

# The European Constitution's Prospects

Antonio D'Atena

## 1 Two Apparently Contradictory Statements

I would like to begin my paper by making two apparently contradictory statements.

The first is that the Lisbon Treaty clearly reverses the trend reflected in the Rome Treaty of 2004 and resolutely shelves any prospect of a European Constitution. Indeed, in line with both the German Presidency's report dated June 2007<sup>1</sup> and the conclusions reached by the European Council in Brussels shortly afterwards,<sup>2</sup> the Treaty deliberately abandons the term "constitution". This therefore marks a sharp U-turn after the Rome Treaty, since the latter had constructed all its institutional and presentational strategy around that term.

The second statement is that the U-turn is nevertheless more apparent than real.

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English translation by Catharine Rose de Rienzo (née Everett-Heath).

<sup>1</sup>Report from the Presidency to the European Council pursuing the Treaty reform process (14 June 2007): "A certain number of Member States underlined the importance of avoiding the impression which might be given by the symbolism and the title 'Constitution' that the nature of the Union is undergoing radical change. For them this also implies a return to the traditional method of treaty change through an amending treaty, as well as a number of changes of terminology, not least the dropping of the title 'Constitution'". From the Treaty of Rome onwards, legal scholars had expressed a similar point of view; see Caruso (2005).

<sup>2</sup>Presidency Conclusions – Brussels 21/22 June 2007 (11177/1/07), pp. 15 et seq.: "The IGC is asked to draw up a Treaty (hereinafter called the 'Reform Treaty') amending the existing Treaties with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action. *The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution', is abandoned*" (my italics).

A. D'Atena (✉)

Via Orazio Raimondo, 18, 00173, Roma, Italy

e-mail: [datena@juris.uniroma2.it](mailto:datena@juris.uniroma2.it)

## 2 A Treaty, Not a Constitution

The U-turn is more apparent than real because, despite its title “Treaty establishing a Constitution for Europe”, the Rome Treaty could not be considered a genuine constitution.<sup>3</sup>

From a formal point of view, first of all, it was not a constitution. In saying this, I am referring to the process followed for its creation. Such a process was the one typical of international treaties, not constitutions. As is well known, treaties obey the logic of contracts. Like contracts, they become legally binding only if all the parties involved agree on the treaty's text.<sup>4</sup> This has the consequence that, should a state dissent, there is no treaty. The impact on the Rome Treaty of the “No” resulting from the referenda in France and the Netherlands demonstrates this quite clearly.

The logic inspiring constitutions is totally different. It is not the logic of unanimity but rather that of the majority.<sup>5</sup> In order to create or change a constitution, a majority vote is required. Usually this is a qualified majority: often a two thirds majority is necessary.

In order to appreciate the significance of this fact, we can recall the constituent processes presenting the greatest number of similarities with the one developed in Europe, namely, those processes occurring in federal states. What happens in such a process is that several sovereign states decide to become one single state, ceding their sovereignty but maintaining their individual identity. This process culminates in the federal constitution's entry into force. The constitution must be approved by the Member States but it is not necessary that they do so unanimously. If the number of approving states reaches the critical mass required by the constitution, the latter normally binds those states that voted against it.<sup>6</sup>

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<sup>3</sup>See Schmitz (2007), for the contrary opinion that the Treaty did possess the basic prerequisites of a Constitution.

<sup>4</sup>This is the general rule, as is well known. Derogations from it must be agreed by the parties (see Art. 24 VCLT 1969). Under Romano Prodi's presidency, a solution derogating from the general rule was studied for the Rome Treaty of 2004 but it did not meet with the Member States' favour. Known as the Penelope project and inspired by the federal techniques that will be considered below, it proposed subordinating the treaty's entry into force to ratification by a qualified majority of the Member States. See Prodi (2004) and Ziller (2003), p. 191, on this subject.

<sup>5</sup>On such a difference and its significance, see, for example, Ipsen (1987), pp. 203 et seq. and Grimm (1995), p. 586. Of the most recent publications in Italian, Carnevale (2005), pp. 1101 et seq. and Gabriele (2008), pp. 135 et seq., should also be noted.

