REFLECTIONS ON THE "EUROPEAN CONSTITUENT PROCESS"

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I. THE PROSPECTS AFTER THE LAEKEN MEETING

ON December 14 and 15 the European Council met in Laeken[1], an appointment

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1 The Laeken appointment was planned by the Intergovernmental Conference in the *Declaration concerning the future of the Union*, n° 23, appended to the Nice Treaty, to define four open questions: *1)* the modalities for defining the spheres of competence between the Union and the Member States; *2)* the status of the Charter of Fundamental Rights proclaimed at Nice; *3)* the simplification of the Treaties; *4)* the role of the national parliaments in the European structure.
Concerning the second point, it should be made clear that this now seems less important as the political debate, which initially concerned the necessary modalities for rendering the Charter binding, is now concentrated on the far broader and more complex question concerning the premises of the constituent process. Therefore the Charter could be admitted - without prejudice to the absolute liberty of the Convention to make other decisions - as a *basic treaty* of a constituent procedure *in fieri* tending to enhance the value of the Charter as a prevalently recognitive source of a stock of common values of the Member States (see M. SCUDIERO, Introduzione, *in: Id.* (ed.) *Diritto costituzionale comune europeo. Principi e diritti fondamentali*, vol. I, Jovene, 2002. The author speaks of "*principi strutturali e di tutela dei diritti [...] i quali fanno parte ormai, proprio in ragione della comunicazione-integrazione fra gli ordinamenti implicati, di un indismissibile patrimonio comune dell'Europa*", p. XII. The formal inclusion (or deferment) of the Charter in the future Treaty would entail that the Charter would no longer be a merely jurisprudential source of inspiration - and as such lacking in binding value *ex se* - but be numbered among the negotiated community sources, supported by its own imperativeness, *i.e.* independent of a judicial reading: the European Commission, *Comunicazione sulla natura della*

that had been scheduled in the 23rd Declaration appended to the Nice Treaty. The outcome of the Laeken meeting was a Declaration on the future of Europe, in which it was decided to summon a Convention[2] to examine the "essential questions which the future development of the Union involves and to seek various possible solutions" in preparation for the next Intergovernmental Conference.

Thus the Council has apparently given the Convention a nominally constituent function: the Declaration itself says so, and actually stresses this aim by choosing the name "Convention", almost as if it wished to suggest the ambition of exercising a constituent function, *i.e.* of founding a new political order.

There were also declarations from heads of State and European Governments[3] in favour of the adoption of a European constitutional text, and even the United Kingdom, which had previously expressed serious doubts over a solution of this kind, seems to have overcome them in the declaration of the British Foreign Minister Jack Straw[4], who, at the same time, reassured the public that "national governments will remain the primary source of political legitimation"[5].

But, name apart, can it be a constitution in any real sense?

Carta dei diritti fondamentali dell'Unione europea, of 11/10/2000, n. 644, on p. 6 (Ital. version) stresses the importance of this passage.

2 The Convention, unlike the preceding one, has not adopted an assembly-type method of work, favouring the solution of a restricted committee, called a *praesidium*, which is appointed to draw up the text, after sounding out the other members of the college. The Council for General Affairs of October 8 and 9 has already expressed itself in these terms, indicating that one of the tasks of the Council of Laeken was that of nominating a president of the Convention, backed by a *praesidium* composed of four members, one for each component of the Convention. The Commission for Constitutional Affairs of the European Parliament pronounced in somewhat different terms on the point of the nomination of the president: in the proposal for a resolution, approved on October 22, it indicated instead the advisability of the president being elected within the Convention itself, "from political figures of European stature", and suggested that, where the number of the members of the *praesidium* was concerned, there could be up to seven members. In the end, the Council chose to increase the formation of the *praesidium* to one president, two vice-presidents and nine members belonging to the Convention. However, the Council did not agree with the recommendations of the Commission for Constitutional Affairs as to who had the authority to appoint the president and vice-presidents, nominating them directly itself and leaving to the Convention only the nomination of the nine members from its own ranks, whose requisites had already been decided: *cf.* Consiglio Europeo, Laeken, 14 e 15 dicembre 2001, *Dichiarazione di Laeken sul futuro dell'Unione europea* (Ital. version), *in: http//europa.eu.int/*, espec. p. 26.

3 *Cf.* C. A. CIAMPI, L'Europa dei valori; J. RAU, Per una Costituzione europea; J. JOSPIN, Il futuro dell'unione allargata, *in: Aspenia*, 2000, 14-15, resp. pp. 17 ff., pp. 36 ff., pp. 29 ff.

4 There is an early comment on the British position in V. ONIDA, Costituzione Europea: un passo verso le scelte di merito, *in: http:/www.unife.it/forumcostituzionale/cost-eu.htm*

5 *Cf. The Independent*, August 28, 2002, p. 12.

2. THE INDEFECTIBLE REQUIREMENTS FOR GRANTING THE CONVENTION CONSTITUENT POWER

"From the point of view of modern constitutionalism, the two crucial premises of a constitution, are"[6] a constituent power and, in the context of a democratic State, a people to whom this power belongs.

Do they exist in the present case?

a) The first - the constituent power - is an original, supreme, unrepeatable manifestation of sovereignty, and ushers in a new political order, the State.

The Constitution and the State are reciprocally correspondent - the existence of the one entails the other. It is a relationship which is felicitously defined by the negative expression, "no Constitution without a State", which underlines precisely the indefectibility of the State as the exclusive object of the fundamental rules, the absence of which would abolish the *raison d'être*[7] of the Constitution itself.

The Laeken mandate is very clear on this point: it drastically excludes the possibility that the Conventionists' work could result in the birth of a "super European state"[8], which would cause the States to lose their sovereignty in internal and international law. Rather than divest themselves of it or exercise it in solitude they prefer to develop models of joint cooperation in supranational seats[9].

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6 See G. FERRARA, Verso la Costituzione europea?, *in: Dir. Pubbl.*, 2002, 1, espec. p. 167, recalling E. J. SIEYÈS' thoughts *in: Qu'est-ce que le tiers état?*, (It. trans. "*Che cosa è il terzo Stato?*" di U. CERRONI), Rome, 1972, espec. pp. 93-107. Also G. AZZARITI, La carta dei diritti fondamentali dell'Unione europea nel "processo costituente europeo", *in: Rassegna di diritto pubblico europe*o, nn. 1-2, 2002, espec. pp. 20-23.

