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## Convention on the Future of Europe and the Process of Constitutional Choices

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## *The Constitution of Europe Convention on the future of Europe and the Process of Constitutional Choices*

### **1. Constitutional choices**

Constitutional choice could be defined as a process of collective decision-making at the largest possible scale, by which peoples and nations select their basic political commitments and political institutions by which they are to govern their affairs. This definition, thus, assumes that constitutional choices have to be done in order to establish a democratic rule upon the principles of the rule of law. The constitution of a tyranny or an autocracy cannot thus be considered a constitution in a proper sense. As Giovanni Sartori asserts "To be sure (it should go without saying) constitutions are a plan or frame for free government. As a manner of speech we have fallen into a careless habit of calling any and all state forms constitutions. As a matter of correct understanding it should be understood, however, that for constitutionalism... constitutions are only the state forms in which (as Rousseau said) we are free because we are governed by laws and not by other men."<sup>1</sup> In the process, drafting of constitutions and acts of constitutional importance makes only an initial, expert stage of constitutional engineering. Between the resulting constitutional act and "the living constitution" comes a process of implementation which heavily depends of the capacity of certain political community to accept the proposed solutions as its constituting and working principles.

There could be distinguished the fundamental and the specific or operational constitutional choices.<sup>2</sup>

Those of the first category have usually been done at the great historical events, such as constitutional conventions and popular referenda.<sup>3</sup> The choices of the second category are being done continuously, during a long process of implementation of the constitution, by the decisions of legislatures, courts of justice, behavior of the political leaders and acts of the common citizens in everyday life.<sup>4</sup> The result might, but does not have to be what is called "a living constitution".

"Processes of fundamental constitutional choices", according to the distinguished American political scientist Vincent Ostrom,<sup>5</sup> can be reasonably distinguished from collective choice and operational choice.

While constitutional documents might be elaborated with a great scientific consideration and knowledge, there is no guarantee that they would function as their creators have intended and expected. Erroneous constitutional choices, grounded on excessive expectations, might cause real catastrophes when applied.

## 2. American experience in constitutional choice

In the *Federalist Papers*, Alexander Hamilton, one of the most outstanding American Founding Fathers, define the most important purpose of the new Constitution as a opportunity to demonstrate and prove to the Mankind, that political communities are capable of establishing their political institutions on reflection and choice, instead of permanently being destined to depend in that regard onto accident and force.<sup>5</sup> This words, reflection and choice could be read as: on the basis of a serious scientific insight into the needs and preferences of a political community, into experiences of its component parts, as well as into its readiness and capacity for institutional and structural changes required by the new system of governance. In the next sentence he warns against acting upon an intuitive basis - if the choice is made upon false assumptions, it could be understood as a misfortune for the whole Humankind.

This statement makes the basic explanation for a scientific approach to problems of constitutional choice, often called also a "constitutional engineering" or a "constitutional architecture", meaning the decisions on the kind and design of political institutions appropriate for the political community. This was the task of the Philadelphia Convention of 1787. and the text adopted by it as a result of a series of compromises has fulfilled the task.

This "expert" work makes, however, only a basis for the final test of the quality of the choice being thus made. The great discussion that followed during the process of ratification of the constitutional document was the most important part of the process of constitutional choice. The arguments in favor of the adopted solutions could be find in the works of the proponents, and indeed the designers of the Constitution, signed Publius and collected under the name of "*The Federalist Papers*". But only a study of the works of its opponents, known as "anti-federalists" of various orientations, demonstrate the nature, depth and seriousness of that discussion upon which the popular choice has been made by referenda or decisions of the representative assemblies in the member states of the new Union. In the moment the Philadelphia Convention adopted the Constitution, the destiny of the proposal was far from being fully determined. The final constitutional choice was to be done by the people of the constituting states.

Alexis de Tocqueville, in his analysis of the factors upon which the new political system, founded upon the principles of republicanism, federalism and representative government and named democracy, has been established in America, points out the three such factors: first, "the special circumstances into which the Providence located American people". i.e. geographical situation; second, the Constitution and the laws of the land, and, third, "the habits of the heart and mind" shared by the people (mora, morality), which seems correct to translate into the modern political science language as "political culture".<sup>6</sup> The specific combination of the three enabled and made possible to maintain and develop the new democratic political system. Constitutions and legislation make only a part of the whole, whereas the interaction of those factors was not completely clear even to Tocqueville himself, so that he would at some points in the book stress the importance of one or another of them.<sup>7</sup>

Constitution makers often invest too much trust into the writing and adopting constitutional texts and legislation. By neglecting the problems of implementation of such carefully devised provisions, they rather often induce disappointment and demands for new institutional changes, while the constitutional

texts remain but a words on paper.<sup>8</sup>

Choices articulated at the American Constitutional Convention of 1787. have made a bicentennial success for two reasons: first, because they were suited to the expectations of the people of the thirteen American states at the historical juncture of their adoption, and, second, because they included a mechanism of a permanent revision and adaptation of the institutions to the changing circumstances and the changing world, whilst preserving the original principles of limited government and control over the rulers. Those basic principles might be defined as: the republican principle, the federal principle and the principle of separated but shared powers, both in their horizontal and vertical (territorial) dimension. Judicial review of the legislation has been derived from the principle of separation of powers. Local government has been derived from the application of the federal principle of compounding various levels of government in structuring the federation as well as within the member states.

