1. The historical–political meaning of law in the constitutional tradition of continental Europe.

1.1 The current meaning of the political concept of “Law” (Law act) is the result of a long and complex historical evolution. The underlying premise is that the notion of law doesn’t always follow the development of the values of democracy. On the contrary, the political datum of the centrality of the act “law” is constant in the system of the sources of the right of the State. Thus our reflection must look for the political roots of the centrality of the law in contemporary legal systems. We must understand why the doctrines of constitutionism have assigned to the centrality of the law the role and meaning of fundamental instrument for the democratic construction of the state legal system.

In order to reduce the time range of our analysis, I would start from the liberal state of the eighteenth century. Therefore, I avoid confronting - for example - the study of the concept of law according to the historical/political doctrines of Voluntarism (Volontarismo), or the study of the ethical/religious foundations of law, theories that we still find applied today in totalitarian systems and theocratic systems.
In different contexts the law can find its foundation in institutional pluralism\(^1\), in the tradition of common law\(^2\) or in its own representative character. But from the bourgeois State on, the law assumes the essential meaning of political and legal centre of the system of the sources of rights.

As is well known, the stabilization of the legal doctrine founded on the centrality of the political concepts of law arises especially in France and Germany between the middle of the eighteenth century and the 1930’s. (30’s of the twentieth century). However, the substantial meaning of this political act was still not the one presupposed by the contemporary theories of democracy. This is particularly true in Germany, where the supremacy of the law is due to the its attribution to the State, to the sovereign body (Will) and to the supreme institutions.

In the first meaning, as one will remember, the centrality of the law is justified in as much as it is the child of the sovereignty of the Reich (Laband): “the law is the expression of the power of the State”,\(^3\) of the Staatsgewalt, regardless of how the sovereign functions are differentiated and allocated by the legal system. In this context, the role of the Representation (the Parliament) and of the Monarch are tangled in the exercise of the sovereign function. While the former is responsible for the definition of the content of laws, the latter is the holder of the actual power of adoption - through the sanction - of the act of command directed at the subjects in the form of law.

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1 In the Magna Charta, granted by King John in 1215, there were already the core (the seeds) of the political foundations of the current notion of the rule of law. Indeed, art. 12 established the principle ‘no taxation without representation’, and art. 39 which based every restriction of the rights of barons on the judgement of their peers according to the law of their land.

2 The laws of the Parliament themselves - or even better, of the King in Parliament - cannot be entirely compared to the laws of the continental system. Every binding act of the Parliament, in fact, even if it is not prescriptive, is reconverted according to a hermeneutic process (airtight) in the logic of the system of common law (above the mixed English Government, see G.G. Floridia, S. Silvestri).

3 P. Laband, according to the theoretical approach, already elaborated in the essay entitled Das Budgetrecht nach den Bestimmungen der Preussischen Verfassungsurkunde unter besonderer Berücksichtigung der Verfassung des norddeutschen Bundes, Zeit. f. Gesetzgebung und Rechtspflege in Preussen, 1870, 625 ss.
The famous conflict between Parliament and Crown[^4], which occurred in Germany in the second half of the nineteenth century, yielded the emersion of the categories ‘of formal law’ and ‘material law.’ The comparison between these two concepts will successively serve towards the interpretation of the historical evolution of the relations between, law, Parliament and Government concerning the approval of the state budget. The political concept of State will be linked to the formal concept of law, because “only the Sovereign or the supreme State power can issue laws” (Laband). The circumstance for which only the Sovereign, or the supreme State power, can adopt formally legislative acts, thus, does not theoretically follow from the concept of law but from the notions of State effectively established in a given political community. Contrarily, laws in a material sense can be qualified all the sources authorised to issue legal norms by the system - hence also the sources of autonomy -.

From this setting derives, as an immediate consequence, the legal relevance of the “form” of the act of will that integrates the law. Thus, while in a material sense ‘legislative right’ can be considered as a concept equivalent to the one of *Jus scriptum*, such equivalence in a formal sense will only hold for the written law adopted on the basis of the consensus (*Zustimmung*) of the representation of people. It obviously follows the meaningful consequence that the laws in a formal sense are also those acts ascribed to the will of the State - *Willensakte des Staates* - for which the consensus of the representative organs (the Parliament) is necessary, but they are acts that could not have normative content[^5].


