ON THE CONSOLIDATION AND SIMPLIFICATION OF THE EUROPEAN TREATIES AND THE CONVENTION PROCEDURE

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1. The Rules of European Law and the Problems of their "Simplification"

The legal rules governing the institutional organization of the European Union can be derived in part from the original Treaties establishing the European Communities and the Union. They can also be derived from an examination of the practices which have assumed a normative character, something hardly imaginable if one were to consider the Treaties' text alone. The importance of practice in the formation of European public law does not arise from the fact that the Treaties' provisions are vague and indeterminate, so much as from an institutional reality in a constant process of adjustment and transformation. The Treaties carry vestiges of the past phases of the integration process, and they no longer respond to legal needs that have changed over time. Especially since the project of political integration has matured, it has become necessary to clearly determine the constitutional principles of the Union. The "consolidation" of the European Treaties implies a task that must pay special attention to the rules emerging from the practice. This task of consolidation also calls for an awareness of a transition to a new phase, in which the goals and objectives of the Union must be clarified. It will be necessary to make choices among the various abstract models for the possible development of the European Union. Only then will the "simplification" of the "principles" and "rules" of the Union be concretely feasible, notwithstanding all the risks and difficulties that such a task entails.

The process of the "simplification", "consolidation" and reform of the rules of European constitutional law that started with the convocation of the "European Convention," will first have to reckon with the need of maintaining a certain degree of flexibility in the development of European institutions. At the same time, it will also have to attend to the reasons at the heart of the demands to compose a new European Treaty. To examine these reasons does not mean to ignore the persistent contradictions that still exist in the process of European integration; such examination may instead lead to an evaluation of the real chances to carry this process forward. Some of the difficulties posed by the "consolidation" and "simplification" of the European Treaties can already be seen from an examination of their organizational and procedural aspects, which emerge from the official documents which themselves are rich in alternatives and uncertainties. Looking more closely at the existing contradictions in the development of European institutions, it becomes clear that we are facing a constitution-making process that diverges widely from all the constitutional schemes that constitutional scholars have analyzed so far. Still, the presence of anomalies in the Union's current structure cannot justify indefinitely avoiding important choices regarding which model the Union's development should follow, as well as choices regard-

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ing the simplification of the structure that the Union might assume in order to fully discharge common purposes. These anomalies can no longer justify avoiding the task of the drafting of a new "constitutional treaty."

The reason for entrusting the task of writing a new "constitutional" treaty for Europe to a "Convention" was to promote a substantial reform of the European political system, by opening the debate to all the parties participating in the process of political integration. More than launching a process to just clean up the text of preexisting treaties in a formal sense, it was decided to pursue an unprecedented wide debate on the future of European institutions, to bring the discussion out from the closed circles of ministerial bureaucracies and national parliaments, in order to engage a plurality of participants representing interests and viewpoints potentially different from those of the member states' representatives.[1]

And yet, as we have seen, the official documents contain ambiguities and uncertainties, which reveal the presence of contradictory tendencies on the part of the very promoters of the "consolidation" and "simplification" of the European treaties. Alongside statements that seem to pursue the very innovative goals of a substantial modification of existing institutions and a new discussion on the European integration process, one also finds statements aimed at the preservation of the existing institutional equilibrium.

It is not easy to balance new, adequately flexible, organizational principles with the determination of institutional objectives that cohere with the common democratic and pluralistic traditions of the member states. Respect for these constitutional traditions cannot be guaranteed by merely codifying actual practices, nor by simply formulating vague and indeterminate clauses that could apply to all contingencies. The current situation must be changed in order to widen the political-institutional debate, and to ensure the participation of many parties in an open confrontation on potentially common objectives. Opening up the debate on the constitutional principles of European institutions, and on the purposes of the Union, is itself something that may have important consequences for European constitutional culture. It will be possible to evaluate the results of this debate only at the conclusion of the "constitutional treaty" that should result from the "simplification" and "con-

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[1] The new treaty ought to be elaborated with the participation of different Europan and national institutions and involve "organizations representing civil society" ("the social partners, the business world, non-governmental organizations, academia, etc.," as stated in the Laeken Declaration on the Future of the European Union). The "European Convention" procedure stresses the need for the close involvement of civil society, and thus European public opinion, and makes reference to the procedure followed in the Nice Charter of Fundamental Rights. The Convention envisioned in the Nice Declaration for the purpose of realizing a "consolidation" and "simplification" of the European Treaties is composed of 15 representatives of heads of state or government of the member states, (1 from each member state), 13 representatives of candidate countries (1 per country), 30 representatives of member states' national parliaments (2 from each member state), 26 representatives of candidate countries' national parliaments, 16 representatives of the European Parliament and 2 representatives of the European Commission. 3 representatives of the Economic and Social Committee, 6 representatives of the committee of regions and the European mediator all have observer status. The representatives of candidate countries are appointed in the same proportion as those from the member states. The European Council has appointed Valey Giscard d'Estaing as president and Giuliano Amato and Jean Luc Dehaene as vicepresidents.

solidation" of the European Treaties. From where we stand now, we can already see that the dialogue between different social, political and legal cultures, triggered by this process (and not confined to university and governmental circles), represents the forging of a new constitutional path.