After the experience with Confederation a larger union with ensured autonomy of its composite parts made a visible advancement. At the moment of the Constitution entering into legal force, the balance between the need for unity and the demand for autonomy of the composite parts under the new concept of federalism, as well as the balance among the branches of government in a specific version of the doctrine of separation of powers, created at the Convention, were properly devised and that was the most important contribution of the Founders. During the subsequent development a meaning of literally all the constitutional provisions has been changed in the constitutional process, but the basic principles of the constitutional democracy have been preserved and developed in accordance to the requirements of the developing democracy.

The success of this, first experiment in scientific constitutional choice was such that some concluded on the direct intervention of the Providence, a miracle.<sup>9</sup> The truth is that the Convention was made of individuals who understood their country and its needs and believed in the capacity of their people to accept democratic solutions and live with and under them. The Founders of the American Constitution were obsessed with the history of Europe and aware of the historical opportunity to avoid a repetition of that history of wars and violence on the American soil and that is what inspired cautiousness in their efforts. They were well aware of the great stakes of their undertaking and consequently cautious enough not to press with theoretically best solutions where there existed no social circumstances to implement them. The decade of the Articles of Confederation since 1777, generally judged in literature as a failure, might be as well be interpreted as a necessary transitional period of preparations for "a closer union".

The subsequent development of the constitutional system was characterized by a similar cautiousness and gradual development, with the exception of the tragedy of Civil war in the second part of 19th century. According to Larry Siedentop, who also leans onto the Tocqueville's analysis, the most important factors in favor of such a development have been: the habit of local self-government; a common language; an open political class dominated by lawyers and some shared moral beliefs.<sup>10</sup> Due to a favorable interaction of all those factors, the constitutional choice made initially at the Constitutional Convention makes an unprecedented story of constitutional success.

The bicentennial success of the American constitutional development has since influenced the efforts of constitution-makers of new democracies around the world. In particular it has been the case of new post-communist democracies in Eastern and

Middle Europe, including Croatia at the dawn of the 20th century. In the process of making further steps in the process of constitutional choice European Union and the Convention on the Future of Europe should take this experience into account.<sup>11</sup>

This does not mean an invitation to copy the American institutions, but rather to learn from the principles and the basic approach to a democratic constitutional choice. As Tocqueville asserts: "Let us look to America, not in order to make a servile copy of the institutions that she has established, but to gain a clearer view of the polity that will be the best for us; let us look there less to find examples than instruction; let us borrow from her principles, rather than the details, of her laws... the principles on which the American constitutions rest, those principles of order, of the balance of powers, of true liberty, of deep and sincere respect for right, are indispensable to all republics; they ought to be common to all; and it may be said beforehand that wherever they are not found, the republic will soon have ceased to exist".<sup>12</sup>

These principles and such an approach are valid guidelines for all the constitution-makers. They warn against instant decisions between the abstract concepts of federation and confederation. They also point out the importance of extra-constitutional and extra-legal conditions, which are requisite in order to make viable certain constitutional concepts. Constitutional choice is a process, not the moment. This is probably the most important lesson the constitution-makers, including those of the European Union could draw from the American experience in constitutional choice.

### **3. Constitutional choices in Postwar Europe**

#### **a. Transitions to democracy in the Western Europe**

The tradition of constitutional choice in Europe has been much historically different and much more influenced, in Hamilton's language by "accidents and force". But this had changed during the second part of the 20th century. It seems that the same principles which lead the European founding fathers to the invention of "functionalism" have inspired the national constitution makers in particular countries after the World War II.

In the period, several European countries, including the major ones, have past through a process of "transition into democracy". The new constitutions served rather well in these processes, provided that they were taken as frameworks of principles upon which the constitutional practices should be developed and adapted to the demands of the societies. The German Basic Act of 1948 makes a good instance, being conceptualized as a provisional law, until the German nation devises and establishes its constitution, it has subsequently been adapted even to the needs of a reunited country. The French tradition of making constitutions anew resembles Maurice Duverger to a series of small earthquakes following the great one of the Revolution, a stabilization of the system only to be found in the Fifth Republic, after almost fifty years of its development.<sup>13</sup> By the small constitutional revision in 2002, France seems to accept such an approach. The transition to democracy of Portugal and Spain in the seventies of the past century, resulted in a quite stable constitutions under which in the both countries the principles of democracy and representative government have been stabilized and developed since. Only after a long development Switzerland has adopted its new Constitution in 2000, which encompassed and harmonized the changes previously made by over 100 amendments to the 1867 Constitution.