This reconstruction finds already in Laband its own underlying political justification in the theory of division of powers. But in the theoretical system of the famous scholar the political concept of representation, in reality, does not assume central role in the category of the law which is, instead, founded de facto on the sheer form of the act. In fact the word ‘law’ in the end, assumes the mere formal meaning of ‘act produced resorting to a specific procedure,’ also on the basis of the contribution of the political representation (the Parliament) that expresses its own consensus about the content of declarations of will by the State. This value, though, is due only because the laws are adopted through the ‘sanction’ of the Kaiser, regardless of the contents of such acts. From here derives the radical difference between the two concepts: one indicative of the form of the declaration of will, the other its indicative content.

Moreover as a further step: the concept of law, in a formal sense, is useful to qualify the subjective holding of the legislative function over specific material fields—that is competence. The distinction between law in a formal sense and law in a material sense, thus, leads to the positivisation of the concept of competence. This concept is therefore relevant for the relations between Bund and Länder, as well as it use to be relevant, with respect to the budget, in the relations between Parliament (Kaiser and Landtag) and Government: with the particular prominence, though, that the datum of the substantial identity between legislative power and the sovereign authority of the State assumes in that historical/political context; an authority that cannot be confirmed by the law: “Die Staatsgewalt in abstracto ist durch das Gesetz niemals gebunden” (Laband again).

Therefore, on one hand, we have a competence which is a product of the sovereignty of the State, that permits member states to adopt legislative acts only in the capacity based on their autonomy; on the other hand, the form which qualifies the acts which are reserved for the contribution of the political representation (of the Parliament). In such a way, the guarantee of the ‘dualism’ is established, typical of the liberal constitutions of the nineteenth century, “between the new institution of representation…and the new competences of the sovereign” (G.G. Floridia), between Parliament and Government. As one can see, the representation, the degree of democracy of the law, is not yet relevant.

To all this, one must add the role of the Bundesrat in qualifying the value of the representation of the member States in deciding the content of the legislative acts adopted through sanctions of the Kaiser. The latter can obtain the application of command acts of the Reich, of legislative rank towards the member states and the subjects. Though, it can never eliminate the material contribution of the same States in defining the contents of the law. For
these, the constitutionally competent organ is the Bundersrat not the Kaiser. The Kaiser, at the most, through his own sanction, takes a decision which is a unitary act of will of the State - an act which is the synthesis of the will of the individual members of the community, the wills which are expressed in the course of the procedure for their assumption within the law of the Reich.

Only with Heller, the law in a material sense will become a political act qualified by the principle of the *stato di diritto* (*Rechtsstaat*); the law will be an expression of the general will, that is of the interest of the general will, and will contain ‘supreme law rules issued by the legislative power of the people, or by its representation (The Parliament). But as we already observed above, the reconstruction by Heller is forcefully opposed to the theoretically model by Laband. The latter, in fact, is built on the basis of the distinct between of the concepts of law in the formal sense and the law in the material sense. For Laband, the role of the representation does not concern, in fact, the relevance of the interests of the citizens/subjects in determining the contents of the law. Conversely, such a role regards the formal concept in its capacity as a structural element of the procedure. This depends on the influence exerted upon Heller by the revolutionary bourgeoisie, from the article 6 *Declaration of the Rights of the Man and of the Citizen* of 1789 (*La loi est l’expression de la volonté générale*).

1.2 Jumping ahead one century circa, we arrive at the democratic and pluralistic constitution of the second Post War era. In the Italian constitution of 1947, a central role in the system of the sources is assigned to the law because the law is the most important Political act of the Parliament. The constitutional system, in fact, assigns to the Parliament the central position among the constitutional organs of the State. The Parliament is the political centre of the system, is the most politically representative organ in as much as it is directly elected by the people and with a proportional electoral system. The Constitution gives to the Parliament such a

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central and dominant role also to reduce the political strength of the Government. The Political forces represented in the Constituent Assembly elected in 1946, radically opposed in different ideological clusters, feared too strong a Government in case they lost the political elections.