7 M. LUCIANI, Diritti sociali e integrazione europea, *in:* Associazione italiana dei costituzionalisti, *Annuario 1999. La costituzione europea. Atti del XIV Convegno Annuale*, Perugia, 7-8-9 ottobre 1999, Padua, 2000, espec. p. 547, considers that the existence "*di una comunità autenticamente politica di riferimento*" is a premise for the adoption of a new constitutional text and, noting that "*l'Unione non è un ente politico", because it is limited to "perseguire politiche in settori singoli*", he comes to the conclusion that a European Constitution is inexistent.

For foreign authorities, see D. GRIMM, Una Costituzione per l'Europa? (It. trans.), *in:* G. ZAGREBELSKY / P.P. PORTINARO / J. LUTHER (ed.), *Il futuro della costituzione*, Turin, 1996, pp. 339 ff.; *Id.*, Le moment est-il venu d'élaborer une Constitution européenne? *in:* R. DEHOUSSE (ed.), *Une constitution pour l'Europe?*, Paris, 2002, pp. 69 ff. In both works the author insists on his idea that Europe will never be able to have a constitution both because it does not have a people, as distinct from national collectivities, and because the "*débat fondamental au sujet de la Constitution européenne conduit à se demander si un Etat fédéral européen est souhaitable*".

8 In these terms see Consiglio Europeo, Laeken, 14 e 15 dicembre 2001, *Dichiarazione di Laeken sul futuro dell'Unione europe* (Ital. version), *in: http//europa.eu.int/*, espec. p. 23.

9 See G. FERRARA'S reflections, Verso la Costituzione europea?, *in: Dir. pubbl.*, cit., espec. pp. 178-179.

The Laeken mandate does not reduce the States to parts of a whole: they continue to be "wholes", and the transfer of any fractions of sovereignty to supranational subjects is only partial, and, at the same time - most important of all - is to their own benefit, not as single individualities but as components of the European Council or Council of Ministers.

In confirmation of this, we can observe that the mandate's object is essentially that of redesigning the competencies between States and Union, redrawing the decisional processes of the Union's organs, simplifying the instruments in order to give them back efficiency, rationality and external visibility. But nothing is said about giving dignity to the European Parliament, which, due to its hybrid formation, cannot be representative either of national political interests or of those of the European people.

If there had been a desire to create a Federal State, the first objective would have been to redesign the elective assembly's architecture along bicameral lines - the bicameral model being the one that best favours dialogue and negotiation between national and supranational political requirements, with the consequent reduction of the Executive role. In Laeken nothing of the kind was ever mentioned, and the fact that much attention was focused on making the Council of Ministers and the European Council more rapid and agile in decision-making is symptomatic of the wish to maintain the *status quo* - apart from the technical-juridical innovations needed to improve the mechanisms of interstate co-decision - and not to alter the institutional geometry, which would inevitably occur if the Parliament were given a central role in the dialectic between the powers, whose barycentre is and must remain closely linked to the National Executives[10].

This is an understandable concern in view of an enlarged Europe, in which it would be preferable to trust the old organs of consensus, rather than count on negotiation in an elephantine Parliament, where the results could be unpredictable and uncontrollable.

If the constituent power lacks its natural object, it is constituent only in the Conventionists' affirmations.

b) We shall examine in a similar way the second premise, the indefectible attribution to the people of the power under consideration: is the Convention, a subject created *ad hoc* to accomplish this power, referable to the popular will?

The Convention, as the mandate has established, is composed of four elements: two, though indirectly, of popular derivation, *i.e.* the members designated by each national and European Parliament, and two of "executive" derivation: *i.e.* the members designated by national and European governments.

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10 G. FERRARA, Più Europa e meno Europa. Ma quanta democrazia?, *in: Rivista del Manifesto*, n. 32, October 2002, espec. pp. 45-46, sees in the inalienable dominion of the States over the treaties "the supreme taboo" to setting up a European federal law, since "*i Stati resisteranno ad ogni istanza che possa privarli anche indirettamente delle qualità che li rendono tali*".

Thus the Convention is disappointing in its composition, because it is so far removed from the model of the constituent people.

To fulfil this role the organ would have needed investiture from the original holder of sovereignty, the European people. But, as things stand, since they do not yet exist as a legal subject distinct from the national collectivities, until the constituent process has taken place they can only be identified with the respective populations of the States, who are the only ones fit to confer legitimation on the constituent organ.

In this perspective there are several possible solutions, all of them faithful to the idea of the constituent power residing in the people. An *ad hoc* body could have been set up such as the European constituent assembly. Or, if an existing institution seemed preferable, this empowered subject could have been the European Parliament, since it is the organ which directly represents the political will (if not of the People of the Union, at least of the people of the single States). Finally, a proposal for a European constitution could have been thought out and written by the Convention, subject to a constitutional referendum.

This last possibility deserves special attention today, since the procedures initiated substantially preclude the first two.

The option of a referendum could still today remedy the deficit of democratic legitimation and probably change the very nature of the innovation towards which we are proceeding.

This option raises several issues for which no answers are available at the moment, both because the political debate has only just begun to consider such an option[11], and also because its solution requires a political maturity which has not yet been attained. However we can identify the principal questions here.

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11 The intervention of Sen. Giuliano Amato appears to fit into this perspective, as expressed on the occasion of the conference "For the future of Europe", held under the auspices of the Presidents of the Upper and Lower Chamber of Parliament held in the Aula Montecitorio on November 30 2001, in the Senate and the Chamber of Deputies, *Per l'avvenire dell'Europa*, Rome, 2001, pp. 73-78.

But AMATO himself, in a later work, La Convenzione Europea. Primi approdi e dilemmi aperti, *in: Quad. cost.*, XXII, n. 3, 2002, pp. 449 ff., seems to have set aside the referendum hypothesis and discussed the alternative between fundamental Treaty and Constitution exclusively in terms of the kind of amendment procedure to be adopted. More precisely, if the modification procedure were to remain unchanged (Art. 48 TUE), it would be a Treaty, as such modifiable only with the consensus of all the contracting States. In this way the dominion of the States over the treaties would be reasserted. If, on the other hand, different procedures were found, "*ad esempio, che i futuri emendamenti siano deliberati dal Parlamento europeo ed entrino in vigore una volta approvati dai quattro quinti dei Parlamenti nazionali*" then the act would certainly have constitutional implications. Consequently the author has the juridical régime of this act in progress derive from the type of amendment procedure chosen, and not - as would be more correct - from the subjective and objective premises of the act. If he had done so, the outcome of the evaluation would be reversed, *i.e.* if there are the premises specific to an international agreement between States, the act will be open to the amendatory procedure due to its negotiated nature; while in the case of a Constitutional Charter - once the presence of the two premises

A first - and preliminary - question concerns the number of referenda to call for: one single European referendum or a plurality of national referenda?