2. The "Consolidation" and "Simplification" of the Treaties

By convening a "Convention on the Future of Europe," to meet in Brussels, the Laeken Intergovernmental Conference of 15 December 2001 started a process that might lead to the drafting of what has been called a "constitutional treaty," the outcomes of which cannot be presently foreseen. The job of elaborating texts upon which the heads of government of the member states can reach an agreement has been entrusted to a "European Convention." This Convention may hold hearings, consultations, discussions and debates and may draft one or more final documents that will be the starting point for the future intergovernmental conference. The project or the projects elaborated by the "European Convention" might respond to demands for expanding the Unions' future sphere of activity, establish new principles, identify the Union's missions, and possibly incorporate the Nice declaration of fundamental rights. It is hard to imagine that the "Convention" will limit itself to proposing a new, technically more precise formulation of the Union's existing organizational rules, thus declining the chance to put forward proposals for innovating the existing positive law.

It seems that Europe has indeed come to a "crossroads." The process of political integration might just as much come to a halt, as continue towards strengthening common institutions and drafting constitutional principles, capable of reorienting our common development. The realization of a common, supranational, institutional arrangement, embracing the different decision-making bodies of the Union, as well as a more secure determination of the Union's missions, might be the most innovative result of European institutional reform, in that it might depart from the formal strict separation between the economic Communities and the European Union. There is a clear contradiction in the official documents that illustrate the content and purposes of treaty reform, and set forth the procedure to be followed by the "European Convention." This is a contradiction rooted in two competing visions: one aims at reforming the general structure of the European legal system, and the other conceives of a minimalist, more bureaucratic project of formalizing the Treaties' rules. This should not preclude a more intense discussion of the possible future developments of European institutional reform. Still, the occasional presence of radical conflicts should not be surprising; moreover these conflicts nourish the life of political institutions and the processes of political communication. The persistence of disagreements over the structure of institutional arrangements should not leave us discouraged.

The entry into force of the new "constitutional treaty" should not be expected to eliminate the plurality of constitutional arrangements in Europe, even if a supranational constitutional law will surely influence the different constitutional and political systems of the member states. The debate amongst European legal scholars and practitioners yields conflicting evaluations of the integration process, and of the imperative of reconsidering the methodological presuppositions at the basis of the different systems of public and pri-

vate law in the single European legal cultures. No longer confined to the circle of community law specialists, this debate contributes to the formation of a common constitutional culture, as well as to an understanding of constitutional transformations in the member states. It also provides theoretical tools that aid in constructing a European constitutional law.

A striking example of the uncertainties surrounding the issue of European institutional reform can be seen in a statement contained in the "Declaration on the future of the Union" (annex C, n.23 of the Nice Treaty), which seeks to realize *"a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning.*" In order to avoid changing the meaning of the Treaties, there would need to be a universal agreement on their essential content; this content would represent the meaning that could in no circumstance be modified. This suggests that in the other statements of this Declaration, those that do not contain direct references to the very essence of the process of European integration, one should be able to identify by exclusion the rules subject to "simplification." In order to realize a closer political integration, the Union would need constitutional structures that allow for decision-making functions. Moreover, the formal separation between the Europe of the Union and the Europe of the economic Community would need to be abandoned.

The Laeken Declaration contains a series of headings. They range from "Towards a Constitution for European Citizens" and "the Future of the Union" (at the outset), to "Europe at a Crossroads", and "the Democratic Challenge Facing Europe" (contained in part I), and "Challenges and Reforms in a Renewed Union" (part II). These suggest a profound revision of existing arrangements, rather than a merely formal adjustment of the Treaties' text, as the minimalist conception would have it. The "democratic challenge" to which the Laeken Declaration refers, is founded upon the reaffirmation of the "fundamental values" of democracy, human rights, and the protection of minorities, all of which are connected to the principle of the rule of law. The "democratic challenge," and the challenge of European constitutional reform more generally, presuppose a substantial social and political initiative, aimed at reconciling economic justifications with human and legal ones, and at launching an increasingly intense process of political integration among the European constitutional systems.