<sup>6</sup>This is what happened both in the case of the Swiss Federal Constitution of 1848 and in that of the German Basic Law of 1949. Indeed, although neither was approved unanimously, they both also became legally binding upon the sub-national entities that had voted against them. A different solution, on the other hand, was adopted under Art. VII of the Constitution of the United States of America, which provides as follows: “The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”

The reason for the difference between the process provided for the European Treaties and the one provided for federal constitutions is clear. Indeed, the federative processes give birth to a state: *e pluribus unum* (according to the motto which appears on the Great Seal of the United States). The body that emerges from the process of European integration, on the other hand, is not a state. In this latter case, the EU Member States not only maintain their individual identity (as in the case of a federation) but they also (unlike the case of a federation) preserve a good part of their sovereignty.

The point is precisely that: sovereignty. I would like to state that the issue is an extremely complex one and would therefore require an ad hoc meeting. For our purposes, it is sufficient to note that, up until now, the states have, to a large extent, preserved their sovereignty. Hence the preservation of the international treaty mechanism (and the unanimity rule tied to it).

### 3 The “Convention” Method

Without prejudice to the premise that what we are talking about is an international treaty, it must be stressed that the manner in which the text was achieved was not the one typical of treaties, namely, the method of intergovernmental negotiation.

A different method was followed: the “Convention” method.<sup>7</sup> This is not to say that intergovernmental negotiations were eliminated. On the contrary, the final text was adopted by an Intergovernmental Conference. Nevertheless, it was a Convention that was appointed to draw up the text, i.e. a body composed of national parliamentarians, national government representatives, European Parliamentarians and representatives from the European Union’s (EU) Commission.<sup>8</sup>

The importance of this fact cannot escape us. It is indeed true that the Convention did not have to take any decisions but simply carried out work of a preparatory nature. Its composition nevertheless presented characteristics of great interest from a constitutional point of view, since it had the effect of introducing the

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<sup>7</sup>As regards the “Convention” method, see Atripaldi (2003), pp. 213 et seq., writing with reference to the Nice Charter but in terms that lend themselves to wider contexts.

<sup>8</sup>The Convention provided for by the Laeken Declaration of 15 December 2001 was composed of a Chairman and two Vice-Chairmen (appointed directly by the European Council), 15 representatives of the Heads of State or Government of the Member States (one from each Member State), 13 government representatives from the accession candidate countries, 30 members of the national parliaments (two from each Member State), 26 representatives from the national parliaments of the candidate countries (two for each State), 16 members of the European Parliament and two Commission representatives. In addition, observers representing the Economic and Social Committee, the Committee of the Regions and the European Ombudsman, respectively, also participated without voting rights.

parliamentary element (i.e. both the European Parliament and national parliaments) into the decision-making process.<sup>9</sup>

As we know, a specific precedent in this field may be found in the Nice Charter. The Charter's text had been prepared by a Convention convened by the European Council of Tampere in October 1999.<sup>10</sup> However (and this is of greater interest to us here), there existed an older precedent, one tied to the history of constitutionalism and a real milestone. I am referring, of course, to the Constitutional Convention of 1787 that drew up the Constitution of the United States of America in Philadelphia. It was composed of delegates from the United States such as George Washington, Benjamin Franklin, Alexander Hamilton and James Madison, whose names remain permanently linked to the history of constitutionalism.<sup>11</sup>

It is true that, unlike the Philadelphia Convention, the European Convention did not have the task of drawing up the text to submit for ratification by the States. Its task was, rather, to draw up a preparatory document to submit to the Intergovernmental Conference.<sup>12</sup> Two not unimportant aspects should be considered, however.

First of all, there is a symbolic aspect. Indeed, it is not without significance that, during the process of creating a document entitled "Constitution for Europe", there was agreement about introducing a body named after the historic Convention that drew up the oldest federal constitution in the world.

The second aspect is institutional. As I have said, it was through this choice that the democratic/representational element was introduced into the decision-making process (and, with it, an element of democratic legitimation). It may be added, incidentally, that the method followed ought to have contributed to this same function, being as it was a method that was open to the contributions made by civil society. One can think of the hearings and the great public debate made possible by the Internet *forum*.<sup>13</sup>

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<sup>9</sup>The importance of this aspect is emphasised by Napolitano (2004), p. 139.