Naturally, I’m trying to simplify issues which are far more complex and articulated. The democratic-pluralistic Constitutions of the second half of the twentieth century also represent the first important reasons for the crisis of the Parliamentarism. This is so for at least two reasons. The first is linked to the advent of mass democracy. In fact, it will soon be evident that the Parliament will not be capable of guaranteeing the synthesis of the general interest as well as it use to in the liberal system. The homogeneous democracy of the bourgeoisie class of the nineteenth century was much easier than the democracy of all citizens contemporary pluralistic system. The very political meaning of the law itself will soon change. It is sufficient to confront the meaning of the “reserve of law” (*riserva di legge*) in the liberal Constitutions and in the democratic ones, starting from the Constitution of Weimar of 1919. The law, in fact, loses its role of instrument of protection of the bourgeoisie’s property against the risk of arbitrary expropriations. It will not be any longer the instrument through which the Parliament defends the class of proprietors—the only class represented in it—against the aggressions towards their own properties. The article 153 of the Constitution of Weimar calls the law to discipline the very content of the property right. It must, in fact, guarantee, in the property right, the interest of the public and of other subjects *together* with the *interest* of the proprietor of the good. The legislator does not any longer protect, in the notion of property rights, the sole interests of the proprietor, but rather he has to construct the synthesis of several interests in a single norm. In this way, the law changes its own role and its own structure. No more just a condition of legitimacy for the expropriation of the untouchable right of property; no more reserve of competence in favour of the bourgeoisie, but an instrument for the discipline of the content of the right and of its limits. The political consequence of this historical datum, thus, will be the transformation of the law from instrument for the protection of the interests of the bourgeoisie into instrument for the mediation of the social conflict, of the class conflict.

But the crisis of the law also depends on other reasons, more strictly juridical. First of all the birth of rigid Constitutions, that is, Constitutions that the law itself cannot modify. A ‘superior law’, thus, that the law must respect, associated with a control of constitutionality over the contents of the law to guarantee the superiority of the Constitution. In this way, the law loses its political primacy in the system, although it still remains the normative act which is

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7 Il principio, dalla Costituzione di Weimar passato poi nel Grundgesetz, stabilisce che “Eigentum verpflichtet. Sein Gebrauch soll zugleich Dienst sein für Gemeine Beste”.

8 Marbury vs. Madison, 1804.
politically central for the development of the system; the Constitution will place side by side to law other equally important normative acts: acts of the Government, acts of the autonomous bodies, acts of reserved competence, etc. etc… However, the strongest meaning of the law as a political acts survives: the capability to give to democracy a visible practical sense. The idea of law held by contemporary jurists, in fact, represents the essence and the value of democracy. The representation of all of the interests involved in the decisional process; the discussion among conflicting interests; their synthesis and, in so doing, the building of a new object: the general interest. The Parliament, already in its etymology, keeps the value of the dialectics, of the debate, of the procedure as an instrument of the compromise. From the debate between the parties, the most diverse interests—through the mediation, the agreement, the compromise achieved respecting the Parliamentary procedures - they merge together and transform themselves into something different: the general interest. This is the deep nexus between parliamentarism and democracy. No other rule making process can guarantee such a strong participation of the interests to the construction of the rule that will govern them.

The law, in the system of the “legislative parliamentary state,” used to be the moving centre of the political system because the parliament or the bourgeoisie was the supreme body of the system. Conversely, the law of the contemporary legal culture, is assumed as the voice of the political representation, truly as the expression of the general will. Perhaps such an idea can be considered illusionary, but it represents the politically principle upon which the modern concept of democracy is founded.