The hypothesis of a truly European referendum is undoubtedly attractive because of the strong sense of legitimacy it entails. However, it is extremely complex both technically and legally. In the first place, it presumes the existence of a European People, as a legal subject, not to be confused with the single national collectivities, and clearly an entity of this kind has not yet completed its *iter*, since the concept itself of European citizenship is, as things stand, little more than an idea, "dense with symbolic value", courageously introduced by Maastricht, but still waiting for concretisation in a catalogue of rights and duties[12] after the failure of the Amsterdam meeting to resolve the question[13]. Consequently, in the absence of a European people, the political rights would belong to no one, *i.e.* they would be rights "without a holder", or non-rights.

In any case, apart from *status*, the notion itself of citizenship was not originally conceived by the Union[14], which in fact abdicated from what is a specific

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quoted above is ascertained - the Charter will be open to revision procedures which the Constitution itself has set up.

12 Foreign authorities as well have linked the birth of the European citizen to the recognition of the political rights and obligations of the *cives:* J.H. WEILER, The European Union belongs to its citizens: three immodest proposals, *in: Eur. Law Rev*., 1997, pp. 150 ff., was the first to add to the modest list of active situations the right to take a part in the political decisions of the Union, through the introduction of institutions of direct democracy of a referendum type or European consultation, but also of obligations of fiscal contribution to the Union.

A. MANZELLA does not agree in L'identità costituzionale dell'Unione Europea, *in:* Aa.Vv., *Studi in onore di Leopoldo Elia*, vol. II, Milan, 1999, espec. p. 934. According to the author the mere attribution of advantage situations would be sufficient to perfect the *status* of *cives*. Manzella's position has, however, remained isolated among Italian thinkers. Other experts (Lippolis, Cartabia, Luciani) have regarded as essential, in defining the concept of citizenship, not only rights but also specific and significant duties, as they are symptomatic of the existence of a citizen's bond of political solidarity towards the State - duties which are certainly absent from the European Union.

13 L. SERENA ROSSI, Con il Trattato di Amsterdam l'Unione è più vicina ai suoi cittadini?, *in: Dir. Unione Eur*., 2-3, 98, espec. p. 353, is dissatisfied with the contribution of the Amsterdam Treaty to the definition of the concept of citizenship, because the modifications introduced to Art. 8 EC (which becomes 17) are minimal and carry little weight - they have not even changed the rule's position, which in fact remains inappropriately in the EC Treaty - and because duties have not been specified, nor has the list of rights been extended.

14 The literature on the subject is vast; for monographs see: V. LIPPOLIS, *La cittadinanza europea*, Bologna, 1994; B. NASCINBENE (ed.), *Da Schengen a Maastricht*, Milan, 1995; M. ORLANDI, *Cittadinanza europea e libera circolazione delle persone*, Naples, 1996; G. CORDINI, *Elementi per una teoria giuridica della cittadinanza*, Padua, 1998; A. DEL VECCHIO (ed.), *La cittadinanza europea*, Milan, 1999; V. E. PARSI (ed.), *Cittadinanza e identità culturale europea*, Bologna, 2001 and L. COTESTA, *La cittadinanza europea*, Naples, 2002. For other contributions *cf.*: F. CUOCOLO, La cittadinanza europea (prospettive costituzionali*), in: Pol. dir*., 1991, pp. 659 ff.; C. CLOSA, The Concept of Citizenship in the Treaty of European Union, *in: Com. Mar. Law*

prerogative of statehood: the autonomous choice of criteria for individual membership of the national collectivity. It preferred to assume those already selected by the respective States. We are therefore in the presence of a derivative concept of citizenship, a notion which is definable *per relationem*: "we are citizens of the Union insofar as we are citizens of a member State" (Art. 17 Treaty Un., mod. Treaty Amst.). The Union has settled for a second degree concept[15] and in so doing has implicitly denied the existence of a people of its own[16].

Besides, even if one could conceive that the existence of the European People were not a necessary requirement for calling a referendum, but that Europeans as a people will come into existence when the referendum is called, other issues would still remain open. In fact, a referendum of this kind would have to be anticipated by the introduction in each country's legal system of specific laws concerning the referendum itself. At present a European authority legitimated to call a referendum does not exist, nor do European laws exist concerning referendum procedures: *i.e.* the voting system, the structural quorum, the functional quorum, the active electorate. Thus the conditions required for voting a referendum do not exist, espe-

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Rev., 1992, pp. 1141; R. KOVAR / D. SIMON, La citoyenneté européenne, *in: Cahiers droit eur*., 1993, pp. 285 ff.; R. ADAM, Prime riflessioni sulla cittadinanza dell'Unione, *in: Riv. dir. internaz*., 1992, pp. 623 ff.; S. CASSESE, La cittadinanza europea e le prospettive di sviluppo dell'Europa, *in: Riv. it. dir. pubbl. comun.*, 1996, pp. 869 ff.; M. CARTABIA, Cittadinanza europea, *in: Enc. giur*., vol. IV di aggiornamento, Rome, 1995, pp. 3 ff.; V. LIPPOLIS, La cittadinanza europea dopo il Trattato di Amsterdam, *in: Rass. parl*., 2, 1999, pp. 381-389; M. PROTO, María Martínez Sala V. Freistaat Bayern e la cittadinanza europea, *in: Dir. pubbl*., n. 3, 2000, pp. 876; S. BARTOLE, La cittadinanza e l'identità europea, *in: Quad. cost.*, n. 1, 2000, pp. 39 ff.

15 S. BARTOLE, La cittadinanza e l'identità europea, *in: Quad. cost*., 1, 2000, espec. pp. 42 ff., prefers to use the term "complementary" citizen, which however does not have the same meaning as "derived": here "complementary" means that European citizenship cannot be superimposed on national citizenship, but exists side by side with it, with the consequence that the former's essence cannot be defined in terms of subjective claims from the latter.

By contrast, European jurisprudence clarified the existence of a derivative relationship of the concept of European citizenship from that of national citizenship *cf.* sent. July 7 1992, C-369/90, *Micheletti*, in which the Court of Justice specified that the conditions of acquisition and loss of European citizenship were merely those dictated by each Member State. This concept can be found in European studies; *cf.* for all: S. O'LEARY, The relationship between community citizenship and the protection of fundamental rights in community law, *in: Comm. Mark. Law Rev*., 1995, on p. 538 "community citizenship does not forge a direct relationship between the Community and its citizens".

