2014, p. 930.

<sup>56</sup> See C. MORTATI, *Concetto, limiti e procedimento della revisione costituzionale*, in *Riv. Trim. di dir. pubb.*, n. 58/1952; P. BARILE, *La revisione della Costituzione*, in P. CALAMANDREI – A. LEVI (dir.), *Commentario sistematico alla Costituzione italiana*, Vol. 2, Firenze, 1950, p. 472. See also J. LOCKE, *Second Treatise of Government*, Indianapolis, 1980, sect. 226-227.

<sup>57</sup> See M.P. VIVIANI SCHLEIN, *Rigidità e flessibilità costituzionale*, in AA.VV., *Studi in onore di Paolo Biscaretti di Ruffia*, Vol. 2, Milano, 1987, p. 1376; S. BONFIGLIO, *Sulla rigidità delle Costituzioni. Il dibattito italiano e la prospettiva comparata*, in *Dir. Pubb.*, n. 1/2015, p. 109.

<sup>58</sup> Article 168, Spanish Const. A clear distinction between total and partial revision is contained also in Austrian Constitution (Article 44(3), B-VG refers to total revision; Articles 44(2) and 35(4), B-VG refers to partial revisions) and Swiss Constitution (Article 193 regarding total revision; Article 194 regarding partial revision).

Second, conceptual distinction between total and partial revision is not always entrenched in the constitutional text. It does not mean that there is not identified the type of revision in order to perform a constitutional change according to the specific purpose of the designated procedure; the text leaves simply unstated this distinction. If Spanish, Austrian, and Swiss constitutions insist on the *explicit* recognition of the two procedures of constitutional revision, other constitutions, such as Germany, Belgium, Italy or France, leave unspecified this distinction with the risk that their *implicit* recognition make difficult to identify the constitutional change subject, as well as compromise the related consequences and outcomes.

Following Richard Albert's approach,<sup>59</sup> it could be embedded also the taxonomy of formal amendments based on the content of constitutional text related to the Upper House involvement and the range of constitutional provisions open to formal amendments by those aforementioned procedures: a) *comprehensive revision*, according to which all amendable provisions are susceptible to amendment by both types of revision requiring the consent of Upper House (Germany, France, Italy and Belgium); b) *restricted revision*, under which to each amendable provision corresponds one of designated procedure requiring the approval of Upper House (Spain); and c) *exceptional revision*, pursuant to which only one available procedure is applied to a specific amendable provision (or a set of related provisions) affecting the competences of the Upper House (Austria).

Furthermore, from a pure textual perspective, rules of formal constitutional amendments (including those relating to the involvement of Upper House) are contained in one or more provisions; thus, the constitutional text can be categorized in: i) *complete*, where the rules are contained in a Part or Title of the constitution unifying the rules of more articles, and sufficiently comprehensive to identify the paths of amendments procedure (Spain, Italy, Belgium, Switzerland<sup>60</sup>); ii) *substantive*, pursuant to which the procedure is restricted to only one article, quite comprehensible of paths to be followed (France, Germany<sup>61</sup>); iii) *discrete*, where the provisions are entailed in different parts of the constitutional text and indicate for each of them one specific procedure (Austria<sup>62</sup>).

### 3.4. Procedural Paradigm

Written constitutions embed different procedures available to formally amend them: first, a *single-path procedure*, applied to all amendable provisions and which requires to Upper House to vote in only one

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<sup>59</sup> See R. ALBERT, *op.cit.*, pp. 936-948.

<sup>60</sup> Part X, Articles 166-169, Spanish Const.; Title VI, Sec. II, Articles 138-139, Italian Const.; Title VIII, Articles 195-198, Belgian Const.; Title VI, Articles 192-195, Title VI, Articles 192-195, Swiss Const.

<sup>61</sup> Article 89, French Const.; Article 79, GG.

<sup>62</sup> Article 44(3), B-VG refers to total revision; Article 35(4), B-VG regarding partial revision.

session<sup>63</sup>; second, *double-path procedure*, pursuant to which a single-path procedure is integrated by a referendum<sup>64</sup>, or according to which formal amendments are adopted by Upper House after two successive divided debates<sup>65</sup>; and finally, *multi-path procedure*, featuring an additional consent by referendum, no matter if this possibility is an eventually alternative when the legislatives chambers do not reach the necessary supermajorities on the amendments proposed (optional referendum)<sup>66</sup>, or if this tool is constitutionalized as a method of formal amendments procedure (mandatory referendum).<sup>67</sup>

In federal and non-federal ‘territorial’ systems, the need to protect the constitutional rigidity and the division of powers is bound up with the representation and participation of sub-national units to the constitutional review process.<sup>68</sup> Formal amendment rules laid down by the constitutions provide for another paradigm related to the drivers of constitutional change (i.e. in this particular analysis, upper houses and sub-national units).<sup>69</sup> This allows for some important observations.

First. The power of sub-national communities to initiate an amendment process is normally exercised through the Upper House. Evidently, upper houses favor the *indirect* participation of the sub-national units to the constitutional amendment process. Nonetheless, a few systems allow them to *directly*<sup>70</sup>

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<sup>63</sup> Germany (Article 79); Austria (Article 44(3), if, in case of partial revision, one third of the members of the Federal Council or the National Council do not demand for a referendum); France (Article 89(2)).

<sup>64</sup> Austria (Article 44(2) and (3); Article 35(4)); France (Article 89(1)).

<sup>65</sup> In Italy, the amendments proposed shall be adopted by each House after two successive debates at intervals of not less than three months (Article 138(1)). The constitutions of Belgium (Article 195) and Spain (Article 168) impose electoral preconditions upon formal amendments rules, requiring dissolution of the chambers and successive votes separated by the election of the new chambers which must ratify the decision and proceed to examine the new constitutional text.

<sup>66</sup> Within certain time limits, Senators, group of Senators or sub-national legislatures may demand to submit the approved amendments to a referendum (Article 138(2) Italian Const.; Article 167(3), Spanish Const.)

<sup>67</sup> Spain (Article 168);

<sup>68</sup> N. ARONEY, *op.cit.*, p. 326.

<sup>69</sup> For a general classification of the formal (and informal) amendments processes based on the drivers of constitutional change, see C. FUSARO – D. OLIVER, *Towards a Theory of Constitutional Change*, in C. FUSARO – D. OLIVER (eds.), *How Constitutions Change: A Comparative Study*, Oxford, 2011, pp. 405-433.

<sup>70</sup> The sub-national units do not exactly propose directly themselves an amendment; actually, a group of them act as a “unique body”.



initiative constitutional amendments.<sup>71</sup> Such *constitutional arrangements*<sup>72</sup> prevent revisions unilaterally provided by the central government<sup>73</sup> and legitimate the equal participation of both chambers in the constitutional amendment processes.<sup>74</sup> In any case, direct inclusion device is rare because, actually, it divides the amendment power between vertical levels of government, determining, in their favor, a further guarantee, namely the constitutional rigidity.<sup>75</sup> However, this method for including sub-national units is limited by the simple fact that no system allows sub-national units to adopt amendments without subsequent approval by the national legislature and/or a referendum. Furthermore, a more practical limitation is the difficulty of coordinating amendment proposals between multiple sub-national units that have to act as a ‘unique entity’.