<sup>10</sup>On the basis of the Annex to the Presidency Conclusions of the Tampere European Council (15 and 16 October 1999), its composition was as follows: 15 representatives of the Heads of State or Government of the Member States, a representative of the President of the European Commission, 16 members of the European Parliament designated by the latter and 30 members of the national parliaments (two from each national parliament).

<sup>11</sup>The Convention's work lasted from 25 May to 17 September 1787. As is known, it was composed of 55 delegates from all the ex-colonies except Rhode Island, the latter preferring not to be represented.

<sup>12</sup>As regards the mandate given to the Convention tasked with drawing up the draft Constitutional Treaty, see for example: Ferrara (2002), pp. 177 et seq. As regards the "constitutional" problems the Convention was called to face, the account given by the Vice-Chairman is significant: see Amato (2003). As regards the work's organisation, discussions and progress, see Floridia and Scianella (2003); Ziller (2003), pp. 91 et seq. and Gabriele (2008), pp. 35 et seq. As regards the tension, in that particular case, between the Convention method and intergovernmental negotiations, see Amato (2004).

<sup>13</sup>The significance of this procedure is considered in Cerulli Irelli (2006), pp. 60 et seq.

But that is not all. It is true that the Treaty provided that it could only be amended by way of a new international treaty. However, this was not to be a normal international treaty (to be worked out according to the method of diplomatic negotiation). Indeed, Art. IV-443 TCE provided that the text had to be drafted by a Convention representing Parliaments, Governments and the Commission.<sup>14</sup>

On this occasion I shall not dwell on the simplified revision procedures, even though the Treaty provides for them (under Art. IV-444 and 445 TCE). What I am interested in emphasising is that, in this way, a dose of constitutionalism (or a principle containing constitutional DNA, if you like) was introduced into an international procedure.

Well then, as is known, the Lisbon Treaty did not follow the road paved by the Rome Treaty as regards the creation process. Indeed, it was a normal intergovernmental conference that had the task of reviving the process of reforming the Treaties and was appointed to draft the text for ratification by the Member States.<sup>15</sup>

Such a fact has not meant, however, that the constitutional DNA to which I have just referred was lost. Indeed, in confirming the principle introduced by Art. IV-443 TCE, Art. 48 TEU has revived the Convention method for Treaty amendment.

If one considers the formal aspects (i.e. those governing the creation and amendment process), one may conclude that the transition from Rome to Lisbon has not had particularly important consequences. In both cases, the product is an international treaty and not a constitution (as we have seen).

In both cases, nevertheless, the amendment procedure contains a constitutional type of contamination (through application of the Convention method).

## 4 Content

We now come to the substantive aspects or, in other words, the content of the Treaty documents.<sup>16</sup> From this point of view, too, it was difficult to maintain that the so-called constitutional treaty had the characteristics of a constitution.

The first factor for consideration is an extrinsic one, namely, length. It is well known that contemporary constitutions are not as straightforward as the constitution of the United States of America. Contemporary constitutions are, generally speaking, long constitutions. The Italian Constitution, for example, had 139 articles and 18 transitional and final provisions. I use the past tense because the number of articles has decreased, following the constitutional reform of 2001, even though the number of words has increased. Such a fact is not necessarily a sign of good

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<sup>14</sup>As regards such procedure and other procedures for amending the Treaty, see Gabriele (2008), pp. 181 et seq. and Busia (2003), pp. 65 et seq.

<sup>15</sup>Brussels European Council, 21/22 June 2007, Presidency Conclusions, paragraph No. 10.

<sup>16</sup>As regards the need to go beyond a strictly formal perspective, see Walker (1996), pp. 270 et seq.

drafting. There are, moreover, constitutions that are particularly long. The Portuguese Constitution of 1976 is an emblematic example of this, with its 295 articles.

Well, the so-called European Constitution beats all the records. It actually comprised 448 articles, to which the 36 protocols were to be annexed.<sup>17</sup> The anomaly was not limited to such an extrinsic fact, however. It was also manifest at the level of content in the strict sense and by this I mean the kind of rules the treaty expressed.