The terms "consolidation" and "simplification" of the Treaties, to which the official documents refer as the object of the reform to be deliberated by the "European convention," are anything but unequivocal and unambiguous. This observation emerges from a consideration of both past experiences and the contemporary scholarly debate. The uncertainties clearly present in these terms relate to the content of possible reforms and to effective disagreements between those who refer to a more or less systematic compilation of existing rules and those who instead stress the innovative nature of the "consolidations" and "simplifications" that have been carried out in the past. More limited references to "consolidation" can be seen in recent studies on the "technique of legislation" of English

inspiration.[2] Indeed, some of these studies refer to "consolidation" and "simplification" as techniques for dealing with the proliferation of legal instruments. In such cases, the meaning of these terms is bound to the specific contexts of the legislation; it is furthermore tied to the state of the positive law, to provisions for forms of "delegification" (the legal phenomenon in which Parliament authorizes administrative authorities to adopt regulations in areas previously governed by statute) or for the reordering of specific legal areas.[3]

In order to evaluate the purpose of a "consolidation" process, like the one taking place in the European Union, it makes no sense to assume a dogmatic definition of the concepts of "consolidation" or "simplification." Moreover, it would be unthinkable to appeal to a supposed ideal contrast between the concept of "consolidation" (that has sometimes been understood as the mere compilation of existing rules, aimed at making them more certain) and the concept of "codification" (that French scholars have often associated with the idea of "simplification"). This last juxtaposition is highly unstable in consideration of the most famous experiences of writing down the rules. As it has recently been noted, this idealized juxtaposition instead represents a "myth to discredit, rather than a historiografic category or an interpretive scheme, because of the way in which it has been construed, the ambiguous way in which it has been used, the overreaching it might lead to, and some of the misunderstandings upon which it is based."[4] Still, if we reflect on past experiences of "consolidation," "simplification" and even "codification," we might gain an insight into the theoretical issues presented by the work of every legislator. These issues should not be neglected, neither in processes of constitution-making, nor in processes of "codification" or "consolidation." "Consolidation" refers to the re-composition of rules already existing in practice, as well as to the coordination and the more organic systematization of the legal order. "Simplification," by contrast, promises more explicitly a better and more effective determination of the principles and purposes of the Union, and perhaps lends itself better to processes of constitutional innovation.

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2 In the contemporary "technique of legislation" language, one finds the term "consolidation" used with reference to the compilation of written rules, mostly of a legislative nature, in order to compose written organic texts that include the various provisions adopted separately by the legislator. Analyzing *'consolidation'* problems in the context of the Renton Report, Pizzorusso observes that *"as useful as it may be, the systemazition of laws in a limited number of unified texts…cannot change the essential features of the system,"* and adds that *"it would be completely disproportionate to conceive of an entire program of legislative revision…for the pursuit of such a limited objective* (Cfr. A. PIZZORUSSO, *Il Renton report e le prospettive di evoluzione del sistema giuridico inglese*, in A. GIULIANI, N. PICARDI, *L'educazione giuridica*, Vol.V, tomo III, Napoli 1967, p.150 and citations, DIAMOND, *La codification du droit anglais*, in *Annuaire de législation française et étrangère* 1978 p. 2, where it is observed that consolidated laws, conceived as laws that restate previous laws, have often been used in England *"to simplify the sources of law"*. See also A. VEDASCHI, *Istituzioni europee e tecnica legislativa*, Milano 2002, pag. 138 e 165 ss. where the author stresses the purely informative function of the so-called official consolidation of community practice.

3 Cfr. AINIS M., *La legge oscura*, Bari 2002; RESCIGNO U., Voce *Tecnica legislativa*, in *Enciclopedia giuridica Treccani,* A.VERDASCHI, *Istituzioni europee e tecnica legislativa*, Milano 2001,pag. 167.