Second. There are some exceptions to this principle of equal participation of both chambers to constitutional revisions: a) on the one hand, in order to ‘safeguard’ the federal arrangements, amendment rules are structured by giving sub-national units strong veto powers<sup>76</sup>; on the other, upper houses’ objection can be overcome by the lower houses; b) while, on the one hand, a constitutional revision becomes effective also if the houses approve the amendments by different majorities<sup>77</sup>; on the other, joint commissions may be convened in order to reach an agreement between the chambers on the amendments proposed.<sup>78</sup>

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<sup>71</sup> There is some variety in how sub-national units can initiate amendments. Spanish sub-national communities, through their legislatures, can initiate a national amendment process but with some important limitations (Articles 87 and 166). To them it is only recognized the opportunity to urge the Government to adopt a bill or to remit to the Congressional Steering Committee a proposal and to form a delegation of up to three members, appointed to defend the proposal before the House. In any way, this initiative, being merely a proposal, does not require the Government to submit a draft reform to the *Cortes*. The position of the Autonomous Communities can be compared to that of individual parliamentarians, so as to qualify a limited initiative. In Spain, in fact, although lawmakers of the Autonomous Communities have the right to propose legislative amendments, the passage of these amendments can be exclusively through the *Cortes Generales*. Thus, there are not effective forms of participation in the constitutional review by the subjects of territorial pluralism. The Italian Constitution does not expressly state the bodies which can initiate a constitutional amendment process but legal scholarship considers that the power to propose a constitutional revision is extended to the same bodies with power to initiate ordinary legislation. So, pursuant to Article 71, laws amending the Constitution could “be introduced by the Government, by a member of Parliament and by those entities and bodies [constitutionally] empowered.”

<sup>72</sup> See C.J. FRIEDRICH, *op.cit.*, p. 295.

<sup>73</sup> T. GROPPPI, *Federalismo e revisione costituzionale*, in F. PALERMO (cur.), *La «manutenzione» costituzionale*, Padova, 2007, p. 25.

<sup>74</sup> F. PALERMO – M. NICOLINI, *Bicameralismo*, *op.cit.*, p. 166.

<sup>75</sup> A.V. DICEY, *Introduction to the Study of the Law and the Constitutions*, London, 1885, pp. 142-145.

<sup>76</sup> Austria and Germany.

<sup>77</sup> Spain (Article 167(2)); Austria (Article 44(1) and 37(1)).

<sup>78</sup> Spain (Article 167(a)); Germany (Article 77(2)). In France, it could not be convened a joint commission in order to achieve a common consent on the proposed amendments as for the ordinary laws, but when the President of the Republic decides to submit constitutional amendments to Parliament, this is convened in joint session (Article 89(2)).

Finally, the alternative use of nation-wide referenda to amend national constitutions is a ‘threat’ to bypass the legislature. The use of this tool envisages a further limitation because it could reverse the entire process through a rejection of the amendments proposed and undermine the consistency of the communities’ representative chamber.<sup>79</sup> Moreover, there are only popular referendums and this stress a limitation because in this way sub-national communities do not have the opportunity to participate directly in the process in order to achieve a greater consensus in favor of the amendments or reject them completely.

### 3.5. Normative Paradigm

The recognized role of the territorial components in the constitutions’ ‘life’ through their involvement (even if indirect) into constitutional changes help us to assess the appropriateness of revision formulas both with regard to the amendability and the permanent validity of the constitutional texts. Evidently that any formal amendment requirement for having a real aggravating effect, should be established by a higher source of law, namely the constitution or constitutional norms. Thus, through this method will be sought to construct a normative framework on the basis of hierarchical constitutional importance of the norms employed in the amendment processes and gradually structure the constitutional rigidity.

Formal amendment procedures represent the guarantee of the constitutional framework and ensure the ‘essence’ of legal systems<sup>80</sup> in which the Constitution is the supreme norm and any constitutional change has to preserve its nature. It is the supremacy of the constitution<sup>81</sup> – as document solemnly enacted<sup>82</sup> – above ordinary law that confirms its rigidity, and the constitutional rigidity that corresponds to a special amendment procedure, aggravated respect to the ordinary one.<sup>83</sup> Thus, constitutional revision is placed outside the realm of ordinary lawmaking.<sup>84</sup>

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<sup>79</sup> For instance, Italian amendment rules regarding the eventually referendum establish only the structural quorum; thus, amendments are passed if the law submitted to referendum is approved by a majority of valid votes.

<sup>80</sup> A. PACE, *La causa della rigidità costituzionale*, Padova, 1996, p. 90; T. GROPPPI, *Federalismo e costituzione: la revisione costituzionale negli stati federali*, Milano, 2001, p. 133.

<sup>81</sup> Written form of a constitution concerns a fundamental law which pretends to be “supreme” respect to other norms not because of its nature but because of its claim to being as such resulting from the formal or substantive limits set up in it. See SANTI ROMANO, *Il diritto pubblico italiano*, Milano, 1998, p. 234; E. SIEYES, *Opinione sulle attribuzioni e l’organizzazione del Giurì costituzionale proposta alla Convenzione nazionale il 2 termidoro anno III (1795)*, in E. SIEYES, *Opere e testimonianze politiche*, Tomo I, Vol. II, Milano, 1993, pp. 814-824.

<sup>82</sup> J. BRYCE, *Flexible and Rigid Constitutions*, in *Studies of History and Jurisprudence*, Vol. I, Oxford, 1901, p. 208.

<sup>83</sup> See J. BRYCE, *The American Commonwealth*, Vol. I, London, 1889, p. 350; J. BRYCE, *Flexible*, *op.ult.cit.*, pp. 153, 203-210, 217-221.

<sup>84</sup> T. GINSBURG – Z. ELKINS – J. BLOUNT, *Does the Process of Constitution-Making Matter?*, in *Ann. Rev. L. & Soc. Sci.*, n. 5/2009, p. 206.

Formal constitutional amendment rules, distinguishing the ‘supreme’ law from ordinary law, imply certain specified exceptions to the legislative authority. In this event, a rigid constitution coincides to a *limited constitution*:<sup>85</sup> limits imposed to the constitutional revision power can be justified on the grounds of “the principle of hierarchical differentiation of the formal constitutional law, which delivers varying degree of constitutional rigidity”.<sup>86</sup>

First of all, as mentioned above, the different degrees of rigidity are outlined in consideration of different types of revision that render amendable, adaptable and modifiable under certain conditions the fundamental texts. A constitutional revision *stricto sensu* embedded the so-called *formal* (or *normal*) *rigidity*: if a constitution is susceptible to change, it can be changed only by that authority “superior to the authority of the other laws of the State” or by that special body, and “by a method different from that, whereby those laws are enacted or repealed”.<sup>87</sup> Thus, the ‘normal’ rigidity is given by the amendable nature of the written text. Indeed, since the absolute immutability of the constitution is impossible to sustain and to pursue, the most suitable and efficient mechanism is that of the special amendment procedure by means of constitutional laws enacted by the proper organ for issuing legal norms.

Facing the supremacy of the constitution, it occurs to highlight the superiority of the fundamental principles, confirmed by the recognition of formal and substantive limits to the constitutional revision power. In this perspective, a further degree of rigidity, in the sense of ‘increase rigidity’, should be considered. First, this concept is tied to that of *substantive rigidity* according to which fundamental principles stating the ‘core elements’ of the constitution<sup>88</sup> are susceptible to resist to any ‘constitutional maintenance work’ or constitutional renewal, including that by European law.<sup>89</sup> Second, this pattern becomes relevant in those constitutions which include reinforced amendment mechanisms related to specific matters for which it is not sufficient a normal revision procedure, and which stress the so-called *intermediate rigidity*.<sup>90</sup>

Conversely, the ‘decrease rigidity’ refers to ‘other norms’, enclosing the same value and efficiency as formal constitutional laws, which diminish the impact and scope of the constitutional rigidity. These

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<sup>85</sup> See A. HAMILTON, *Essay No. 78*, in *The Federalist Papers*, Penguin, 1987.