16 In these terms, M. LUCIANI, Diritti sociali e integrazione europea, *in: Associazione italiana dei costituzionalisti, Annuario 1999. La costituzione europea*, Padova, 2000, espec. p. 549: "*Un popolo si compone di cittadini, e quindi l'attuale situazione dell'ordinamento europeo è perfettamente logica. Per un verso, poiché si tratta di un ordinamento che non sa autonomamente definire chi siano i suoi cittadini, ciò vuol dire che non ha un popolo. Per l'altro, specularmente, l'impossibilità di definire da sé le condizioni della cittadinanza dipende proprio dall'assenza di qualcosa che si possa legittimamente chiamare 'popolo'*".

cially in the case of a referendum with legal effects. In the same way any decision on the matter taken by the Convention or by the Conference would need to be transferred to each jurisdiction in the appropriate manner.

Nor does the hypothesis of a referendum of the "European people" appear to be free from criticism from a political point of view: it is easy to see how a decision taken through a majority vote at a European level would place the decision in the hands of a few large States. A possible contrary vote, expressed by one or more smaller countries, would be relatively insignificant. Therefore, national referenda on a level of formal equality are indispensable: the vote of a small State must carry the same weight as that of a large State, *i.e.* each vote must count *pro capite*, because it refers to the State as such, regardless of the numerical weight of its population. In addition, from a juridical point of view, since the final goal of this innovation is a modification of the treaties, the hypothesis that a modification of this kind could be reached without the consent of all the founding parties is impracticable.

It is in fact very difficult to hypothesise a referendum procedure which has not been legitimated by the vote of the people of each State. Of the two ways taken into consideration here - a single European referendum and multiple national referenda - the second way appears the easier to follow and the one which must necessarily be taken. However, for this second way too the juridical problems are far from marginal.

I would like to clarify that in this second hypothesis the referendum would not work as an element legitimising the constituent function, but would operate on a different level: at a national level of instruments used by each State to introduce European law into each legal system.

So, the future treaty could take into consideration a referendum not as a compulsory element, but simply as an option in the ratification proceedings; otherwise it would influence *ultra vires* matters: constitutional law within each state.

The contracting States would have the political discretion to decide if and how to plan a referendum.

There are two possible hypotheses.

1) A referendum as compulsory and binding parliamentary ratification.

In this case, *i.e.* if a decision were taken in the direction of the indefectibility of a referendum, its outcome would condition the effectiveness of the ratification law.

Since it would operate at a national level, every question involved would find suitable solutions in the national context.

In the case of the Italian system, since referenda are covered by constitutional discipline, this new type of referendum would also require the same treatment. Therefore, since there is no constitutional provision *ad hoc*, this provision would have to be created *ex novo* through the procedure of Art. 138 of the Constitution. This would be a constitutional law with immediate extinction since it would only

be applied once, *i.e.* when the referendum for the approval of the European Constitution is held[17].

Therefore a new provision-law would be necessary. This would not be a novelty for Italy, since in 1989[18] a similar law was introduced, in which, however, the electorate had a merely consultative role, the issue on that occasion being the conferring of the mandate to write the Constitution of the European Parliament. In fact we ought to ask ourselves why, despite the fact that the Italians voted in favour, their wishes have not been taken into account.

If the ratification law were approved as a constitutional law, that law could provide for a referendum, whose ratification could only be effective in the event of a positive result. The provisions would be complex: it would at the same time be the approval by the elective legislative chambers of the community negotiation by the government, and a law on legislative procedures insofar as it provides for a new kind of referendum which subordinates positive results to an operational effect of the ratification contextually voted. Such a plan would be perfectly coherent with Art. 138 of the Constitution, with the specificity of assuming the referendum as necessary while constitutional law considers it only a possibility.

2) A referendum seen as an advisory phase and, therefore, coming before the parliamentary decision connected to ratification proceedings[19]. In this case its

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17 A. BARBERA seems to resolve the question in different terms in *La Carta dei diritti dell'Unione europea, Relazione*, presented in the course of the memorial Conference for Paolo Barile, Florence, June 2001, and now available on internet: *http//www.paolobarile.unifi.it/progr.htm*, in which he indicates as a solution a constitutional treaty, with multiple contents, because it would be defining the institutions from the treaties and the founding values of the community from the Charter. According to the author, in order to ratify a treaty of this kind a constitutional law would be necessary which would still leave open the question of the impossibility of overstepping the limit represented by the fundamental rights and principles - a limit which can be opposed both to the supranational law in Art. 11 of the Constitution. and the constitutional one in Art. 138 of the Constitution.

18 *Cf.* Constitutional law of April 3 1989, bearing "the proclamation of a referendum of orientation concerning the conferring of a constituent mandate to the European Parliament which will be elected in 1989".
For authorities on the subject *cf.* B. CARAVITA, Il referendum sui poteri del Parlamento europeo: riflessioni critiche, *in: Pol. dir*., 1989, pp. 319 ff.; B. PEZZINI, Il referendum consultivo nel contesto istituzionale italiano, *in: Dir. soc*., 1992/93, pp. 429 ff.; G. LAURICELLA, In margine alla ratifica degli accordi di Maastricht: la legge costituzionale del 1989 ed il referendum popolare sul mandato costituente al parlamento europeo, *in: Riv. trim. dir. proc. civ*., 1992, pp. 1225 ff. The authors cited agree in recognising a non-binding nature to popular pronouncement. They see it as merely interlocutory with respect to the titular holder of the active function, which is not legally obliged to accept the result of popular opinion, since the latter has only the dignity of politically significant advice lacking binding force.

19 See the project of Astrid, presented in Bruxelles, Justus Lipsius Building, 6 March 2003, to the European press "Per la Costituzione dell'Unione Europea" (paper).

result would have no legal influence on the future parliamentary which could ratify the treaty even if people had rejected it. The problem of the conflict between the people's will and the decision of their representatives is on an obvious different level.

In such a case the referendum could not compensate the lack of democracy in the constituent community body as it would have a mere advisory value.

The hypothesis of multiple national referenda obliges us to consider the possibility of one or more referenda giving a negative response.

Here too the criterion of unanimity must be respected and therefore all the national referenda must produce favourable responses. Actually the same objections as those raised in connection with the hypothesis of a single European referendum are applicable. Nor do considerations other than those already debated with regard to the Convention and the Conference seem possible. If decisions in these two seats have to be taken according to a criterion of substantial unanimity, the same must apply to national referenda: *i.e.* the expression of a disagreement cannot have different effects depending on where or how this disagreement has been expressed, unless the referendum were conceived as an exclusively consultative one leaving the door open for a consensus of the State expressed in a different way. But this possibility would be in contradiction with the need discussed here for popular legitimation. Otherwise it would be better to opt for a single European referendum in which the decision of the majority would prevail.