To borrow an untranslatable German word, it may be said that, if considered in terms of the rules it contained, the Treaty was a *Sammelsurium*: that is, a collection of heterogeneous rules very many of which were totally out of place in a constitutional document.<sup>18</sup>

It was possible to identify a body of substantively constitutional rules within this *corpus*, nonetheless – a sort of constitution within the Constitution, as it were. These were rules that could be traced to the two basic ingredients of constitutional documents: those governing fundamental rights and those governing the organisation of the Union's institutions, their competences and the relations between them. To these two parts common to most constitutions, a third was added. This third part was common only to the constitutions of federal and regional states. It was the law governing the division of competences between the EU and the Member States.

As regards the law governing fundamental rights, the Treaty's incorporation of the Nice Charter (i.e. the European Union Charter of Fundamental Right (EUCFR), thereby conferring on such a document the formal value it had formerly lacked and still lacks<sup>19</sup>) should be remembered.

On this level, too, the Lisbon Treaty does not mark a retreat, however. On the contrary, it may be said that it presents a more marked "constitutional" character than the constitutional Treaty of Rome.

Such a fact is a consequence of abandoning the *Sammelsurium* model. Indeed, whilst maintaining the existing systemic structure, the Lisbon Treaty distinguishes the Treaty on European Union (TEU) from the Treaty on the Functioning of the European Union (TFEU) (which replaces the Treaty establishing the European Community) and introduces a great part of the substantively constitutional rules into the former.

<sup>17</sup>As regards this aspect see, for example, Draetta (2004), p. 528 and Gabriele (2008), pp. 139 et seq.

<sup>18</sup>This view is very widely held [see, from amongst the many who share it, Tizzano (2004), p. 19]. As regards the incompatibility of this content with the essence of a constitution, see Anzon (2003), pp. 330 et seq.

<sup>19</sup>Publications on the Charter's legal enforceability are endless. From amongst the most significant contributions, see Weber (2000); Pace (2001); Diez Picazo (2001); Bifulco et al. (2001); Braibant (2001); Ruggeri (2001); Carrillo Salcedo (2001); Weber (2002); Matia Portilla (2002); Rubio Llorente (2002); Jacqué (2002); Tomuschat (2002); Dutheil de la Rochère (2002); Toniatti (2002); Pagano (2003); Siclari (2003); Balduzzi (2003); Villani (2004); Skouris (2004); Stern (2006) and Pollicino and Sciarabba (2008).

In this respect, some specific details really should be noted. The first is with regard to the law governing fundamental rights. Indeed, unlike the Rome Treaty, the Lisbon Treaty does not incorporate the Nice Charter but provides that it shall have “the same legal value as the Treaties” (Art. 6 TEU). It therefore distributes its “constitutional” content between various documents and thus does not present the “one-document” format that is normally characteristic of constitutions.

Similar considerations may also apply to the distribution of content between the TEU and the TFEU. Indeed, the second contains a great number of rules of a substantively constitutional character. One may think, in particular, of Part I, containing principles, and Title I of Part VI, containing the institutional provisions.

Simplifying to a certain extent, it may therefore be said that the constitutional Treaty of Rome, albeit presenting the characteristics of a *Sammelsurium*, contained the “constitution”. The Lisbon version of the TEU, on the other hand, contains only a part of the “constitution”, whilst the remaining parts need to be sought in separate documents, i.e. the EUCFR (enjoying the same legal value as the Treaties, as we have seen) and some parts of the TFEU. To complete the framework, one may add that, on the level of contents, the innovations of the Lisbon Treaty cannot be considered insignificant.

## 5 In What Sense Could the Existence of a European Constitution Affirm Itself Even Before Lisbon

Despite the entry into force of the Lisbon Treaty on 1 December 2009 a question becomes unavoidable. In what sense may it be said that Europe had a constitution even before the Lisbon Treaty? I shall seek to answer this question through a series of increasingly precise observations.

The first observation I would like to make is that the act of asserting the existence of a European Constitution is not limited to observing that the European legal order (like every complex legal order) is based on a body of rules that regulates its basic structure.<sup>20</sup> For example, the term “constitution” (linked to the advent of the modern state) is used in this sense with reference to legal orders to which the historical and ideological concept of constitution was and is alien. One may think, for example, of Francesco De Martino’s study on the constitution under the Roman legal order<sup>21</sup> or the works by Alfred Verdross and Piero Ziccardi on the

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<sup>20</sup>For example, the existence of a European Constitution in this very general sense is recognised in Cassese (1991), p. 447. For a critical approach, however, see Anzon (2003), pp. 303 et seq., emphasising that it is not to such a concept of “constitution” that reference should be made when attempting to answer the question as to whether, today, Europe has a Constitution. See, also Walker (1996), p. 269.