<sup>86</sup> G. DE VERGOTTINI, *Diritto costituzionale comparato*, Vol. I, VI ed., Padova, 2004, p. 130.

<sup>87</sup> J. BRYCE, *Flexible*, *op.cit.*, pp. 151, 197.

<sup>88</sup> See M.P. VIVIANI SCHLEIN, *Rigidità e flessibilità*, *op.cit.*, pp. 1367-1368. On unamendable constitutional values see C. SCHMITT, *Théorie de la Constitution*, Paris, 1993.

<sup>89</sup> Member States can uphold core elements of their constitutions that may not be overridden by the EU law by virtue of the Lisbon Treaty clause according to which EU should respect the national identities of the Member States (Article 4(2), TUE).

<sup>90</sup> For instance, the substantial revision of Spanish Constitution (Article 168(1)) related to fundamental principles, the Crown, rights and duties of citizens; the special revision of Austrian Constitution regarding election rules, eligibility preconditions, competences of *Länders* (Articles 35(4) and 44(2)); the so-called Italian “*reinforced constitutional laws*” concerning the creation of new Regions (Article 132).

norms endowed by passive force weakened the rigidity of the constitution because were not coming in force neither by a constituent process nor by an amendment procedure, but are supposed to be amended through the same constitutional revision procedure.<sup>91</sup> This explains, at the large extend, the *variable rigidity* according to which a norm equivalent to a formal constitutional law ‘deconstitutionalizes’ the ‘normal’ amendment procedure and can change the structure of the legal order.

A more accurate identification of the degree of rigidity is correlated to the distinction between *express* and *tacit* revision. On the one hand, the constitutional rigidity – meant as the guarantee of the stability of the supreme legal order – would be best attained if the fundamental text specifies the appropriate source of law able to modify the constitution;<sup>92</sup> on the other, implied revision involves constitutional changes by ‘other constitutional laws’ that, nonetheless enacted by a special amendment procedure, are not included in the constitutional text, do not weighed on this because rest totally independent of it.<sup>93</sup> Thus, constitutions’ durability can be affected by the flexibility and inclusiveness of its amendment rules.

Finally, the constitutionalism beyond the Nation State jeopardizes the traditional methods of reading the constitutions and imposed to rethink mechanisms of constitutional change as reaction to extra-national challenges. A *specialized rigidity* has to be address in those legal systems, such as Italy, in which mandatory

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<sup>91</sup> See German federal laws regarding new delimitation of the federal territory as stated by the Article 29; provisions of some Italian Statutes of special regions can be amended also by an ordinary law and are subject to advisory opinion of the regional bodies (Article 54(2) Statute of Sardegna; Article 103(3), Statute of Trentino-Alto Adige, Article 63(3), Statute of Friuli-Venezia Giulia); French organic laws regarding the Senate should obtain the consent of this body (Article 46(4)) or those amending the Statute of overseas communities need the consent of their Deliberative Assembly (Article 74(2)); Spanish organic laws relating to the implementation of fundamental rights and public liberties and those approving the Statutes of Autonomy (Article 81), as well as the framework acts on self-governing of Autonomous Communities (Article 150(3)); the Belgian special laws which, pursuant to Article 4(3), can change and correct the boundaries of the four linguistic regions only if “passed by a majority of the votes cast in each linguistic group in each House, on condition that a majority of the members of each group is present and provided that the total number of votes in favor that are cast in the two linguistic groups is equal to at least two-thirds of the votes cast”. In these cases, the veto of the Second Chamber or of the sub-national components could not be overcome.

<sup>92</sup> Pursuant to Article 79(1), German “Basic Law may be amended only by a law expressly amending or supplementing its text”. The Belgian federal law amending the constitutions has to contain the *nomen iuris*, that is a declaration regarding reasons to revise such constitutional provision (Article 195(1)).

<sup>93</sup> Article 138 It. Const. does not make a clear distinction among revision laws and formal constitutional laws, even if part of legal scholarship considers that the revision laws modify or supplement the constitutional text. See M.P. VIVIANI SCHLEIN, *Rigidità e flessibilità*, *op.cit.*, p. 1381. Also in the Austrian legal system the denomination of “constitutional law” to create a constitutional provision that does not necessarily have to be incorporated into the core document has paved the way for the enactment of numerous constitutional laws and even constitutional provisions entrenched in simple laws, transforming this constitution in one of the most flexible constitutions of the world. See M. STELZER, *Constitutional change in Austria*, in X. CONTIADES (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA.*, London-New York, 2013, pp. 21-22. Implicit revision can occur also by the Declaration of revision used in Belgian system. See C. BEHRENDT, *The process of constitutional amendment in Belgium*, in X. CONTIADES (ed.), *op.cit.*, p. 39.

provisions deriving from EU law and international law become part of the constitutional framework<sup>94</sup> and undermine the supremacy of the constitution. The Constitution is not anymore the ‘supreme’ norm of the domestic constitutional order as long as ‘supra-constitutional’ norms are binding, limit the sovereign power of the states, and determine the content of internal law disapplying national norms in contrast to them (provided that do not include fundamental principles or recognize inviolable human rights<sup>95</sup>). On the one hand, the rigidity seems to be mitigated by virtue of the international norms, especially of the supranational norms, and, on the other, explains its degree and differentiated (or specialized) nature because of those norms hieratically placed between superordinate and subordinate laws, and for which is requested a special and more complex procedure than that of the revision.<sup>96</sup> There is not only one category of constitutional rigidity, nor could it be structured, beyond a certain limit, the concept of rigidity. The criterion used to assess a higher or lower rank of the related source of law falls on the simplicity or complexity of the procedure it takes to create and/or amend the constitutional norms. Moreover, the degree of difficulty of the amendment process is linked to degrees of protection that political forces, in power at a given historical moment, had wanted to assign to the constitutional text.<sup>97</sup> No formal rule can entirely guarantee the essence and spirit of the constitution: not necessarily a more complex amendment procedure designed to ensure the highest degree of constitutional unalterability will lead to greater stability of the constitutions. The lack of direct participation of the sub-national units in the amendment processes favors the ordinary legislation instead of a formal constitutional amendment procedure, and methods of subnational inclusion through upper houses in amendment procedures may not frustrate constitutional flexibility.

### 3.6. Amendability Paradigm

As mention above, constitutional changes are very closely linked to the amendable nature of the provisions. Besides procedural prerequisites, amendment rules specifies what is subject to or immune from the formal amendment.

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<sup>94</sup> Article 117(1), It. Const.: “Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.”

<sup>95</sup> See M. CARTABIA (cur.), *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti europee*, Bologna, 2007), p. 57 (distinguishing a sort of «inverted *primauté*» according to which it is denied - also following the "communitarization" of the Charter of Fundamental Rights - the primacy of the fundamental rights of the Union with respect to the same guarantees ensured by the national constitutions).

<sup>96</sup> M.P. VIVIANI SCHLEIN, *Il caso svizzero: una revisione continua*, in F. PALERMO (cur.), *La «manutenzione»*, *op.cit.*, pp. 386-387.

<sup>97</sup> S. BONFIGLIO, *Sulla rigidità*, *op.cit.*, p. 118.