4 U. PETRONIO, *La lotta per la codificazione*, Torino 2002.

In his book[5] on the history of codification, M. Viora poses an ideal contrast between "consolidations" and "codifications," and states that "consolidations" are specifically compilations of existing rules in a single organic body. The same author nevertheless introduces solid arguments in favor of a thesis that substantially blurs this distinction and provides examples of "consolidation" that undermine the sharp distinction between "consolidations" and "codifications." He states that "codifications" are characterized by the "new spirit" that animates them, by a more systematic character and by their "clear and concise language." "Consolidations," by contrast, ultimately rely upon a compilation of already existing norms,[6] even those that "appear to be architecturally better conceived" and are realized according to "a more harmonious general plan."[7] At the same time, he stresses that the task of "consolidation" consists precisely in the transformation of these norms, in order to systematize them in a more organic way. N. Irti insists upon the historical character of both "consolidation" and "codification," and states that every consolidation is characterized by the fact that the legislator must be able to "compile the rules governing an area of law in a consolidating text: i.e., in a cluster of norms capable of lasting over time"[8]; in this sense, consolidated rules "become parts of a whole that is not only backward-looking, but orients the past to the future."[9] M.P. Chiti, recently discussing the Nice Charter of Fundamental Rights of the European Union, correctly states that this Charter "consolidates" rights already recognized in the jurisprudence. He highlights the risk potentially associated with such a "consolidation": it might "block an open and dynamic development of rights."[10] This traditional understanding of "consolidation" cannot be reduced to a mere reproduction of the existing rules in a legislative text – according to the criteria of legislative drafting – but seems to refer to the writing of unwritten, or incomplete, principles and rules.

The expression "simplifier" was used in important moments: one example arose in the course of the French debate on the Code civil. The report, signed by Portalis and others (Tronchet, Bigot-Prémeneu, Maleville), cautioned against the desire to foresee everything, a temptation endemic to every codification attempt. The report instead stressed the importance of determining only the necessary rules ("Tout prévoir, est un but qu'il est impossible d'atteidre"; "il ne faut point des lois inutiles; elles affaibliraient les lois nécessaires"). The

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5 M.E. VIORA, *Consolidazioni e codificazioni contributo alla storia della codificazione*, Torino, reprint 1967, pp.42 ss.

6 M.E. VIORA, *Consolidazioni e codificazioni contributo alla storia della codificazione*, cit. pp.42 ss.

7 The distinction becomes blurred when VIORA exhalts Prussian *Landrecht* ot the great Freanch *"ordonnances"*. In these instances, he observes, consolidations are the product of "wise framing" and "skilled realaboration" rather than mere collections, and the introduction of "new rules", and their "completeness and reciprocal harmony" should be praised.

8 N. IRTI, *Consolidazioni e codificazioni delle leggi civili,* in *Il Codice civile. Convegno del cinquantenario dedicato a Francesco Santoro-Passarelli,* Roma 1994, p. 146, calls "consolidation" a cluster of norms, that *once floated in a changing and provisional way, and that at a certain moment show a high degree of persitance and stability,"* and therefore stresses what might be an oversharp contrast between codification and the innovative character of "consolidation" that, if nothing else, at least eliminates the transitory and ever-changing quality that characterized the law prior to consolidation, finally conferring stability and persistence. The innovative character of consolidation presupposes a greater coherence around certain principles.

9 N. IRTI, *passim*

10 M.P. CHITI, *La carta europea dei diritti, in Riv. Trim. Dir. Pubbl.* 2002 p. 2.

report's writers credit themselves for avoiding "la dangereuse ambition de vouloir tout régler et tout prévoir, les lois positives ne sauraient jamais entièrement remplacer l'usage de la raison naturelle dans les affaires de la vie. Les besoins de la société sont si variées, la communication des hommes est si active, leurs intérêts sont si multipliées, et leurs rapports si étendus, qu'il est impossible au législateur de pourvoir à tout…..Car si la prévoyance des législateurs est limité, la nature est infinie." These very famous words, read by Portalis at the presentation of the Civil Code, stress the need to determine the necessary rules by means of a simplification procedure. They acknowledge the important role of the legislature in identifying principles, and also allow "natural reason" to forge its own path. These words teach us that a serious "simplification" cannot be reduced to mere legislative technique. This is because simplification accents the legislator's creativity, and the awareness of his duties to fairly accommodate both the need to write down the necessary rules and the need to contain the proliferation of the details.

We must also bear in mind that the terms "consolidation" and "simplification," which evoke glorious past experiences and point towards a true constitution-making process, have been associated with the image of a "European Convention." This means that at least a relevant part of the participants in the debate on European reform believe that this project might profoundly influence the content of the current European Treaties. The term "simplification" might seem more precise than "consolidation," because simplification appeals more explicitly to the idea of streamlining an existing body of law. It renounces the pursuit of an overarching, comprehensive and detailed body of law, and instead pursues a clearer definition of principles. Simplification, more than consolidation, has excited the enthusiasm of those who have commented on the Laeken declaration. Some of these writers have picked up on the apparently innovative character of simplification,[11] stating that it is basically a "euphemism for constitution-making," thus underscoring the point that the Convention is charged with drafting a normative text that may become the fundamental law of European political institutions. Along these same lines, I believe that we should focus on the contents of the new "constitutional treaty," and set aside the doubts raised by minimalist interpretations. This is essential so that we may pursue from the outset a more coherent and more courageous process of constitutional innovation, and overcome the persistent ambiguities endemic to the terms "consolidation" and "simplification." We must be careful not to reduce the Convention's work to an exercise of pure legislative technique.