This is the theoretical datum that justifies my setting: every system, every foundation of legitimization of the legislative power, that we considered in a given historical moment, depends on a political principle. The political principal that governs the legal system choose the foundation of such a system: the will of the sovereign in the absolute monarchies; the will of God in the theocratic state; the will of the bourgeois Parliament in the liberal state; the interest of the people in the contemporary democracy. This, however, is also the main problem nowadays: how do the interests of the people translate into the contents of the juridical norms? Is the law of the Parliament still the most effective instrument? I believe so. Indeed, I believe that it is the only instrument, as long as the Parliament is truly representative. Here I put forward just concrete example: the majority system, today enforced in Italy, does not guarantee to Parliament the exercise of the representative function. The Italian Parliament, today, does not absorb the social conflict within the legislative synthesis. It is an instrument of the majority and

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9 Wesen und Wert, Kelsen, 1929.
10 Tradizionalmente si fa riferimento all’ordinamento instaurato in Francia con la Costituzione del 1875.
causes strong marginalization. The most direct consequence of this datum is the mutual de-legitimation of the conflicting parties - but this is another story.

2. THE CIVIL SOCIETY’S PARTICIPATION IN DECISION MAKING PROCEDURES: A CRITICAL POINT OF VIEW.

I will immediately say that I do not like the idea that the direct participation of the interests involved in the decision making process represents a different form of democracy. I don’t like it because I don’t believe in it. I do not believe that individual European citizens, the companies, the private associations, the unions, the churches, to short the ‘civil society’ of the White Book on the European Governance can really participate in the decision making processes of the EU effectively substituting a representative Parliament. I will say why in a moment. First I want to remind the audience that the idea is not new. For instance, Niklas Luhmann in his famous essay entitled Legitimation durch Verfahren (1969) had already proposed, some time ago, a critical reconstruction of such a model. This book is very important, and it is important for its content and not just its title. I say this because, often, the title of this volume has been used as a synthesis of its contents, at least in the Italian literature, as if the book wanted to demonstrate that the participation in the decision making process is sufficient to politically legitimize the decision. But this is not what Luhmann recounts in his book. Conversely, Luhmann intended to construct the role of the participation of citizens in decision making processes as a category of the justice. The idea is the struggle of individual rights against the establishment, (power) as opposed to the rights as instruments to legitimize the establishment. (power) That is the participation must mean equal chances for all the interests compromised by the decision; substantial justice; search for the objective truth through the rules. (due process of law). Franco Ledda, an important Italian scholar of administrative law, described the participation of the decision making process in opposition terms to the ones used in the White Book: ‘In praise of dissent’ ‘resistance of the interests’ and not the manifestation of the consensus.

This is the background issue (the pivotal point), the main objection to the proposed model. In this context, the rights of participation are instruments of warrantee against the legitimate forms of exercise of power. The model should provide for a) rights of political participation that guarantee the democratic nature of the system; b) rights of defence against the aggression towards ones goods, towards ones substantial interests, by the democratic power.
Constitutionalism has accustomed us in this way. The rule of law defends the rights of individuals even against democratic decisions, but the model of Governance (is a new word sufficient to resolve the problems?) pays attention to only one of the two elements - indeed entangles one within the other.

I will say more. The participation of the interests in the process will never be equal for all. Not all of the interests involved in the decision have the same strength, the capability, or the same information. The conclusion is obvious, it doesn’t need to be demonstrated: the ‘rights’ of the participation are privileges for the few - not rights for all. The absence of equality in the rights of political participation is incompatible with democracy - I mean within the contemporary concept of democracy. Would you like a practical example? European citizens have become consumers. Is the meaning of the two words the same?

In a different context we should pay attention, anyway, to every form of sectoral agreement which could facilitate compromise solutions every time the system of interests involved in a decision making process are complex and in contradiction to each other. I’m thinking, now, of a new form of negotiating among labor unions (syndicates), firms associations and Government we had in Italian politics during the 90’s. These agreements have been improved to plan some important economic and financial policies by the public institutions involving private and social actors in public decision making; and this could enforce the common consent on public polices even when painful for the people. This way to build polices content is called in Italy “concertazione”11, and in the European context should be used to effect communitarian directives in social fields (Amsterdam Treaty). This is a kind of alternative Participation in decision making processes which I approve as a real form of consent of private interests on public choices because of the high representative capability of the subjects involved. And because of the importance, in a democratic sense, I mean talking about equality on participation’s rights, of these interests.