While upper houses representing sub-national components are included in the amendment processes with respect to any amendable subject-matter, direct sub-national units' involvement is limited to certain issues, usually related to their authority, jurisdiction, and territory. Spain's Constitution requires sub-national involvement regarding any proposals to create a new *Comunidad Autónoma* (considering that a federation of Autonomous Communities is strictly prohibited<sup>98</sup>), to amend provisions addressing self-government.<sup>99</sup> Further, it requires sub-national involvement in proposals to amend tax provisions<sup>100</sup> or provisions regarding State service to culture<sup>101</sup>. Also, in Italy, a merger between existing Regions or the creation of new sub-national units having a minimum of one million inhabitants<sup>102</sup> may trigger sub-national involvement: the territory of an Italian Region can be modified and the resulting territorial alteration has consequences on the representation of the sub-national units in the national legislature. Conversely, the German Basic Law strictly prohibits the amendments affecting the division of the Federation into *Länder* or their participation on principle in the legislative process even if the request came from other *Länder*.<sup>103</sup> Thus, only a new constituent power may overcome this provision.<sup>104</sup>

Subject-matter triggers have entrenched exceptional thresholds to federal-reinforcing function. In some systems, in order to safeguard federalism, sub-national units have to directly approve the proposed amendment, either through their legislatures represented in the Upper House or referendum. In Austria, a formal amendment thresholds is established in respect of special provisions. Hence, amendments affecting the legislative or executive authority of the *Länder* trigger a supermajority requirement in the *Bundestrat*, or those stressing election and representation prerequisites of the *Bundestrat* trigger an

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<sup>98</sup> Article 145(1), Spanish Const.

<sup>99</sup> Article 143, Spanish Const.

<sup>100</sup> Article 133(2), Spanish Const. Moreover, Article 87(2) establishes that “[t]he Assemblies of the Autonomous Communities may [...] refer a non-governmental bill [which involves an increase in credits or a decrease in budget revenue, see Article 133(6)] to the Congressional Steering Committee and to delegate a maximum of three Assembly members to defend it.”

<sup>101</sup> Article 149(2), Spanish Const.: “Without prejudice to the jurisdiction which may be assumed by the Autonomous Communities, the State shall consider the promotion of culture a duty and an essential function and shall facilitate cultural communication between the Autonomous Communities, in collaboration with them.”

<sup>102</sup> Article 132, Italian Const.: “By a constitutional law, after consultation with the Regional Councils, a merger between existing Regions or the creation of new Regions having a minimum of one million inhabitants may be agreed, when such request has been made by a number of Municipal Councils representing not less than one-third of the populations involved, and the request has been approved by referendum by a majority of said populations. The Provinces and Municipalities which request to be detached from a Region and incorporated in another may be allowed to do so, following a referendum and a law of the Republic, which obtains the majority of the populations of the Province or Provinces and of the Municipality or Municipalities concerned, and after having heard the Regional Councils.”

<sup>103</sup> Article 79(3), GG.

<sup>104</sup> J. WOELK, *La Germania: tra numerose revisioni e nucleo essenziale protetto*, in F. PALERMO (cur.), *La «manutenzione»*, *op.cit.*, p. 155.

additional majority requirement – that of Federal Council members representing at least four of nine sub-national units.<sup>105</sup>

Obviously, subject-matter thresholds and exceptional involvement increase the authority of sub-national units in the amendment processes. However, degree of procedural difficulties arises under restricted and exceptional amendment rules governing subject-matters linked to constitutional values. On the one hand, in those systems in which the constitution marked the boundary between amendment and revision, this distinction may be exploited to express amending power vis-à-vis the constitutional values – whether the constitutional text sets out<sup>106</sup> or leaves unstated these specific rights and fundamental principles.<sup>107</sup> On the other, subject-matter triggers combine with constitutional values lead to a constitutional hierarchy of thresholds that culminate with the unamendability of certain basic principles and affirmation of ‘entrenched clauses’.<sup>108</sup>

As degree of procedural difficulty arises under restricted and exceptional amendment framework, the subject-matter thresholds assigned to some provisions likewise make difficult and challenge the amendment process. Especially, when formal amendment mechanisms involve sub-national units, increase rigidity becomes relevant. Though, this pattern is useful for channelizing political actors towards the most appropriate route for formal amendment in order to avoid the trap of an ‘unconstitutional constitutional amendment’.

#### **4. Ambassadorial Paradigm and Amendment Rules in the European Constitutional Framework**

In the European milieu, Member States are the ‘national units’ within the supranational framework. This part describes the peculiar European constitutional framework in which the ‘national units’ are represented, and then, starting from the aforementioned national paradigms, defines the contemporary

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<sup>105</sup> Articles 44(2) and 35(4), B-VG. See A. GAMPER, *Legislative and Executive Government in Austria*, Wien, 2004.

<sup>106</sup> Article 168, Spanish Const.

<sup>107</sup> An unstated identification of constitutional principles makes room for interpretation: according to Austrian scholars and Constitutional Court the constitution is ‘totally revised’ whenever principles of the constitution, such as the democratic principle, the federal principle or the principle of *Rechtsstaat* are amended or seriously affected. See M. STELZER, *op.cit.*, p. 24; A. GAMPER, *Revisione e “manutenzione” della costituzione austriaca*, in F. PALERMO (cur.), *La «manutenzione», op.cit.*, pp. 65-68; G. AVOLIO – C. ZWILLING, *Percorsi alternativi alla revisione costituzionale in Germania ed Austria. Il rischio dell’empasse tra bilancio e progetto*, in DPCE, n. 1/2006, pp. 3-19.

<sup>108</sup> The content of unamendable provisions varies from the form and system of government, political and governmental structure, to basic rights. See Article 79(3), GG; Article 139, It. Const.; Article 89(5), French Const.; Articles 17, 18 and 25, Belgian Const. Cf. Y. ROZNAI, *Unamendability and Genetic Code of the Constitution*, in *NY Working Paper*, n. 15-13/2015.

*supranational paradigm* justifying the most suitable approach to including ‘national components’ in the process of ‘formal European constitutional change’<sup>109</sup> both by their governments and by their legislators.

#### **4.1. The European Paradox: National Units within (No)State, (No)Constitution, (No)Upper House**

The ‘supranational bicameralism’ stands a forced conceptualization given that at European level neither exists a state structure nor bicameral principle is applied, as regards to the institutions. However, there are institutions that represent the EU ‘territorial’ interest. In fact, in the scholarship debate around the European federal nature,<sup>110</sup> it is stressed that the potential evolution into a federal state should move towards the transformation of the Council in a real Second Federal Chamber that represents the Member States and counterbalances the chamber of general representation embodied in the European Parliament.<sup>111</sup>

In the sense of ‘territorial’ representation in the European space, the Council is the consequent institution of the *Europe des Patries* as long as asserts a forum of the constitutive sovereignties, namely the Member States. Its evolution from an intergovernmental body to a supranational legislator of variable composition within a federal framework of ‘reversed bicameralism’<sup>112</sup>, votes’ unity as representatives of national executives, and use of weighted representation formula has rendered this institution similar to German *Bundesrat*,<sup>113</sup> but it has not yet amounted to a European Upper House in the proper sense.<sup>114</sup>

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<sup>109</sup> I use this formula because as argued by Möllers, EU primary law has been ‘constitutionalized’ and ECJ has increasingly made use of what Von Bogdandy calls ‘constitutional semantics’. See C. MÖLLERS, *Pouvoir Constituant – Contitution – Constitutionalisation*, in A. VON BOGDANDY – J. BAST (eds.), *Principles of European Constitutional Law*, 2<sup>nd</sup> ed., Oxford, 2009, p. 195; A. VON BOGDANDY, *Founding Principles of EU Law: A Theoretical and Doctrinal Sketch*, in *Eur. L. J.*, n. 16(2)/2010, p. 96.