<sup>21</sup>De Martino (1951, 1954, 1955).

constitution of the international legal order.<sup>22</sup> It is well known that the concept of a constitution in the substantive sense is applied in these cases.

When speaking of a European Constitution, something more is meant. What is meant, in particular, is that whilst the formal characteristics normally present in state constitutions are missing, there nevertheless existed and exists within the European legal order a body of rules presenting marked similarities with many of the rules contained in such state constitutions.

To what am I referring? To the rules outlining the Union's basic organisation, first of all – those rules that identify its bodies (including the institutions), establish their spheres of competence and govern decision-making.

In order to avoid misunderstanding, it should be noted that such rules do not correspond in every respect to those to be found in state constitutions. Indeed, the EU is not a state and this fact is reflected in the characteristics of its constitutional organisation (and, therefore, in those of the rules governing it).<sup>23</sup> Suffice it to think of the importance of the intergovernmental component in the European order, the fact that such an order does not apply the principle of the separation of powers,<sup>24</sup> the lack of a system of sources of law structured according to form<sup>25</sup> and the absence of any decentralised administration and so on. The list could continue.

In my opinion, however, one cannot deduce from such facts that the Union does not have “constitutional” rules. One should be inferring something different, namely, that the said rules differ at a substantive level (i.e. in content) from the corresponding rules to be found in the majority of national constitutions.

The differences are not radical, however.<sup>26</sup> One may think, for example, of the influence that the intergovernmental component enjoys in the German federal order. Here, I am referring to the *Bundesrat*, which presents not negligible similarities with the Council.<sup>27</sup>

One may also think of the widespread model of *Vollzugsföderalismus* (i.e. executive federalism) commonly applied in the Middle European federal systems,

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<sup>22</sup>Verdross (1926) and Ziccardi (1943).

<sup>23</sup>A different reasoning would apply were it to be held that the term “constitution” is only appropriate in the context of a state (as does Grimm (1995), p. 590). This perspective is increasingly contested, however, since the tendency nowadays is to recognise that constitutions may exist beyond the state. Indeed, see Weiler (1999); Pernice (1999); Walker (2004) and Pólares Maduro (2004). See, also, Luciani (2001); Pinelli (2002); pp. 183 et seq. and Ruggeri (2008), on this issue.

<sup>24</sup>Walker (1996), pp. 269 et seq., emphasises that, as a consequence of the specific characteristics both of the EU legal order and of the role of its executive (which cannot be compared to that of national executives), the principle of the separation of powers as we know it would not be indispensable at a European level.

<sup>25</sup>As regards this characteristic which distinguishes European sources from national sources on structural grounds, see D'Atena (2001).

<sup>26</sup>Violini (1998), pp. 1251 et seq., highlights the substantive similarities between the European Constitution (in the sense it is given here) and the Member States' Constitutions.

<sup>27</sup>For this opinion see Fromont (1998), p. 132.



a model that, not by chance, some legal scholars also use with reference to the European legal order.<sup>28</sup>

Similar considerations apply to the rules governing fundamental rights. In the past many authors have inferred the inexistence of a European Constitution from the absence of such rules.<sup>29</sup> Those following this line of reasoning take as their model the paradigm offered by Art. 16 of the “Declaration of the Rights of Man and of the Citizen” of 1789. It is well known that this places the rules governing fundamental rights amongst the indispensable characteristics of a constitution: amongst those characteristics without which a state “does not have a constitution”.

Well, it must not be forgotten that, were this the model to be applied, one would have to say that history's first great constitution (i.e. the 1787 Constitution of the United States of America) was not a constitution. Indeed, in its original version, that document did not make provision for fundamental rights. The latter were added a few years later, with the first ten amendments.<sup>30</sup> Significantly, these are known as the “Bill of Rights”. Nor, by virtue of the same absence, could the first French Constitution (1791) be considered an authentic constitution, since its rules governing fundamental rights were very partial and fragmentary. As we know, the latter found their expression in another document of a *recognitive* rather than *constitutive* nature (in line with the natural law ideology inspiring its authors). Such a document was the “Declaration of the Rights of Man and of the Citizen” to which I have already referred.