The Laeken Declaration, after stating that "a simplification" of the European Treaties "is essential," posits the goal of a reform that is much more incisive than a mere compilation of the different "objectives, powers and policy instruments" in a single text. The Declaration poses the fundamentally important question of whether "the distinction between Union and Communities" should be reviewed, and whether "the division into three pillars" should be kept. The further question, which suggests that it might be necessary to distinguish "between a basic treaty and the other treaty provisions," raises some perplexities. The unity of the Treaty, as the basis of the simplification process, ought to be safeguarded in

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[11] See A. PIERUCCI, *Il parlamento europeo*, in a collection of essays called "*Verso la costituzione europea*" , S. GUERRIERI, A. MANZELLA, F. SDOGATI, *Dall'Europa a Quindici alla Grande Europa*, p.196.

order to maintain a general view which comprehends common institutions and the constitutional principles that ought to characterize them. It is only this way that the Union may strengthen its system of procedural safeguards, judicial remedies, communicative circuits and minority rights. The Union's constitutional principles cannot be dissociated in separate texts, each one drawing inspiration only from its own internal logic.

In a communication to the European Convention of 22 May 2002, the European Commission expressed the hope "that the Convention will submit a truly constitutional text with which the people of Europe can identify and where they can also identify their common project." It is particularly interesting to consider whether the adoption of a constitution, or of a European fundamental law, might lead to a proclamation of the "values cultivated by the Union," citizen's fundamental rights and duties, and the relations among the Union's member states. Those who hope that the constitutional treaty will pursue lofty goals cannot but respond positively to such statements. They would like to see a strong preamble, as well as provisions that state realistically fundamental and unifying principles. These principles might leave space to the infinite developments of nature, while still contributing to the process of identifying constitutional principles, in which we are all called to contribute.

Official declarations regarding a "political union," and frequent references to expressions like "institutional architecture," "European institutional reform," as well as the objective importance of the Union's current enlargement, all suggest measures that are more incisive and more innovative than mere "consolidations" or "simplifications." Simply rewriting the treaties (even if accompanied by far-reaching formal revisions), would disappoint the public expectations for institutional reform, as signaled by many of the "European Convention's" participants.

3. The Elaboration of a "Constitutional Treaty" by Means of the "Convention Method"

At the present moment, the convocation of a true European constitutional assembly, if not preceded by adequate preparatory and organizational work, might encounter several difficulties. These difficulties include a public disorientation regarding supranational institutions, an enduring crisis in the political party system of the individual member states, as well as those linked to the larger project of the Union's political integration. As these difficulties cannot now be easily overcome, the member states' governments, gathered in Nice, decided to proceed in a piecemeal fashion, and to begin with the writing of a new international treaty. The treaty in question was conceived as having a constitutional character, necessary to further European political integration and to replace the previous Treaties (those creating the various Communities and the Union), which are surely inadequate to the performance of a constitutional function.

The governments gathered in Nice regarded the European Union as an ever-expanding order, implicating developmental patterns that are different with respect to both the birth of the European Communities, and the constitutional development of the member states. It is evident that it is a path paved with difficulties. The member states, which shall be the main players in the final phase of the Treaty, recognized that they themselves might be

resistant to reform. They thus chose to open the debate on the reform of the Treaties to other parties, at least during the preparatory stage, thinking that this might help in overcoming their resistance, and facilitate the transition to a new institutional equilibrium. The "constitutional treaty" emerging from this Convention might one day be superseded, when times are ripe for a European constitutional assembly. For the time being, however, the member states have been satisfied with resorting to the "convention method," which in any case represents a step forward from the traditional way constitutional texts have been approved: through the mere decision of state plenipotentiaries.

The "convention method" – currently invoked in this preparatory phase of the "simplification" and "consolidation" of the European Treaties – could propose normative texts, while leaving the final word to the national governments' representatives.[12] The transitional character of the final outcomes of the current European political and institutional reform project is revealed by the fact that these results present themselves as steady steps on a path in which further structural changes will still be required, to be realized with the support of public opinion, national institutions and social actors. The innovations present in the "convention method" consist above all in the enhanced participation in the debate on institutional reforms, the broader awareness of the ongoing changes in the political institutions and the increased involvement of public opinion.