<sup>110</sup> J.A. CAPORASO, *The European Union and Forms of State: Westphalian, Regulatory or Post-Modern?*, in *JCMS* n. 34/1996, pp. 29-52; T.A. BÖRZEL – T. RISSE, *Who is Afraid of A European Federation? How to Constitutionalise a Multi-Level Governance System*, in C. JOERGES – Y. MÉNY – J.H.H. WEILER (eds.), *What kind of constitution for what kind of polity? Responses to Joschka Fischer*, Florence, 2000, pp. 45-60.

<sup>111</sup> P. PASSAGLIA, *Suggestion to find a “Parliament” within the Institutional Organization of EU*, in J. LUTHER – P. PASSAGLIA – R. TARCHI (eds.), *A World, op.cit.*, p. 1085; K. LENAERTS, *Federalism: Essential Concepts in evolution – the Case of the European Union*, in *Fordham Int’l L.J.*, n. 21(3)/1998, p. 763.

<sup>112</sup> T.O. HUEGLIN – A. FENNA, *Comparative Federalism, op.cit.*, p. 203.

<sup>113</sup> T.O. HUEGLIN – A. FENNA, *Comparative Federalism, op.ult.cit.*, p. 204. See also R. BIFULCO (cur.), *Ordinamenti federali comparati. II. America Latina, India, Europa e Unione Europea*, Torino, 2012, pp. 206-207, 212, 221.

<sup>114</sup> Despite the lack of textual denomination in this sense, constitutional scholarship held the thesis of the second Chamber of EU on the basis of explicit Treaty’s provisions concerning the legislative power (Articles 14(1) TEU and 16(1) and (8) TEU), the ‘joint commission’ similar to national ones (Article 294(10) TFEU). In any case, it cannot be considered an Upper House *stricto sensu* because, from a structural outlook, it is devoid of a *plenum*, and of transparency in its work because of the ‘technical’ composition of members, receiving a binding mandate.



There is no doubt that it has been often attempted to frame the European Union on the basis of the conceptual comparison on statehood and to define it according to the existing forms of State.<sup>115</sup> The extent to which exists a form of EU legal order is proportional to the degree of its constitutionalization, and this precisely because it is the existence of a constitution (and not necessarily the existence of a State) that allows the affirmation of a form of State.<sup>116</sup> Accurately, the *No-State* form of European Union has allowed the genesis and gradually settlement of a *European form of State* in the absence of a constituent moment – functionally replaced, on the one hand, by the Member States’ amenability to the EU integration process (*uti singuli* or collectively through the Council of the European Union), and, on the other, by the development of the constitutional principles by the Court of Justice and progressively recognized by the national courts.<sup>117</sup>

The European Union is not a *State*; it is qualified as a *Federation of States*<sup>118</sup> in which the *treaties* corresponds to a *Constitutional Charter of Union*.<sup>119</sup> The range of competences, the broad use of fundamental principles and values, and the binding force the Charter of fundamental rights are all recognized as elements that erect the EU treaties to a constitutional level.<sup>120</sup> Thus, the Lisbon Treaty could be described as a quasi-

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<sup>115</sup> See G.F. MANCINI, *Europe: the Case of Statehood*, in *Eur. L. J.*, n. 4/1998, pp. 29-42.

<sup>116</sup> See M. SHAPIRO, *Comparative Law and Comparative Politics*, in *S. Cal. L. Rev.*, n. 53/1979, pp. 537-542.

<sup>117</sup> F. PALERMO, *La forma di Stato dell’Unione Europea. Per una storia costituzionale dell’integrazione sovranazionale*, Padova, 2005, pp. 81-83.

<sup>118</sup> R. SCHÜTZE, *From dual to cooperative federalism. The Changing Structure of European Union*, Oxford, 2009, pp. 52-53; 69-73;

<sup>119</sup> J.H.H. WEILER, *The Transformation of Europe*, in J.H.H. WEILER, *The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration*, Cambridge, 1999, p. 12. See ECJ judgment of 23 April 1986, Case 294/83, *Parti Ecologiste ‘Les Verts’ v European Parliament*, ECR 1986-4, at 1339; judgment of 23 March 1993, Case C-314/91, *Beate Weber v European Parliament*, ECR 1993-1, at 1083, para. 8; ECJ judgment of 3 September 2008, Joined Cases C-402/05 P&C-415/05 P, *Kadi v. Council*, 2008 ECR I -06351, para. 281. But see the opinion of the German Constitutional Court in its Decision on the Treaty of Lisbon, *Bundesverfassungsgericht (BVerfG)*, June 30, 2009, 2 be 2/08, paras. 233, 235, available at [www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html), which insists that Europe is not at present a true federal State, and stating moreover that the German Constitution would prohibit any degree of integration going so far as to supplant “the constituent power of the Member States as the Masters of the Treaties.” In other words, in the view of the Court, the constituent power of the peoples of Europe remains within the national Member States; and at least in Germany it must remain so.

<sup>120</sup> The proclivity on drawing stark lines between “constitution” and “treaty” arise in the literature on federalism and, especially, in the context of the European Union. The conflation of these concepts amounts to an analytical sin: the “constitutional” status of the European treaties is hotly contested even in the courts, with a palpable linguistic divergence in the jurisprudence of the Court of Justice of the European Union (hereinafter ECJ) and the supreme courts of the Member States (see *Kadi* Case, para. 285). See also M. POIARES MADURO, *The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism*, in *Int’l J. Const. L.*, n. 3/2005, p. 352 (insisting that “the choice of the legal form of a treaty, and the subjection of the text, for the most part, to the traditional mechanisms of treaty ratification make clear that we are not confronting a constitution in the classical sense”).

constitutional Treaty as long as contributes to establishing a sort of ‘material’ constitution;<sup>121</sup> however, it is not yet a Constitution.<sup>122</sup>

Nowadays, constitutional framework of European Union results from the existing multiple layers of authority. Thus, the European constitutional space is a constitutional mosaic compound of EU and Member States’ constitutions. In this event, EU is better defined as a ‘compound of constitutions’ (*Verfassungsverbund*) resulting from its primary law and constitutional law of Member States; hence, the principle of ‘constitutional composite’ has heterogeneous dimension (both supranational and national) in the context of European multilevel system (*Mehrebenensystem*).<sup>123</sup>

#### 4.2. Member States and Treaties’ Rules of Revision: Mechanisms and Rationales of Inclusion

There is no doubt that EU can be characterized as a system of second chamber governance and entire institutional evolution is a response to the widely criticized ‘democratic deficit’ of the Union. The European system based on *council governance* could be explained by the intergovernmental (and supranational) background in which the Council of Ministers rests the supranational policy-maker which acts by a qualified majority voting, leaving the main role on Treaty changes to the European Council where the unanimity prevails. Additionally, governments of Member states (alongside European Parliament and Commission), as drivers of Treaty changes, may propose an amendment to the existing treaties and initiate the revision procedure submitting it to the Council, which then is transmitted to the European Council and notified to the national parliaments. Thus, from the *representation* outlook, national components’ delegate their representatives at EU level, who are toughly accountable to their States and who express the will of their governments.<sup>124</sup> Since the nature of such members clearly resembles that of

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<sup>121</sup> M. ROSENFELD, *The European Treaty - Constitution and Constitutional Identity: A View from America*, in *Int'l J. Const. L.*, n. 3/2005, pp. 317- 318. See also J.H.H. WEILER, *On the Power of the Word: Europe's Constitutional Iconography*, in *Int'l J. Const. L.* n- 3/2005, p. 174 (referring to the proposed EU Constitution as a “treaty masquerading as a constitution,” in the interest of impugning what he takes to be an empty gesture at formal constitutionalism). Weiler does, however, insist that the European Union is a constitutional entity in spite of the “constitutional” paucity of its formal instruments; materially speaking, “in its quotidian existence Europe is constitutional and accepted as such.” J.H.H. WEILER, *op.ult.cit.*, p. 183.