3. AN EXAMPLE: THE WORKS OF THE CONVENTION ON THE FUTURE OF THE EU.

3.1 The project of “Treaty that establishes a Constitution for Europe,” for the first time proposes to modify the name of the EU normative acts. The “regulation” will be called

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'European law;' the “directive” becomes, instead, ‘European framework-law’. European law: the name clarifies what the role of this normative act should be, but is its nature comparable to the one of the law of the State? The EU system, in fact, is not founded on the principle of the division of powers. There is no theory of sources in Ec Law, no attention on formal and substantial characters of legislative acts. We don’t have appropriate juridical categories (terms) to understand such a question: why law acts should have a specific form (typical formal signs), a specific content (general, abstract, normative, I mean a specific inner structure), why should they be distinguished on types; why we should look at the subject, at the organ which adopt the normative act to classify this act? There is no answer to these theoretical questions in the European system.

Even more, it does not recognise autonomous legitimation to political action as such. I will try to explain this point. In the national systems, the Government is free to decide its own polices within the framework of the rules of the Constitution. Is it the same in Europe? I do not want to tackle, now, the problem of which one, among the European Institutions, corresponds to the state government. It is a complex question to which, in another paper\(^\text{12}\), I tried to provide an answer. I content myself with remarking that the normative structure of EU treaties produces the neutralization of every political motion (action)\(^\text{13}\). The institution aims of the European system, in fact, are all described in the provision concerning the market economy, the competition and the ‘EU polices.’ Out of the competencies established by the norms, there is no room for political autonomy. It is the States that, in building the systems of the treaties, have already set all the targets of the Union. They have composed such targets in details in a set of enumerated competences. They have protected such targets entrusting the Commission with the legislative initiative and with vigilance over the application of EU laws.

Such normative technique is entirely resumed by the project of constitutional treaty. The competencies of the Union\(^\text{14}\), in fact, are all defined as procedures to be applied according to the dispositions contained in Title 3 of the Treaty. Moreover, the European ‘policy’ is subject to rigorous judicial control by the Court of Justice, in order to guarantee the respect of the legal parameters in which the policy is bridled.: a rigorous control of lawfulness of the political action of the institutions of the Union! Massimo Severo Giannini, one of the most important Italian


\(^\text{14}\) Artt. 9 ss.
Jurists of the twentieth century, had already proposed to qualify the EU law as a system of administrative law\(^\text{15}\) (in the sense of “non constitutional”). The foundation of such a judgement was based on the strong homogeneity of the interests protected by that system. I can not say whether this is still the state of things, but certainly this foundational element is still dominant.

However, there is a paradox in that system: The fact that the judge, the Court of Justice, is the only authority endowed with political initiative and strongly determined to use all its power well beyond the content of the treaties and, perhaps, against the very will of the States. This is the only institution that plays a role of political stimulus of the system\(^\text{16}\), apart from the States, within the European Council. But this issue doesn’t fall, today, within my competences. The rest is all planned in detail by the norms, by the procedures, by the competencies, by the agencies of control and guarantee of the respect of the EU law in the hands of the Commission and the Court itself.

But, then, which are the acts, the decisions, the decision making procedures to be rendered more democratic? Making the decision, making procedure more transparent is a noble assignment and an important commitment, the Commission seems aware of this. But is it really possible that, apart from transparency, the effective participation of the involved interests can be guaranteed? I mean: the participation of all the involved interests, without selection and in a regime of substantial equality. The large company and the individual citizen/consumer? I remind the audience that, at least in Italy, the consumers’ associations are neither open nor representative: they exert a mere lobbying activity in tutelage of specific interests.

We should also consider that the EU system is basically oriented along the case-law of the Court of Justice. I mean this order is much more constitutionally implemented by the jurisprudence\(^\text{17}\) than by the law acts of Parliament and Council. That is why I don’t find correct the text of the Charter of fundamental rights of the Union on forwarding to the “Law” while considering the fundamental rights limitations\(^\text{18}\). There won’t be an European Law until the new treaty will get into force. The only European law that has regulated this subject until now is the Court of Justice’s case-law, which represent the foundations system of the Charter itself. But this case-law is not able to create a new European common law, because the EC law is not

\(^{15}\) In una conferenza tenuta a Roma nel 1967, ora pubblicata con il titolo Profili di un diritto amministrativo delle Comunità europee, in Riv.trim.dir.pubbl., 2003, 982 ss.