The institutional development currently taking place in Europe proceeds at a slow pace. It requires flexible instruments that can be adapted to ripening needs, but it must also affirm fundamental principles. For this very reason, we must not lose sight of the Union's purposes and the fundamental principles of a European constitutional system, which can no longer be tied exclusively to the protection of the common market. If that was the case, institutional reform would not have been needed; the Union's purposes could have been fulfilled on the basis of the old Community structures, and it would not have been necessary to pursue integration at the level of political institutions. The political work of the Union cannot be satisfied by reinforcing the "three pillars" logic, which posits a sharp distinction between the objectives of Community law, and the goals in other areas of potentially common actions – from foreign policy to common security, from the cooperation of the police and the judiciary in criminal affairs, and so on. European institutional reform also implies the determination of new institutional practices. Because they have to respect the Union's fundamental principles, these practices – when they are not challenged – can profoundly influence the development of the general constitutional architecture.

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12 The Declaration on the future of the Union of 14 February 2001 (Annex to Final Act of the Treaty of Nice, Art. 23) envisioned "wide-ranging discussions with all interested parties; representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society etc." The relevant provisions of the Laeken Charter (and also the part relative to the Declaration on the future of the Union that seem to pursue the objective of opening an ever wider informal space for discussion and political communication) mainly refer to the elecronic information network. Though improving information and the collection of opinions by means of the world wide web cannot be underestimated, one should not ignore the need to create real public spaces for debate, to ensure through actual practice the confrontation and exchange of different positions, ideas and arguments, supporting different institutional proposals.

The democratic deficit and the excessive power of bureaucracy represent the clearest defects in the current European institutional order. One might doubt whether merging "the Treaty on the European Union with the Community treaties" can indeed be achieved, should the "simplification" and "consolidation" of existing treaties be interpreted in a minimalist sense. The project of a European political integration requires a spirit of innovation and the courage to meet the public's expectations for moving past the institutional architecture of the economic community, to allow for real political communication at the European Union level. The member states' vision of common political structures should be harmonized with procedures that enable intermediate forms of interstate and even transregional cooperation. All of this, however, requires the creation of a system for the protection of common principles, and the political and constitutional review of supranational cooperation procedures. The goal of the "simplification" of the treaties, if interpreted reductively as the reinforcement of Union action in the exclusive area of Community competences – without increasing the guarantees of its public, political character, without strengthening the European Parliament and improving the circuits of political communication – could hinder the further development of the European Union and the realization of deeper institutional reforms.

The Laeken Declaration uses the term "convention," which is more rigorous than "consolidation" or "simplification, and helps to overcome some of their ambiguities. In the wake of the Nice Charter of Fundamental Rights, "convention" has become a working method. It is used here to proceed to European institutional reforms, even though the procedural rules may yet change in relation to the debate of specific issues. The "convention method" must include the participation of different social actors, in addition to institutional ones. The term convention has a particular meaning in the history of European and American constitutionalism. In light of this it might seem disproportionate to resort to a "convention" in which the representatives of so many countries participate, when the task is just to produce formal and technical rules. The use of the term "convention" thus helps us to understand the very important element of federalism at the heart of the process of European political integration. The term "convention" recalls the formation of the American Constitution, through an open process of constitution-making,[13] in which the different components of the emerging social and constitutional order played an important role.

Some logicians have underscored the risks inherent in entrusting legislative functions to the same institutional actors at both the preparatory and the proposal phase of reform pro-

[13] This openness has been stressed in European and American political and constitutional literature. See H. ARENDT, *On Revolution*, New York, 1990, p.213; B. ACKERMAN, *We the People*, *vol II*, *Transformations*, Cambridge 2001, p.179.

jects, as well as at their final deliberative phase.[14] The actual process for the formation of international treaty norms is generally not all that open to non-governmental actors, especially in comparison with other law-making processes, which provide for many forms of participation in the phases leading up to the final decision. Calling attention to the phases of initiation, consultation and the subsequent unfolding of the deliberative process, down to the creative moment of the final decision, Alessandro Giuliani has stressed the importance of a proceeding that is able to keep separate these different phases in the formation of a normative decision. The point is not to water down the contents of the decision, by requiring longer periods of consultation and deliberation, but to construct a proceeding that does not leave the final decision in the hands of the same few entrusted with the job of proposal, and allows that the proposal phase and the consultations may be adequate to the final "*inventio*".