<sup>122</sup> The denomination “Constitution” is reserved for *only* those treaties that establish a unitary sovereign power, reflecting the identity of a constituent (and in return reflexively constituted) *demos*; anything less remains a mere treaty-based organization among sovereign states. See J. ARATO, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, in *Yale J. Int'l L.*, n. 38/2013, p. 298.

<sup>123</sup> I. PERNICE, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, in *Colum. J. Eur. L.*, n. 15(3)/2009, p. 373; N. LUPO, *Parlamento Europeo e Parlamenti nazionali nella costituzione “composita” nell’UE: le diverse letture possibili*, in *Rivistaic.it*, n. 3/2014, p. 2; A. MANZELLA, *L’identità costituzionale dell’Unione europea*, in ID., *Quaderno europeo. Dall’Euro all’Euro-crisi*, Venezia, 2005, pp. 41-51 (referring to ‘union of constitutions’).

<sup>124</sup> Cf. H. WALLACE – F. RENSHAW, *The Council of Ministers*, Basingstoke, 2006; D. NAURIN, *Representation in the Councils of the EU*, in S. KROGER (ed.), *Political Representation in the European Union. Democracy in a Time of Crisis*, London-New York, 2014.

ambassadors, this paradigm could be described as an *ambassadorial model* within the post-modern executive federalism.<sup>125</sup>

However, this ambassadorial solution was reinforced by institutionalization of the Convention and by the inclusion of national parliaments in the revision process. On the one hand, the Convention (which also provide for involvement of the national parliaments) assesses the legitimacy of the Treaty amendment process.<sup>126</sup> The role of national parliaments in the ‘proper functioning’ of the European Union is considered in the Lisbon Treaty as an informing principle of European democracy. The national parliaments not only democratizes the Treaty revision process<sup>127</sup> but also aim to control the European Council meetings.<sup>128</sup>

In terms of federalism, the treaties’ rules governing the European amendment changes embed different and complex procedures which, in essence, continue with the tradition of intergovernmental agreement and *unanimous consent* (both within the European Council and within the ratification phase by all Member States as a precondition for the entry into force of the amended treaties) as long as the Member States would ultimately remain ‘Masters of the Treaties’ and have no intention to giving up their position.

European Treaty amendments’ rules are enshrined into a consolidated (unified) document, and most precisely into only one and complete provision (Article 48 TEU) which provides for an explicit recognition of the procedures. In the matters of revision, Lisbon Treaty does not distinguish between total and partial revisions; better, it can be asserted the *qualified* nature of the treaties’ revision procedure as well as an *exceptional and restricted treaties’ revision* within the *increase rigidity paradigm*.

From the *structural* and *procedural* perspectives, formal treaty revision framework enacted by the Lisbon Treaty entrenches four possible procedures – two *ordinary revision procedures* and two *simplified revision procedures*.<sup>129</sup> This distinction produces, beyond the textual location of the single provisions, varying

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<sup>125</sup> J. HABERMAS, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How is it Possible*, in *Eur. L. J.*, n. 21(4)/2015, p. 546.

<sup>126</sup> See T. RISSE – M. KLEINE, *Assessing the Legitimacy of EU’s Treaty Revision Methods*, in *JCMS*, n. 45(3)/2007, pp. 69-80. Cf. C. PINELLI, *The Convention Method*, in N. LUPO – C. FASONE (eds.), *Interparliamentary Cooperation in the Composite European Constitution*, Oxford, 2016, pp. 57-72;

<sup>127</sup> See M. URREA CORRES, *The New Treaty Revision Procedure and the Entry into Force of the Constitutional Treaty*, available at [www.law.nyu.edu/sites/default/files/upload\\_documents/urreacorrespaper.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/urreacorrespaper.pdf)

<sup>128</sup> W. WESSELS – O. ROZENBER, *The democratic and parliamentary control of the European Council and Eurozone summits*, in *Study of European Parliament’s Committee on Constitutional Affairs* 2013, available at [www.institutdelors.eu](http://www.institutdelors.eu).

<sup>129</sup> Article 48 TEU. See B. De Witte, *Treaty Revision Procedures after Lisbon*, in A. BIONDI – P. EECKHOUT – S. RIPLEY (eds.), *EU Law after Lisbon*, Oxford, 2012, pp. 107-127; L.J. QUESADA, *The Revisions Procedures of the Treaty*, in H.-J. BLANKE – S. MANGIAMELI (eds.), *The European Union after Lisbon*, Berlin-Heidelberg, 2012, pp. 323-342; K. GRANAT, *Interparliamentary Cooperation and the Simplified Revision Procedures*, in N. LUPO – C. FASONE, *Interparliamentary op.cit.*, pp. 75-77 (describing only the simplified revision procedures); B. GUASTAFERRO, *La partecipazione dei Parlamenti nazionali e del Parlamento europeo al procedimento di revisione dei trattati*, in A. MANZELLA –

degrees among the different parts of the Treaty, depending on the procedure employed (more or less aggravated); this, along with a further problem of assessing the value and scope of the provisions approved by one or the other procedure, as well as resolving the inconsistencies between the different norms.<sup>130</sup> In a nutshell, notwithstanding the unitariness of Lisbon Treaty<sup>131</sup>, its provisions were structured following the degrees of revision procedures instead of the boundaries between the two Treaties.

Article 48(2-5) TEU sets forth the *ordinary revision procedure* with or without the formal integration of the Convention method.

First, if, having consulted the European Parliament and the Commission, the European Council decides in favor of the proposal by simple majority, the President of the European Council will call for a Convention, which cannot adopt amendments; it can only *propose* them, by consensus, to an intergovernmental conference (hereinafter IGC). Although its composition – representatives of the national parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission, the Convention's role is that of adopting 'by consensus a recommendation' which does not affect the formal power of Treaty negotiation and conclusion, entrusted to a conference of representatives of the governments of the Member States.

Second, the European Council may propose revisions that should be decided directly by an IGC with any pluralistic involvement through the Convention, as long as the nature of the proposed revision does not justify the setting-up of it.

The constitutional goals featured by ordinary revision procedure are twofold: on the one hand, the attempt to overcome to the unanimity rule through the requirement of a common accord on the proposed amendments and the ratification of that agreement by all Member States separately, in accordance with their own constitutional rules and requirements;<sup>132</sup> on the other, the involvement of all

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N. LUPO (cur.). *Il sistema parlamentare euro-nazionale*, Torino, 2014, pp. 185-194 (describing the procedures also from the perspective of EP).