Consequently it is likely that an attempt will be made to avoid a probably negative referendum result in order to safeguard the process in course. In fact the mere eventuality that, following consultation of the populace, the proposal formulated by the Convention might be frozen, can become an effective blackmail weapon for those States which, in order to emerge from a position of "contractual confinement", may threaten to have recourse to it unless they obtain more favourable contractual conditions. Seen in this light the referendum will have the role of a stabilising element of the initial positions of contractual disparity between the States. In other words, it will serve as a new measure guaranteeing contractual equality, placing on a plane of substantial equality the contractual claims, whatever state they come from, if only because the veto of the smallest State could - if confirmed in the referendum result - cancel *de facto* the results of the process under way.

Finally we should not undervalue the fact that the referendum would force the Conventionists to work not within the four walls of their rooms, but in direct contact with the popular will, since the decision to approve what the former have decided is entrusted to the latter. Here, - unlike the preceding prospect - the referendum would influence the relationship between regulators and regulated[20],

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20 On this see the work in progress of a German research team which is studying the theme of direct democracy in the European process: *www.mehrdemokratic.de*, where we can read in the *Position paper on direct democracy* that "Because of the possible consequences of failure [of the

bringing the recipient of the rule closer to its author, allowing him to carry on a coherent and aware dialogue with the Conventionists; in this light the referendum as an instrument of *ex post* approval of a decision, whose contents cannot be changed, would become a new form of involving the regulated[21] in the making of the rules.

An expressed disagreement with partners who are prepared to follow the path of innovation would indeed cause severe problems. Since modifications to treaties cannot be envisaged unless they have the consent of the contracting partners, we must agree on the birth of new and different community legislation in co-existence with already existing legislation, to be applied only to some of the original contracting parties. However, apart from its evident complexity and difficulties, this could only be a theoretical hypothesis.

The complexity of the process of formation we have highlighted here suggests a reflection concerning procedures for the modification of the future European Constitution. In the absence of specific regulations we should assume that, following long established criteria, any modifications must respect the same regulations established for its approval. Since this itinerary is clearly a difficult one, the Convention or Conference ought to introduce detailed rules on the subject. Here it would be opportune to have modification proceedings different from those presently applicable where innovations to the treaties are concerned: the present system rewards in particular the political will of national Executives, silencing Parliaments, which are limited to ratifying the decisions of others without the possibility of substantially modifying them. In fact this system could be reversed, *i.e.* giving priority to the elective chambers.

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referendum], it would be a first duty of the heads of government and the Convention to work out a text which took the citizens' needs into consideration. […] The announcement of the intention to hold referenda would of itself significantly influence the work of the Convention and of the individual governments, as they would be aware of the need to get popular support for their proposals".

On this same theme *cf.* B. KAUFMANN, *The Democratization of Democracy. The growing role of initiative and referendum in the European integration process*, *Relation* at the *Public hearing* "The European Referendum Challenge", Sept. 19, 2002, held in the European Parliament, room A1G2 (*paper*). In the provisional document the author asked himself - with regard to national referenda which might be proposed in the respective countries in concomitance with the European Parliamentary elections of 2004 - whether or not there should be one query only, because of the complexity of the text to be submitted for approval: "What specific question should be put to the voters in the first European referendum? Should there be multiple questions/options?", for a summary of this contribution see *www.iri-europe.org/reports/europeanreferendumchallenge.pdf*.

21 G. FERRARA, "Più Europa e meno Europa". Ma quanta democrazia?, *in: Rivista del Manifesto*, n. 32, October 2002, espec. p. 42, underlines the need for a "mass" discussion able to revitalise a Convention which, because of the absence of a popular mandate, ought not to be left alone to decide for everyone.

3. How should we Define the Procedure Begun with the Convention?

From a legal point of view, the procedure of the Convention could consist in a mere modification of treaties, to be introduced into the legal system through the normal tools for this end.

As far as the Italian juridical system is concerned, Art. 11 of the Constitution - except for dissenting voices - has functioned until now as the gateway to community regulation sources (pacts and their ramifications). And purely theoretically, because of the incontestable superiority of community law over internal law, community constitutional regulations might prevail over incompatible internal ones. However an obvious doubt arises: is recourse to Art. 11 still appropriate when what is entering the system is not merely operating at the level of ordinary law but one which deals with constitutional matters? This, in fact, is the subject of the Nice Paper[22] - the political precedent which, most probably, will be used as the "*basic treaty*" for the future European Constitution. The Paper has asserted the substantial equality of all freedoms; this presumes a judgment of perfect equivalence between values: one value will have the same value as another, without any hierarchical order, so that fundamental freedoms could be at the expense of economic freedoms or viceversa[23].

In other words, the Paper has chosen a solution which is opposed to that of our own Constitution which, instead, regards individual freedoms as superior to economic ones, *i.e.* denying the sacrifice of individual freedoms in favour of economic ones.

Given that the European Constitution will ask us to accept as our own a sum of values, possibly in common with other States, but, together with these values, a certain discipline regarding them which might not be shared by our people, the

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[22] The Nice Paper, drawn up by the Convention of the 62, an *ad hoc* body mandated by the European Council, was promulgated in Nice by the European Council in a meeting on Dec. 7-9 and published in GUCE 2000/C 364/01 on December 18, 2000. Its insertion in section C of the Gazette confirms its nature as a politically binding act, though deprived at the same time of juridical power. A different meaning lies in the fact that some European Courts referred to this document in order to define their in-court litigations; in such cases the Paper has not entered court rooms as paradigmatic law able to settle controversies, instead - as clearly stressed by the Communication of the Commission concerning the real nature of the Paper of the fundamental Rights of the European Union, *Com. (2000) 644, October 11, 2000* - it was conceived with the different and limited dignity of inspiring source of *jus praetorium* as stated: "it will offer a clear guide for the interpretation of fundamental rights by Court of Justice which in the current situation has to use disparate, sometimes uncertain, sources of inspiration".
Concerning this particular aspect, see: A. Ruggeri, La forza della carta europea dei diritti, *in: Riv. dir. pubbl. com. e eur*., 2001; B. De Witte, The legal status of the Charter: vital question or non issue?, *in: Maastricht jour. eur. com. law*., 8, n. 1, 2001, p. 81.

[23] On this subject *cf.* U. De Siervo, L'ambigua redazione della Carta dei Diritti Fondamentali nel processo di costituzionalizzazione dell'Unione Europea, *in: Dir. Pubbl*, n. 1 , 2001, p. 33.

specific nature of this discipline does not seem naturally to tend towards unity unless we accept large losses of our national "specificity", which is still alive and vital.

Finally, it remains to be clarified how the new European law could enter into national juridical orders.