The procedure launched in Brussels calls for a wide involvement of the general public, as well as legal scholars and practitioners, who are entrusted with more specific task. The latter are called to exercise a critical function in determining the proper meaning of the terms used in the various debates, and in highlighting their relationship with the underlying values. An obstacle to the proper unfolding of the dialogue on institutional reform is posed by the technical language of diplomacy and politics; the former seeks out euphemisms and often avoids particularly binding expressions, while the latter tends to rhetorical images that are often devoid of real meaning, but might ground a consensus. In this context, legal scholars and practitioners are not asked to reestablish certainties and hold true to dogmas, but to guarantee a more rigorous use of the terms in which problems are formulated, on the basis of the argumentative rigor they are accustomed to exercising in justifying particular solutions. The care with which some official documents have avoided referring to federalism or to a constitution, and the preference for general terms and principles (that avoid precise institutional commitments), reflect real conflicts and uncertainties regarding the future of European institutions.[15]

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[14] Cfr. A. GIULIANI, *Il modello di legislatore ragionevole (Riflessioni sulla filosofia italiana della legislazione)*, in *Legislazione. Profili giuridici e politici)*, Atti del XVII Congresso della società italiana di filosofia giuridica e politica, edited by M.BASCIU, Milano 1992); Id., *Retorica diritto e filosofia dell'umanesimo. La Rethorica di Giorgio Trapezunzio,* in Philologica 1994, pp. 10 ss., where Alessandro Giuliani develops some considerations regarding the formation of political decisions and the role of humanistic rhetoric in legislative procedure, apparently very remote from our problems and from the debate on European institutional reform. Renaissance political science, stressing the need for proper regulation of the procedural steps in decision-making, in light of the logic of social and political communication, had called for a distinction between the phases of *"propositio"* and *"consultatio"* and those of "*deliberatio*" and "*inventio*". See also J.G.A. POCOCK, *The Machiavellian Moment*, Princeton, 1975, p. 287.

[15] See U. DE SIERVO, *La difficile costituzione europea e le scorciatoie illusorie*, in U. DE SIERVO, *La difficile costituzione europea*, Bologna 2001, p. 110: *"the problems of substance emerge with sufficient clarity, even though any expression alluding to a process of formal transformation towards federalist features of the Union, or even the adoption of a constitutional text, is excluded. This proves the persistence of strong hurdles to these processes".*

4. The Need to Broaden the Political Debate

European law has evolved a high degree of innovation and dynamism. Still, one cannot help noticing that while the Community legal rules are very detailed, the treaty provisions touching on traditional areas of constitutional law, like fundamental rights and constitutional safeguards, are less adequate to the complexity of the problems. The existing law in this area is highly indeterminate, and it is clear that the European legal order must eventually establish some constitutional principles, to instill political responsibility in the bodies charged with decision-making, and to strengthen the whole system of constitutional guarantees and fundamental rights protection. Constitutions are founded upon the public consensus around specific values, and citizens' commitment to apply those values in public life; they do not depend for their force upon the elegant formulation of their particular provisions. It seems almost facile to mention that the values animating European institutions, values that ought to anchor the principles embodied in the European Treaties, have so far failed to arouse the public enthusiasm and commitment necessary for an effective European constitution. But it is for this reason that one can question the possibility of identifying a European constitution in the provisions of the existing Treaties, and not for the consideration that such a constitution was born without a proper democratic pedigree. The political knots and the contradictions animating the process of European integration are many, and they cannot be resolved by bureaucrats or academics without an effective public exchange on the important European political, social and institutional issues. One of the main functions of European public law must be to sustain fair processes of social and political communication, assuring universal participation and transparent decision-making processes, in order to guarantee that the technical, bureaucratic perspective does not dominate the public debate. European public opinion is neither a chimera nor a phoenix, but depends above all on the awareness of European citizens, on their capacity to seriously confront political and institutional problems and on the international repercussions of the integration progress. The presence of many contradictions, tied to member states' and citizens' disagreements over how to overcome the Union's current limitations, requires flexible instruments; these instruments must be capable of preventing sudden hardenings or rejections, and it is precisely this that demands a more intense participation of the European public in the processes of political communication, and in the debate on the substance of institutional reforms. The realization of European citizens' expectations, and a more secure determination of the Union's purposes, depend on this public participation; in this sense public opinion must be able to exercise pressure on politicians and bureaucratic apparatuses. One can therefore understand the reason why the main actors in the debate on European institutional reform insist on involving larger sectors of the European citizenry in the debates both leading up to and following the proceedings of the "European convention."