<sup>130</sup> G. BUSIA, *Revisione del Trattato, ammissione di nuovi Stati e recesso dall'Unione*, in A. BASSANINI – G. TIBERI, *Le nuove istituzioni europee. Commento al Trattato di Lisbona*, Bologna, 2010, p. 404.

<sup>131</sup> Lisbon Treaty has reunified two treaties (even though formally they are distinct) stating that they have the same legal value (Article 1 TEU).

<sup>132</sup> B. DE WITTE, *Treaty Revision in the European Union: Constitutional Change through International Law*, in *Netherlands Yearbook Int'l L.*, n. 35/2004, p. 74 (explaining that the ratification guarantees the protection of the national principle of separation of powers which the governments cannot set aside). should be added that, on the basis of the tool at its disposal under Article 48(5), the Council can push the reluctant States which within two years after the signature of the treaty amending the Treaties have not ratified it, or encountered difficulties in proceeding with ratification, avoiding, in this way, their withdrawal or a 'super enforced cooperation' among the four-fifth countries that ratified it. See G. BUSIA, *op.cit.*, pp. 407-408.

European institutions in the amendment process, for improving transparency and breaking of the ‘diplomatic negotiations’ circuit’.<sup>133</sup>

The rigidity caused by the national ratification phase of Treaty revision is precisely what the Lisbon Treaty sought to address by including, in Article 48(6-7) TEU, two *simplified revision procedures* for restricted classes of amendment, which are both characterized by the absence of Convention and formal ratifications.

First. The simplified revision procedure laid down in Article 48(6) TEU, has a broader scope and regards amendments of Part Three of the TFEU relating to the Union policies and internal actions<sup>134</sup>, and subject to one major exception: provisions can be revised without increasing the competences conferred on the EU in the treaties; if so, the ordinary revision procedure will have to be used instead. This procedure do not provide for a Convention or an IGC; the amendment will be ‘adopted’ directly by the European Council acting unanimously. The Treaty itself gives no set role to national parliaments, but that decision will be subject to ‘approval’ by each Member State<sup>135</sup>) according to its own constitutional requirements that involve a consultation of the national parliament and a ‘positive approval’ vote by each parliament. As the procedure does not run out of European level, the simplified revision cannot be compared with a deconstitutionalization of treaties’ amendment process.<sup>136</sup>

Second. The *general passerelle* procedure described in Article 48(7) TEU introduces a “genuine measure of flexibility” in Treaty amendment process,<sup>137</sup> under which, the European Council (with a decision taken by unanimity and with the consent of the European Parliament) may remove the voting requirement from unanimity to qualified majority in all the areas and cases where the treaties continue to provide that the Council must act by unanimity<sup>138</sup>, or may introduce the ‘ordinary legislative procedure’ (i.e. co-decision) in all the areas and cases in which the treaties still provide for a different, more intergovernmental, procedure. In other words, a further deepening of integration by making EU decision-making less intergovernmental will, to some extent, be possible without the need for setting up an IGC and, above all, without the need for constitutional ratification of these changes by all the Member States separately.

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<sup>133</sup> P. CRAIG, *The Lisbon Treaty, Revised Edition: Law, Politics, and Treaty Reform*, Oxford, 2013, p. 438; T. CHRISTIANSEN – G FALKNER – K.E. JØRGENSEN, *Theorizing EU treaty reform: beyond diplomacy and bargaining*, in *J. Eur. Public Policy*, n. 9/2002, pp. 12-32.

<sup>134</sup> It does not cover the common foreign and security policy, external action or institutional matters.

<sup>135</sup> And here is the crucial difference with Article 48(7) even if it does not refer to a ratification but a veto right against Treaty revision. See P. KIIVER, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality*, London, 2012, p. 10.

<sup>136</sup> G. BUSIA, *op.cit.*, p. 409.

<sup>137</sup> B. DE WITTE, *Revision*, in *EuConst L. R.*, n. 1/2005, p. 138.

<sup>138</sup> Decisions under the TFEU or Title V of the TEU (external action and CFSP), except “decisions with military implications or those in the area of defence”.

Given this ‘self-amending’ clause applicable to a wider range of cases, the simplified procedure presents what in national constitutional framework was identified as exceptional or restricted revision, with all the consequences drawn up by the *amendability paradigm*. However, the question whether the simplified revision can or cannot be used with regard to some provisions turns out to be a substantive one.<sup>139</sup> In this sense, it can be assessed that the text of the Treaties laid down explicit limits to the revision process. For instance, subject-matters comprised in the Part Three of TFEU – internal market and the four freedoms, area of freedom, security and justice, economic, monetary, and social policy – can be changed with the simplified procedure; this means that, negatively formulated, all provisions of TEU Preamble – the EU general principles, non-discrimination, citizenship, external actions, and institutional and financial issues – are excluded from amendment process. It is clear that simplified procedure cannot be used to increase the EU competences, in contrast to the ordinary procedure which allow amendments both to increase and reduce them.

Moreover, the scope of application of this simplified procedure is quite limited<sup>140</sup>: decisions about the EU's own resources and about its multi-annual financial framework, decisions based on the ‘flexibility clause’ of Article 352 TFEU and sanctions against states violating fundamental rights or the EU's other fundamental values, cannot be made subject to the co-decision procedure and/or qualified majority voting by means of the *passerelle*.

It is not that Article 48 TEU grants the Member States the power to amend the EU treaties as they wish. Lisbon Treaty, as a written ‘supreme’ text<sup>141</sup>, include detailed procedural requirements but do not provide explicit constraints on the ‘formal European constitutional changes’. Searching those substantive requirements of amendability may reveal deeper constitutional structures that trigger the text of the Treaties.

The *substantive rigidity* entrenched in the TEU emphasizes the constitutional aspiration of the provisions and translates them into enforceable norms. Using insights of national constitutional law, these provisions represents the ‘core norms’ and values which design the unamendable boundaries of EU primary law. Beyond the Preamble’s provisions that are unchangeable as results from the ‘negative’ interpretation of the constraints outlines under the simplified procedure, the ECJ has clearly hinted at the existence of substantive limits under the ordinary procedure: ‘the very foundation’ of the EU that can never be amended or abolished by means of EU judicial system (at least can only be integrated and

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<sup>139</sup> See ECJ Judgment of 27 November 2012, Case C-370-12, *Pringle v Government of Ireland*, nyr.

<sup>140</sup> Article 353 TFEU.

<sup>141</sup> K. LENAERTS – P. VAN NUFFEL, *European Union Law*, 3<sup>rd</sup> ed., London, 2011, p. 819.

perfected); constitutional values of Article 2 TEU which, consequently, constraints the objectives of Union (enshrined by Article 3 TEU).<sup>142</sup>

The Treaty remains silent with regards to some ‘constitutional’ principles: either explicitly provides a similar German ‘eternity clause’ or that the ‘spirit’ of the Treaty is unamendable or unreviewable. Anyway, ECJ holds that any Treaty amendment should “assure respect for the autonomy of [EU] legal order”.<sup>143</sup> Finally, a last aspect that should be considered concerns the vetoing power of national parliaments. In this regard, any such simplified amendment based on Article 48(7) TEU and the *passerelles spéciales* for measures with reference to family law with cross-border implications<sup>144</sup>, are subject to a their veto – independent of government,<sup>145</sup> exercisable within six month period following the European Council decision.<sup>146</sup> In this perspective, the double-phased approach to Treaty revision is not entirely abandoned. The difference with the ordinary revision mechanism is that national parliaments, instead of being required to give their ‘positive approval’ to proposed amendments, will have the option of expressing their disagreement by vetoing a proposed amendment,<sup>147</sup> which, from a constitutional design perspective, increase their authority in the amendment processes but also may create barriers to constitutional change as well as produce undemocratic amendment process.