Following the general pattern, this process should occur through the approval of a law of ratification: ordinary law, *i.e.* sub-constitutional law. However a law of this kind, despite its abstract nature, would be considered a law of ordinary ratification and would have as its object a text of constitutional value, and ought in this case to be considered unsuitable.

It is a question of a body of law whose position, in the hierarchy of the sources, would be defined by the principle of the prevalence of community law over national law. Consequently, if usual principles are applied, we would in fact have the co-existence of two legislative bodies - *i.e.* the original Constitution and one stemming from the Community since the former would not be annulled, and consequently questions of which of the Constitutions should prevail and which subordinate law not applied would be decided by the judges case by case, with all the limitations and negative effects this situation would involve.

Finally, a controversial issue arises concerning which organism would be empowered for the final ruling in each new legislative body since the constitutional judges of the single states could no longer fill this role. Possibly the European Court would be appointed for this task; but this would leave many problems open over the possibility of different judgments concerning the tools for an effective function of *nomophilachia* and on jurisprudential modification and integration of the existing constitutional fabric.

So far these issues do not seem to have received adequate attention. It might be useful to consider one possibility: the ratification of the treaty through constitutional law. This solution would, in the first place, be correct with regard to Art. 138 of the Constitution. I would have no doubts over defining the matter of the ratification law as a "constitutional matter" according to Art. 138 itself. Consequently the legislator, whose decision it must be, would be right to use constitutional law for the ratification itself.

By doing this, quite a few issues described earlier would be resolved. In fact once the matter has been constitutionalised, the issue of entering it into our legislation through Art. 11 of the Constitution, with all the ensuing problems, would no longer arise. In this way the Constitutional Court would regain its centrality, although the controversial relations between the Constitutional Court and the European Court would still stand because of the co-existence of the two different legislative bodies, the national body and the community body.

As for the subject of this procedure - as established at Laeken - this should be limited to a plan for a Constitution drawn up by four different subjects, *i.e.* the representatives of the executive and legislative organs of the Member States and the Union respectively. It is true that this would be a step forward with respect to

the Treaties, which so far the governments have monopolised, but we are still far from the idea of the "Europe of the people"[24] which would like to see the fundamental decision entrusted to the people or to their direct spokesman.

As things stand, the final decision will be entrusted to the Intergovernmental Conference, and consequently to the agreement between governments. Nor will the time available for proposals from the Convention serve to compensate the role played by the Conference. In fact it was established at Laeken that the Convention should have a preliminary role, during which it can formulate different options or recommendations sustained by general consensus. It is evident that the effective link between the proposals of the Convention and the decisions of the Conference is defined fairly flexibly, depending essentially on the degree of consensus which the proposals obtain[25]. At all events, from a formal point of view, the Conference will keep its decision-making power intact even if there are differences over the proposals advanced[26].

It should be stressed that whatever "working method" is adopted both during the Convention and the Conference, it seems improbable that the decisions taken may disregard general *consensus*[27]. Besides, if obtaining the application of the principle of majority vote on matters of ordinary administration concerning

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[24] This point has been the object of careful study by the Hon. G. NAPOLITANO who, as President of the Commission for Constitutional Affairs of the European Parliament, spoke in the course of the cognitive enquiry "On the future of the European Union" set up by the III and XIV joint Commissions of the Chamber of Deputies and III and Junta for European Community Affairs of the Senate of the Republic. *Cf. Atto Camera. XIV Leg. Resoconto Stenografico Indagine conoscitiva*, 25 September 2001, p. 8.

[25] Already on the occasion of an informal meeting of the European Council, held in Gand on October 19, a working method was anticipated, and later confirmed at Laeken, by which the Convention would have to seek the consensus or orientations of the majority and indicate majority and minority options only if it did not succeed in this.

[26] On this subject see a first comment which in fact highlights the flexibility mentioned in the text of the relationship between the Convention and IGC: Editorial Comments, What is going on at the European Convention, *in: Comm. Mark. Law Rev*., vol. 39, n. 4, 2002, espec. p. 678: "Moreover, in this case it would make it very difficult for the IGC, which will intervene at a later stage, to decide not to ratify a document proposed by a large majority of the Convention. In any other situation, if the Convention produces alternatives rather than a single draft, or if the final document were to be the expression of a slim majority, the IGC would necessarily be the occasion to reopen the negotiations with no better chance of success than if the Convention had never existed.".

[27] The method is the one adopted in the Document of March 14, 2002, *Doc. Conv. 9/02*, *in:* http://european-convention.eu.int/, which states (Art. 6: "Conduct of meeting") that the decisions will be taken "by consensus" - a concept which, while not being a merely reductive arithmetical majority, does not embrace unanimity either, as is clarified by its excluding that the dissent of candidate States may be an obstacle to the adoption of the decision. But, apart from the assertions of juridical method, we believe that the effective consensus of all the participants cannot be ignored, given that substantial modifications to the pacts are concerned.

community affairs is controversial and difficult today, it is all the more evident that it would be impossible to go any further over questions involving the constitutional substance of each of the States. Particularly if one considers that the ultimate outcome of the work of Laeken is, in one way or another, the modification of the treaties, it does not seem possible that this modification could be attained without the consent of the original contractors.

On the other hand, this likely outcome, *i.e.* absolutely necessary unanimity, is coherent with what we discussed above concerning the impossibility of seeing an effective constituent function in the procedure drawn up. It is clear, in fact, that while an assembly supported by popular consensus would be legitimated to exchange unanimity for decisional efficiency, this could not be done by one lacking constituent investiture.

4. CONCLUSIONS

I do not share the enthusiasm many people have for a Paper written by those who, without the investiture of the People of the Union, claim to interpret its values, partly because, as has been suggested, many related legal issues would need to be discussed.

Even if each State envisages a national referendum, desirable for its undoubted political value as a "multiplier" of the democratic legimitacy of the Convention, the referenda could not alter the nature of the Convention's function, *i.e.* they could not transform what is not constituent into a constituent function, because of the unwillingness of the European Council to draw up a new constitution and therefore a new federal European State.

Consequently the constituent function would have only the subjective requirement - if we consider the *ex post* approval of a people consulted on an *omnibus* question with a binary structure as equivalent to the participation of its representatives in the decision-making - but it would still lack the objective requirement.

With this I do not wish to belittle the Convention's activity. It remains an impressive work of drafting and restyling called for by the great flood of community law. I have, however, tried to define its nature and legal status in accordance with what it really is[28], whatever it might like to be.