One need only recall the two most fertile years of European constitutionalism (1848-49), when public participation in constitutional debate reached a degree of intensity previously unknown. Aside from the basically ephemeral character of the constitutional documents written in this period, the degree of public participation nonetheless enabled a foundation to be laid for the development of European constitutional law in the following

years. We need only review the daily press, not to mention the more theoretically significant books, of that time, and pay some attention to the political events of those years, to appreciate European citizens' hopes and aspirations for the constitutional law and political institutions to be created in the different countries. Those events and political initiatives gave rise to a common constitutional culture, which still preserves the memory of those years and still informs the current debates on institutional reform; it also fuels public expectations for a European community whose mission transcends market regulation and monetary union, to seek a closer political integration and stronger common institutions. If European citizens really do expect political integration, then the seemingly insurmountable quarrels and uncertainties regarding the Union's organization and a European constitution could be overcome, not by triumphant proclamations on the future of Europe, but through the democratic participation of citizens actually committed to the construction of common institutions.

It can take a long time for constitutional orders to take shape, and for the consensus surrounding particular institutions to mature. These processes can require going through many steps and many moments of particular tension. But what matters in the end is that the conditions for public discourse are improved, that the chance to participate is increased and that the processes of social and political communication are expanded to include more interlocutors. For this purpose one must not be intimidated by the diversity of the constitutional experiences of the various states, nor by the dogmatism of traditional conceptions. One must not be excessively preoccupied by the lack of a common language, as experience has shown that this inconvenience has never been an obstacle to wide-ranging political projects. Whatever the outcomes of the current debate on the reform of European institutions, they certainly represent a fundamental step in the deliberation of the future of European constitutional law, and a chance to gain an insight into present constitutional dynamics in a way that transcends the debates among specialists and civil servants, expert in European law.

What this framework requires is a greater commitment on the part of legal scholars and practitioners, who are neither specialists in Community law nor advisors to the Prince. This is because lawyers belong to a culture that values the reflection on legal and social practices in the different European countries, and that equips them to look beyond the formal schemes relative to constitutional or code systems. Lawyers are educated to take some distance from current affairs, from the last decision of a supreme court, and from the statements of a political organ; while keeping an eye trained on the concrete phenomena, they are accustomed to following argumentative paths to justify their decisions, in order to persuade larger social circles. They certainly cannot take the place of the more general public opinion, but they can contribute to highlighting contradictions and deficiencies in the process of European integration, in order to call attention to the patterns in the organizational development of European institutions and to systematic trends that might harden into actual practice and judicial decisions. Lawyers are called to evaluate the way in which the texts are elaborated, in order to point out provisions that are devoid of substantial innovative capacity and only seem to make reference to real values. Lawyers can signal provisions whose ambiguities conceal the danger that they might be used to advantage the few; they

are equipped to suggest a better formulation of specific clauses and even to warn against possible *coups*.

What should be avoided in any case is the possibility that the European institutional reform process delivers one or more texts to the member states and the European public as a *fait accompli*, using provisions devoid of a substantial innovative capacity and thus unable to reform decision-making processes and overcome the Union's democratic deficit. Political integration, if pursued without clear foresight and without a commitment to changing actual conditions, could make it even harder to address the most compelling political and social problems of our times. In this work of deepening the meaning of legal instruments, of evaluating proposed solutions in light of the complexity of existing problems, of creating legal instruments adequate to the desired institutional reforms, the role of public opinion is fundamental. In order to realize an effective reform, it is not enough to write a constitution in the form of an international treaty so as to be binding on all contracting states, nor is it sufficient to determine principles and establish the competences, procedures and structural details of common organs; it is necessary above all to promote the participation, and engage the awareness of the public, and to adequately guarantee the opportunity for wide-ranging debate. The biggest challenges to existing European institutions are the risks for democracy posed by the predominance of bureaucracy and technocracy, and, above all, the weakness of the European public sphere in the face of the need for a democratic debate on the substance of the reforms that continue to unfold with a dramatic lack of transparency.

The Convention's main challenge is to resist a consolidation of the Treaties that only serves to slow down the integration process and freeze existing conditions as they are. The main goal is rather to promote Europeans' awareness of the problems implicit in realizing common institutions. What Europe needs is not just a work of legal draftsmanship, but the opening of a more inclusive social and political debate on the meaning of integration. The public must engage the choice of whether to pursue institutional models inspired by federalism, and institutions that might guarantee more democratic circuits of political communication. Constitutional values can be affirmed neither by the mere writing of a credible catalogue of rights, nor by merely proclaiming vague and indeterminate principles, nor by conveying the impression of a universal agreement on the substance of the integration process, but only through the widespread cultivation of the habit of deliberating upon political values. Because the major risks to constitutional culture, liberties and democracy derive from the anemic character of the European public opinion, it is only by fortifying it that the values of constitutionalism may be affirmed.