## 5. Conclusion: Towards Supranational Paradigm(s)

All fundamental laws need rules for amendments. Both national constitutional law and EU primary law contains express amendment procedures.<sup>148</sup> Formal amendment rules serve a variety of different

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<sup>142</sup> Opinion 1/91, European Court Reports 1991, I-06079, at para. 71; *EEA Case*; *Kadi Case*. See R. PASSCHIER – M. STREMLER, *Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision*, in *CJICL*, n. 5(1)/2016; R. SCHÜTZE, *op.cit.*, pp. 139-142.

<sup>143</sup> Opinion 1/91, para. 35.

<sup>144</sup> Article 81(3) TFEU.

<sup>145</sup> The national parliaments do not possess a similar veto power under the *passerelles spéciales* under Article 81(3) TFEU (measures concerning family law), Article 153(2) TFEU (certain fields of employment and social security law), Article 192(2) TFEU (certain environmental policy matters), Article 312(2) TFEU (multi-annual financial framework). Also Article 333 TFEU, whereby the Council may change the voting requirement for an action under enhanced cooperation from unanimity to qualified majority, or from special legislative procedure to ordinary legislative procedure. Only Member States involved in the enhanced cooperation can vote. The broadest of the *passerelles spéciales* is included in Article 31(3) TEU and refers to the whole common foreign and security policy.

<sup>146</sup> See also Article 6 of the Protocol on national parliaments.

<sup>147</sup> It is not clear from the text whether, in countries with bicameral parliaments, each of the two chambers possess this veto power.

<sup>148</sup> D. LUTZ, *Toward a Theory of Constitutional Amendment*, in *Am. Pol. Sci. Rev.*, n. 88/1994, pp. 335-356.

proposes and functions,<sup>149</sup> and their main aim is to provide an ordered legal process to accomplish necessary and inevitable constitutional changes.<sup>150</sup>

Evidently, constitutional legitimacy derives from a combination of national community and subnational units, as well as from a merge between supranational entity and national States. From the national theoretical and empirical perspective, this paper presents findings of various reasons for bicameralism allowing sub-national units to participate directly or indirectly in the constitutional amendment processes and stresses diverse mechanisms of constitutional change process identifying a summary of national paradigms. Despite this study is not exhaustive, these findings suggest that there is no suitable model: every legal order presents different instrumental solutions according to different goals but is able to order the representation of varied categories of interests and to ensure their effectively participation in the formal amendment process.

On the basis of national patterns on formal amendments, this paper aims to make a small contribution to our understanding of the important issue that concerns us, namely the European design of Treaties revision rules and their degrees of rigidity. Beyond the formal and substantial qualities of these rules describing a unique paradigm, the most important aspects is that of the direct role assigned to national parliaments in the European amendment process.<sup>151</sup>

The participation of national parliaments in the Treaty revision procedures as set up by the Article 48 TEU delivers and conceptualizes the *intermediate rigidity* of an amendment process. There is no doubt that their inclusion in the Treaty revision process have strengthened its rigidity, especially through the vetoing power. However, their involvement seems to be insufficient both with regard to its control over the European (fragmented) Executive<sup>152</sup> and within the representation context that rendered difficult the good functioning of the European democracy.<sup>153</sup>

Although the Lisbon Treaty has brought important changes, the Euro-crisis stimulated a new discussion on the institutional architecture of EU. Notwithstanding an institutional reform for reconfiguring the relationship between Council and European Council in the sense of their unification in a real Upper

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<sup>149</sup> R. ALBERT, *op.cit.*, p. 913.

<sup>150</sup> S LEVINSON, *Imperfection and Amendability*, in ID. (ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, New Jersey, 1995, p. 4.

<sup>151</sup> This new role of national parliaments concerning the powers granted to national parliaments in the Treaty revision process is extended to the right to take part in the conventions for Treaty revisions, the 'bridging clauses' leading to simplified revision and voting procedures (Article 48 TEU), and the 'historical' clause permitting an extension of the Union powers (Article 352 TFEU).

<sup>152</sup> See D. CURTIN, *Executive Power of the European Union. Law, Practices and the Living Constitution*, Oxford, 2009, p. 71; N. LUPO, *Parlamento europeo, op.cit.*, p. 4.

<sup>153</sup> N. LUPO, *Parlamento europeo, op.ult.cit.*, p. 4.



House,<sup>154</sup> it should be considered also the role of other institutions, and especially those of the national parliaments in the decision-making loop.

Already constitutional scholarship stands the thesis of a '(virtual) Third Chamber' in the EU framework which represents national parliaments as guardians of principle of subsidiarity.<sup>155</sup> As demonstrated, a tricameral system already exists, and in which national parliaments correspond to a representative body, even virtually and not based on a real functioning parliamentary chamber. If so, and given their increasingly role in the Treaty revision process, it would be necessary to find the most appropriate means for a prolific dialogue between national parliaments so as to act collectively both in the interest of the State which they represent and in the European interest.

First of all, in the sense of a 'virtual third chamber', national parliaments could become drivers of treaties revision changes alongside other institutions. National parliaments (in the sense of a group of them) may propose general amendments (as in Italy) or more specific subject-matters (as Austrian model) – always acting in the general European interests and not autonomous into European dynamics. Moreover, full revision process by a Convention – in which national parliaments could be collectively represented – would undeniably give more authority to these European 'territorial units', as well as more 'constitutional' ground than a classic intergovernmental conference to the Treaty revision process.<sup>156</sup>

A different challenge could regard their representation at European level: create a new European Parliament into 'reversed European bicameralism'. It could return the proposal of d'Estaing with regards to a 'Congress of the European peoples' *but* made up by representatives elected directly by the European citizens and representative nominated by national parliaments. In such configuration is not only integrated the general representation but also find voice more directly the 'territorial' entities that compound the EU, avoiding in this way any feeling of exclusion or, worst, attempts of independence.

Stating that the most important feature to be able to transform the Treaty into a Constitution is a constitutional approval procedure and a review process involving both European *demos* and Member States, a more incisive participation of national legislatures in the process of 'formal European

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<sup>154</sup> See F. FABBRINI, *The Relation between the European Council and the Council: Institutional Arguments in Favor of an EU Senate*, in *Eur. Pub. L.*, n. 22/2016 (proposing that European Council should become the EU Senate absorbing the legislative power of the Council).

<sup>155</sup> See I. COOPER, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, in *JCMS*, n. 44(2)/2006, pp. 281–304; ID., *A "Virtual Third Chamber" for the European Union? National parliaments after the Treaty of Lisbon*, in *West Eur. Politics*, n. 35(3)/2012, pp. 441-465; ID., *Bicameral or Tricameral? National Parliaments and Representative Democracy in the European Union*, in *J. Eur. Integration*, n. 35(5)/2013, pp. 531-546.

<sup>156</sup> For other constitutional features necessary to transform the Treaty in a European constitution see L.S. ROSSI, *A New Revision of the EU Treaties After Lisbon?* in L.S. ROSSI – F. CASOLARI (eds.), *The EU after Lisbon. Amending or Coping with the Existing Treaties?*, Heidelberg, 2014, pp. 3-19.



constitutional change' and their configuration as 'territorial parliaments' in the European whole seem indispensable; and so, new paradigms in the supranational framework could be shaped.