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28 Foreign authorities have already used an investigative method favouring the observation of the material data as a point of departure for a correct juridical definition of a fact, and a concrete application of it with respect to the current events may be found in P. LUDLOW, *The Laeken Council, European Council Commentary*, vol. I, n. 1, Brussels, 2002, espec. p. 203, where, concerning the correct definition of the Conventionists' power, the author states that "Rather therefore than engage in a quasi-theological debate about what is, and what is not a constitution, it would appear more fruitful at this stage to discuss what the purpose of the Final Act is or ought to be. Its contents and function will define its status, and not viceversa".

5. POST-NOTE

It has become necessary to give an account of the continuation of the work of the Convention, which ended on July 18 2003 in Rome with the presentation of the "Treaty Project which institutes a Constitution for Europe"[29].

As the text shows, questions relative to the procedure of approval and revision of the Treaty were defined in the direction we already anticipated in this article.

Art. IV-8 reconfirms the principle of the unanimous ratification of the High Contracting Parties as an essential element for the conclusion of the Treaty, *i.e.* for it to be juridically binding for the ratifying statutory order.

It therefore follows a line of continuity with respect to Art. 48 TUE, which asserts the principle of double unanimity, *i.e.* so-called internal unanimity which must express itself within the IGC, which "by mutual consent" establishes the modifications to bring to the treaties; and external unanimity, *i.e.* expressed by each contracting party through ratification, the one and only act by which the State manifests its will concerning the conclusion of the Treaty.

This passage is relevant not only from a formal point of view. Even through the confrontation of this disposition and Art. IV-7 concerning the procedures of revision - which, in a noteworthy effort of democratisation and recovery of transparency thanks to the "method of the Convention", has however reconfirmed the principle of the unanimity of consensus[30] - the question of the constituent or non-constituent nature of the process of innovation under discussion passed. This is, therefore, an emblematic and decisive point for the political-institutional reconstruction of what has occurred. And it is not surprising that there were many attempts to overcome the rigid obligation of unanimity.

For example, Duff's proposal[31], in the case of a 4/5 ratification, referred the decision to the Council, with the specific mandate to call a new Intergovernmental Conference (IGC) which "will renegotiate only the provisions of this Article in order to allow the Constitution to come into force". The "Penelope" text[32], on the other hand, provided for the States to unanimously reach a specific and preliminary

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A recent document of the Secretary of the Convention, Sept. 2 2002, called (French version) "*La simplification des traités et l'élaboration d'un traité constitutionnel*" , no longer presents the Constitution as the unique outcome of the Convention's work, but prefers to indicate it as one of the three possible prospects: "*la rédaction d'un nouveau traité 'fondamental', ou 'constitutionnel', ou encore d'une constitution*", p. 9 (paper).

29 *Cfr. Doc. CONV 850/03.*

30 For a detailed comment on the disposition in question see: G. BUSIA, Le procedure di revisione del Trattato e il diritto di recesso dall'Unione, *in:* F. BASSANINI / G. TIBERI (edited by), *Commentario al progetto di Trattato che istituisce una Costituzione per l'Europa*, Bologna, 2003, espec. p. 164.

31 *Cfr. Il Contributo 341, Doc. CONV 764/03*, of May 28 2003.

32 *Cfr. Lo studio di fattibilità. Contributo preliminare di Costituzione dell'Unione Europea. Documento di lavoro* (developed on request of President Prodi), on Art. 101.

Agreement, with the sole object of the coming into force of the Treaty, in which it would be established that the States which did not intend ratifying would not declare confirmation of their adhesion to the Union, unlike those who instead wished to ratify it. The Penelope proposal also contemplated what the authors of the text themselves defined as a "breach with respect to Art. 48", *i.e.* the eventuality that some States would not ratify the preliminary Agreement: in this case the Agreement would nonetheless come into force through a qualified majority.

However all the proposals[33] aimed at overcoming the rigidity of the schema of Art. 48 either tended to place the request for unanimity on a different plane, with a consequent weakness because the absence of the consensus of one State would anyhow have been able to influence the selected plane, whatever this might be; or else, in the final analysis, to strain community legality by reaching a decision in spite of the dissent. It is therefore easily understandable that some people have expressed considerable perplexity on this point[34].

The progressive weakening of the urge to overcome the principle of unanimity explains the formulation of the proposal[35] according to which, in the case of the absence of reaching unanimity over the ratifications, the question would be deferred - within two years of the signing of the Treaty - to the European Council, if ratified by at least 4/5 of the States.

This proposal left many possibilities open, from the re-negotiation of the entire new treaty on withdrawal from the preceding treaties of either the dissenters (with the setting-up of forms of reinforced cooperation), or else of the already ratifying 4/5, setting up among the latter a new plan for a treaty which would be free from pre-existing formal obligations.

At all events, setting aside eventual and future prospects, the significant point for the present lay in the choice of a definition of the crisis in the course of political negotiation in the case of failure of the procedure of adoption. And so the possibility of overcoming the obligations *ex* Art. 48 fell through definitively.

With the latest modifications proposed by the *Praesidium* at the Convention this ulterior and eventual phase of political negotiation within the Council was removed and placed as a "declaration" annexed to the Treaty, and therefore extraneous to it. Consequently it has only maintained the significance of a political commitment to

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33 For an original solution, respecting the obligation of unanimity combined with the possibility of unilateral withdrawal for the non-ratifying part, see the study project developed by the Astrid group, *Per la Costituzione dell'Unione europea*, Roma, February 2003, in www.astridonline.it; the comment to part VI (Transitory and final dispositions) was drafted by GIOVANNA DE MINICO.

34 *Cfr.* B. DE WITTE, Entry into force and revision, *in:* DE WITTE B. (ed.), *Ten reflections on the Constitutional Treaty for Europe*, EUI, Firenze, 2003, on p. 211; F. CHARLEMAGNE, The Perils of Penelope, *in: The Economist*, December, 14 2002, on p. 32.

35 *Cfr. CONV 802/03, of June 12 2003, Art. IV-7, comma 3.*

attempt the path of the negotiation in order to overcome the crisis of the dissenters, a kind of political agenda which appeals to the good faith of the States to respect it.

An evaluation of the synthesis of the complex political-institutional event summed up in the above-mentioned proposals suggests that overcoming the principle of unanimity, and the consequent forcing of community legality, could only come into being in the ambit of a constituent process. That this did not occur cannot be considered an effect of Art. 48. The constituent nature would have manifested itself and been realised precisely through overcoming this disposition, finding *aliunde* its substance and foundation. Therefore if overcoming the principle of unanimity had had the strength to assert itself, it would probably have provided a conclusive indication of the nature of the process itself.