\(^{16}\) Si vedano le riflessioni di M. Dani, Dall’inguietudine all’integrazione: riflessioni su mercato e socialità nello spazio costituzionale europeo, in F. Palermo (a cura di), La forma di stato dell’Unione europea, 2003, in corso di stampa, spec. 19 ss. del testo dattiloscritto.

\(^{17}\) R. Toniatti, Il principio di rule of law e la formazione giurisprudenziale del diritto costituzionale dell’Unione europea, in S. Gambino (a cura di), Costituzione italiana e diritto comunitario. Principi e tradizioni costituzionali comuni. La formazione giurisprudenziale del diritto costituzionale europeo, Milano, 2002, 503 ss.

\(^{18}\) Art. 52, comma 1, “…any limitation on th exercise of the rights and freedoms recognised by this Charter must be provided for by law...”.

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“common” at all, is not based on equality among citizens (there are no peers). It proceeds from a specific political program\textsuperscript{19}, that is well known and gives rise to a compound system of interests in which individuals and big corporations are deemed (considered) as equal. When art. 6 of EU Treaty says “The Union is founded on the principles of...democracy...and the rule of law” (“stato di diritto” in the Italian version), principles which are common to the Member States” it’s sure it refers to the classical, common concept of democracy, founded on parliamentary legal procedures\textsuperscript{20}, open to all the interests there represented. So the democratic foundations of the Union are made up from a synthesis of the traditional cultural concepts of participations of all the citizens, subject to the law, to the decision making procedures, with all their conflicting interests represented in those procedures\textsuperscript{21}. Equality of chances is the topic of the question. And this equality could not be guaranteed by the principle of “participatory democracy” set forth in art. I-46 of the Treaty establishing a constitution for Europe\textsuperscript{22}.

3.2 Now I want to raise an issue and provide an example. The issue is the following. In general the scholars propose a parallel analysis between the legislative procedure of the EU - which involves Commission, Council and Parliament - and one of the individual member States. I believe that such a comparison, even if it is useful it is not simple. In the EU there is no trace of the division of power between legislative institutions and Government institutions. The analysis should be conducted keeping separated the interest of the Community, defined by the treaties but decided by the States; the interests of the Government; the interests of the citizens (consumers?) and of the firms. But I cannot divide in order to allocate them to the different institutions. I believe, in other words, that it is not easy to imagine for the EU the same institutional balance that has been characterizing the “mixed English Government for several centuries.” I am referring to the historical balance among the interests of different social classes in the trilateral relations among Crown, Lords, Commons. Further, an important point for me is that the normative acts of the EU are not like the laws of the States. They do not represent the fundamental political choices of the system. Such choices are already written in the treaties. The “European Laws” are mere acts of execution of such choices - my issue stems from this very fact. If we think about how the mixed English Government was created, how the Parliamentary

\textsuperscript{19} Si vedano, ancora, le considerazioni di M. Dani, Dall’inquietudine all’integrazione, cit., spec. 11 ss.
\textsuperscript{21} Si vedano le interessanti riflessioni critiche di M. Dani, F. Palermo, Della governance e di altri demoni (un dialogo), in Quaderni costituzionali, 2003, 785 ss.
\textsuperscript{22} Ritengo, quindi, di condividere le conclusioni alle quali giunge la stessa F. Bignami, Three Generations of Participation Rights in European Administrative Proceedings, in Jean Monnet Working Paper, 11/03,
regime came about in that system\textsuperscript{23} (since the first traces written in the Magna Charta of the 1215), how some institutions have evolved - such as the \textit{Privy Council}, first, and the \textit{Cabinet} at a later stage - we can obtain important advice in order to evaluate the role played by the ‘\textit{Panels}’ (Joint, Official body) as political institutions. The power of the panel was established in opposition to the monocratic power of the King. The English Constitutionalism teaches that the diffusion of power is obtained through the political panel. Panel means pluralism in the selection and the synthesis of the interests to be represented in the decisions. In England, in reference to such interests, the barons will be considered first, then the interests of the Commons next, and finally the interests of the populace. Conversely, what is the representative role played by the Council of Ministers - the highest political authority of the EU? Is it also a panel created to diffuse the power into pluralism? Obviously not! Rather it represents the Government, their own policies, the interests separated by nationality.