With specific reference to the “European Constitution”, this absence of rules concerning fundamental rights (which the Treaty of Lisbon redresses by recognising the Nice Charter as enjoying the same legal value as the Treaties) could be traced to motives similar to the ones inspiring the US Founding Fathers and the authors of the first federal constitutions in Europe, namely, the Swiss Constitution of 1848 and the German Constitution of 1871. I am referring here to the federal structure. Those three constitutions did not feel the need for rules governing fundamental rights. This was because such rights were (or could be) governed by the Member States' constitutions that, together with the federal constitution, contributed to the creation of an integrated constitutional system.<sup>31</sup>

It must be emphasised, however, that a law governing fundamental rights was not totally absent at a European level. Here, I am obviously referring to Art. 6.2

<sup>28</sup>See, Guzzetta and Marini (2006), pp. 405 et seq.

<sup>29</sup>This opinion is very widely held. Of the many sharing it, see Anzon (2003) and De Marco (2008), pp. 50 et seq.

<sup>30</sup>As regards the absence of a bill of rights in the federal Constitution, see Hamilton et al. (1787/1788).

<sup>31</sup>An extremely clear description of such structure may be found in Nawiasky (1920), p. 144: “The federal constitution [...] is, of its essence, incomplete. It does not give birth to a self-contained legal order, but to a partial order, which may be considered an order insofar as it refers, for its missing part, to the constitutions of the Member States, which complete it.” Albeit from a different angle, Caruso (2005), p. XVI, emphasises the role of the Constitutions of the EU Member States for the purposes of guaranteeing the fundamental rights of European citizens.

TEU-Nice by virtue of which *The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*

Before concluding on this point, I would like to add that the rules dividing competences between the EU and the Member States should also be remembered. Such rules are incontestably constitutional in nature and in large part mirror the analogous rules present in federal constitutions.<sup>32</sup>

These are the reasons for which, in my opinion, it may be asserted that the existence of a “constitution” in Europe was (and is) undeniable, despite the absence of a constitutional Charter. There is a constitution scattered within the Founding Treaties<sup>33</sup> and its contents partly resemble those to be found in state constitutions currently or formerly in force (particularly federal ones). There obviously remain areas where the constitution differs from state constitutions. Such differences are caused by the novelty of the phenomenon to be governed. As I said earlier, the EU is not a state, but rather a new kind of legal order.<sup>34</sup> It is an order without precedent in the history of legal institutions. Its “constitution” therefore cannot fail to be affected by this structural implication.

## 6 European Constitution and National Constitutions: A Pluralistic Approach

Before ending, I would like to emphasise that the “thing” we have called a “European Constitution” does not “intervene” (if one may put it like that) in a constitutional vacuum, but rather in a space that is broadly occupied by the constitutions of the Member States.<sup>35</sup>

It therefore comes as no surprise that fortune has smiled on the expression “multilevel constitutionalism”.<sup>36</sup> This term was coined to convey the phenomenon

<sup>32</sup>See, on this point, D'Atena (2005).

<sup>33</sup>An analogous line of thinking is expressed in Venizelos (2004), who speaks of a “fragmentary and in part unwritten European Constitution”.

<sup>34</sup>For this reason, the claim to read the European constitutional phenomenon by rigidly applying models obtainable from national constitutions or, more precisely, from a part of them, may be criticised [see, taking this line, De Siervo (2001)]. This without considering that to proceed in such a manner runs the risk of denying the “constitutional” character of national constitutions that incontestably enjoy such a character [this point is most opportunely emphasised, with reference to the German Basic Law, by Mangiameli (2008), p. 394].

<sup>35</sup>As regards the ensuing problems, see Häberle (2005), pp. 221 et seq.

<sup>36</sup>In this context, reference to Ingolf Pernice is *de rigueur*. Of his works, see, in particular, Pernice (1999) and Pernice (2002), as well as, most recently, Pernice (2009).

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