This did not occur. But the failure to overcome it is not sufficient in itself to certify the absence of a constituent nature. It may be that a new order will emerge with everyone's consent. Nor is it decisive that the mandate conferred on the Convention at Laeken expressly excluded that the work of the Conventionists could give rise to a super European State. Instead the object of the mandate ended by redesigning the distribution of competencies between the Union and the Member States, accruing the democratic legitimacy of the organs and the transparency of their decisional processes, simplifying the decisional instruments, and finally uniting the four texts in a single seat. But the formal limits of a mandate cannot deny the constituent nature of a process able to concretely assert itself.

On the other hand, the fact that the text approved by the Convention is considered susceptible to modifications by the IGC (and probable, according to some people) seems to confirm, from another point of view, the absence of a constituent nature. In fact, if this constituent nature had asserted itself concretely, it would be unthinkable that the mediations and synthesis acquired during the Convention should appear to yield to the choices made in a successive and different seat where the title to decisional power would belong exclusively to national executives.

We must therefore examine the conclusive formulations in the broader context in which they came into being. It is true that one cannot formally overcome an amendatory schema of treaties, but it is also true that - precisely through the Convention and its work - the development of the desire to come to an agreement has followed entirely new and different paths with respect to the traditional ones[36].

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36 G. AMATO, La Costituzione dell'Unione e "la donna del soldato", *in: Il Sole-24 ore*, June 1 2003, pp. 1 and 10, effectively illustrates the hybrid nature of the Project, which approaches that of a Treaty between States insofar as it is unable to overcome the rule of unanimity for the final approval and the future revision, but projected to become a Constitution in the future: "I too still love what I lived as a Constitution. But I now see it as a travesty and feel that, in calling it Constitution, we are not telling our citizens the truth. My only consolation is that my film is not yet finished. And in mine, unlike Jordan's, no transformation is precluded. On condition that we want it".

N. Walker has expressed an analogouf idea, After the constitutional moment, on p. 9, *in: Seminario permanente di teoria politica*, www.unipr.it/arpa/dsgs/seminario, when he says: "We are, after

It is also true that the new initiative has not overwhelmed the fundamental coordinates of the old Europe. But at the same time the innovation runs deep and marks a moment of significant detachment from the concept of a Europe constrained within the narrow limits of economy and markets [37]. A significant sign in this sense comes from the debate on the suitability of providing the project for a national referendum even though evaluating the suitability and typology of the referendum would be left to the internal political deciders. That the need was felt proves the common perception of the importance of the prospected innovation, even though the absence of any reference to the referendum in the concluding text is coherent, in the overall on-going process, with the interpretation given here [38].

The formulation reached at the conclusion of a complex and difficult confrontation certifies, together with other significant indications, that the Convention event was not in itself constituent. But it also certifies - again together with other significant indications - that, with the Convention, the way to a possible evolution is open. The sequel is entrusted to options of a political nature, and is sustained by the hopes and auspices of European citizens.

ABSTRACTS/RÉSUMÉS

With the Laeken meeting of 15-16 December a new entity was born, the Convention, which received the mandate of drawing the European Constitution. The author poses the question of what is the necessary attribute to qualify the process as a constitutional one. The answer is democratic legitimacy, an attribute that does not qualify the Convention, given that it has not been elected by people, therefore popular consultation remains the only way to confer it the quality it lacks. But the referendum opens a series of problems: what kind of referendum? National referenda or a European one? And in the first hypothesis, what is the nature of this popular consultation? A binding or a consultative one? Furthermore when the

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all, presented not with a Constitution, but with a peculiar hybrid - a Constitutional *Treaty*, with both the ratification and, even more tellingly, the amendment mechanisms in Art IV-8 and IV-7 respectively of the document continuing to treat the IGC, and, ultimately, the member states (in accordance with their constitutional requirements) as 'Master of the (constitutional) Treaty' ". While for an alternative idea of an institutional model preferable to the Constitutional Treaty, cfr.: N. Walker, Europe's Constitutional Passion Play, *in: European law review*, 2003, 28 (forthcoming).

[37] This extra concept can be read in the "organogram of governance", which can be summed up in an "power map" concerning the relations between the institutions and between the institutions and the citizens, in italian doctrine this is called "il principio di divisione dei poteri e le istituzioni delle libertà". On the theme see: P.P. Craig, What Constitution does Europe Need? The house that Giscard built: constitutional rooms with a view, *in: The Federal Trust*, August 2003; J. Ziller, *La nouvelle constitution Europeene*, Paris, (forthcoming).

[38] The referendum, seen as an advisory phase and, therefore, coming before the parliamentary decision connected to ratification proceedings, is contemplated by the study project developed by the Astrid group, *Per la Costituzione dell'Unione europea*, cit., in www.astridonline.it; the comment to part VI (Transitory and final dispositions) was drafted by GIOVANNA DE MINICO.

European constitution enters in force, it might be incompatible with national ones: which of them will prevale? In addition, the problem of conflict of jurisdiction could arise between national Constitutional Courts and their European counterpart. In the post-note the author takes elements from the test elaborated by the Convention to confirm the non-constitutional natura of the European process, as it was already anticipated. But with the Convention the way to a possible evolution toward a European Consitution is open. The sequel is entrusted to options of a political nature, and is sustained by the hopes and auspices of European citizens.

Une nouvelle entité est née au cours de la conférence de Laeken des 15 et 16 décembre: la Convention, qui a reçu le mandat d'établir la Constitution européenne. L'auteur pose la question de savoir quel est l'attribut nécessaire pour qu'un processus soit qualifié de constitutionnel. La réponse est la légitimité démocratique. Or il s'agit d'un attribut que la Convention ne possède pas étant donné qu'elle n'a pas été élue par le peuple. Ainsi, la consultation du peuple reste donc le seul moyen de lui rendre cette qualité qui lui manque. Cependant, évoquer la notion de référendum ouvre la voie à de nombreux problèmes, à savoir: le type de référendum auquel on fait allusion, des référendums nationaux ou bien un référendum européen? Dans la première hypothèse: quelle est la nature de cette consultation du peuple? Est-elle obligatoire ou n'a-t-elle qu'une valeur consultative? De plus, une fois que la Constitution entre en vigueur, il se peut qu'elle soit incompatible avec les constitutions nationales. Quelle sera donc celle qui prévaudra? En outre, il est envisageable qu'un conflit juridictionnel naisse entre les Cours Constitutionnelles et leur homologue européen. A la fin de l'article, l'auteur réunit des éléments de l'essai élaboré par la Convention en vue de confirmer la nature non constitutionnelle du processus européen, ce qui avait donc déjà été anticipé. En revanche, la Convention ouvre la voie à une évolution possible vers une Constitution européenne. La suite des événements est donc confiée à des options de nature politique, et est maintenue par les attentes et les vœux des citoyens européens.