Indeed we face the opposite case; the Council of Ministers is a panel created to concentrate the power\textsuperscript{24}, to separate the political responsibility of each of its members from the control of the citizens of each member State. It is a panel that produces this effect: through the mutual legitimation, it breaks the link between these members and their responsibility towards its citizen. Each decision taken in Europe is then imposed on the member States. The Governments decide together, then they implement the decisions on their own freeing, in so doing, their actions from the responsibility for any of the consequences. They will say: “Europe asks this from us!”

In his capacity of Vice President of the Convention about the future of the EU - the organ entrusted\textsuperscript{25} with writing of a first draft of the new European constitutional treaty - Giuliano Amato put forward an interesting proposal to break such a dependency: the dependency of the EU Council from the national Governments. This proposal consists of transforming the “Legislative Council and for the General Affairs”\textsuperscript{26} into a permanent organ, composed not any longer by the same ministers of the state Governments, but by ministers chosen and appointed \textit{ad hoc}. They would still be state ministers, but chosen to stay permanently in Europe. In this case, we would have had a true European Parliament - a legislative Parliament, typical of a federal State that would be endowed with two chambers: one appointed by the citizens, and the other representing the Governments of the member States. This second chamber would have been able to work for the general interest more easily, being less conditioned by the

\begin{itemize}
  \item \textsuperscript{23} Qui riprendo alla lettera una lezione di Gianni Ferrara.
  \item \textsuperscript{24} Rinvio ancora alla riflessione scientifica ed alla chiarissima ricostruzione teorica proposta da G. Ferrara, \textit{La sovranità statale tra esercizio congiunto e delega permanente}, in S. Labriola (a cura di), \textit{Ripensare lo Stato}, Milano, 2003, 657 ss.
  \item \textsuperscript{25} Consiglio europeo di Laeken, 15 dicembre 2001.
  \item \textsuperscript{26} Art. 23 del progetto di trattato.
\end{itemize}
governments. Indeed, a chamber that would have been slightly more distant from the interests of the individual governments; thus slightly more motivated to research a superior general interest closer, perhaps, to the European Parliament. But the Governments did not accept this solution, also in this case nothing will change in the institutional setting.

What remains is the current European Parliament and its battles before the Court of Justice in order to help prevail, in as much as it is possible, the procedure of “co-decision.” Once again we need to wait for the practice of the Institutions to verify which interests will prevail in the European decision making procedures. Yet the deficit of representation of the European Institution will remain the same. In theory, every representative organ, to be truly so, must reproduce the same structure as the represented body 27. Therefore, the Parliament of a complex society should represent the plural society as a whole. In other words, it should reproduce the organic structure of the source of its own legitimation; hence: which are the sources of legitimation of the European Institution? I will conclude with the example: the “civil society.” It is necessary to involve the “civil society” in the decision making procedures in order to implement democracy. So, have the “representatives of the “civil society” participated in the workings of the Convention? Yes, they have been ‘heard’ in a single hearing, together with the representatives of the regional bodies, of the advisory bodies and of all the other subjects who are marginally involved in the process of development of the project. Does this mean participating in the decision making processes? I remind the audience that, in the case of the European Convention, it consisted of just the development of a proposal, not of the decision about a normative text. What has been (become) the real contribution of the “civil society,” of its expectations, of its interests? The Convention - or better the State Governments through the Convention - put forward a draft of constitution without having received any popular mandate and without voting even once. The text (draft) has been adopted by consensus. I also think we need more participation, more information, more equality, more intellectual honesty, more democracy: but how, if not through an actual and effect representative regime?

27 Ancora Ferrara.