This in our view reflects a modern approach to the constitutions and constitution-making: constitutional choices are being made upon a careful selection of

*institutions, after a close consideration of traditions and a social capacity to accept novelties, and gradually develop them into a democratic direction. Generally, it might be said that sober, instead of revolutionary expectations are being tied to the constitutions, as well as an awareness that constitutional developments depend of many other factors than the pure texts.*

#### ***b. Transitions to democracy in the post-communist countries***

*On the other hand, the post-communist countries begun their attempts on social transition by adopting the new constitutions during the first part of the 90-s. Again, the purpose of those constitutions was not to codify already achieved developments but to open opportunities for an entirely different line of development.*

*Mostly, they produced very well elaborated constitutional texts, sometimes going much further then their West-European models in adopting guarantees of rights and checks to power-holders, than the traditions and precarious situations of their societies would be ready to accept or their economies to endure. Constitutional optimism prevailed in most of them and the problems of implementation are widely visible. The instance of Poland, who first adopted its "Little Constitution" regulating the organization of government and only after few years the complete new Constitution, presents an instance of a different, more cautious and studious approach. The instance of Russia, where the basic constitutional disputes between the Parliament and the President, were decided by the armed conflict in Moscow in September 1993, warns seriously against premature solutions in regard to separation of powers.*

*But the basic approach to the problems of constitutional choice is present in all of these countries: constitutions are amended to easily in order to solve certain actual political problems, which diminishes the meaning of the constitution.*

*Croatia could be said to be a leader in constitutional optimism. The Constitution of December<sup>21</sup>, 1990 was amended first in 1997, and than substantially revised twice after the first alternation of the parties in power (2000 and 2001), and there are still voices advocating new constitutional changes. The problem with those changes is not that they have been made, but in the rush they were elaborated. Because of that, the fundamental constitutional choices, such as a stabile and lasting electoral system, have not yet been finalized. Even the functioning of the parliamentary system of government still seems to be problematic considering the tendencies of the leaderships of political parties to disregard constitutional solutions in decision-making processes.*

*Due to such a prevailing approach, Croatia still faces the need to adopt new constitutional changes. The fundamental constitutional choice, which was made already by conclusion of the Stabilization and Association Agreement with the European Union and confirmed by the application to join the Union in February 2003, obliges us to learn from the contemporary European approach to the constitution making as well as from the American experience.*

### ***4. Constitutional choice in the European integration***

#### ***a. Development***

*"The European Union is a success story" assert the authors of the Laeken Declaration on the Future of the European Union, but today's Europe faces the crossroads unprecedented in its history. This story of success was made possible by the initial constitutional choice made by the European founders in the early 50-s of the last century,*



the invention of what used to be known as “functionalism”. In order to prevent future wars, by which an unification of Europe has been attempted many times in history, they decided to go slowly and gradually towards unification, through economic integration in the fields of common interest to and a gradual transfer of competencies onto common institutions, and thus leave the constitutional choices *stricto sensu*, opening the questions of federation or confederation which immediately rise the question of sovereignty, to the forthcoming generations.

Rejecting the ideas of an immediate creation of European federation, this was the beginning of the process of gradual construction of constitutional institutions. According to Valéry Giscard d’Estaing: “The development of the European Union follows almost exactly the opposite approach. European member states have continued to exercise the classical sovereign powers in foreign policy and defense, while the Union was empowered to work for economic integration, first with a common market and now with the introduction of a common currency, but still with no sign of a common fiscal system”<sup>14</sup> Therefore, as in Renaud Dehousse’s nice metaphor, “It is a mistake to depict Europe as a kind of renaissance cathedral entirely designed by a powerfully-minded architect...it is more like a medieval cathedral, patiently built by several generations of craftsmen with the materials available to them, in response to what they perceived as the needs of their time-hence probably the lack of coherence of the whole construction.”<sup>15</sup>

In the process, however, the specific constitutional choices had to be necessarily made and the skeleton of the constitutional system was created, so that the first books on the European constitutional law, have already appeared.<sup>16</sup> It came through the two lines of development: one was grounded on the practice of the European Court of Justice, and the other on gradual revision of the treaties. But it is difficult to nominate the result “a constitution”.

In the opening pages of his book on the Constitution of Europe J.H.H. Weiler summarizes those constitutional developments: “What, then, are the great constitutional moments in the history of the European Union? There are some obvious candidates. The Schuman Declaration of May 1950? The entry into force of the Treaty of Rome in January 1958? The profoundly important decision of the European Court of July 1964 declaring the supremacy of the community law? Perhaps the 1965 “empty chair” crisis and the subsequent Luxembourg Accord with its hugely important impact on Community decision-making? Perhaps, in more recent times, the 1958 White paper of the Commission setting the 1992 objective for completion of the single market, or, indeed, the 1986 Single European Act which endorsed that plan, restored majority voting to the Council of Ministers and set a veritable Europsychosis across the continent?” In Weiler’s view, the turning point was the aftermath of the Maastricht Treaty on European Union, when the public debate on the aims and the future of the Union came into the focus of public attention.<sup>17</sup>

Although limited in scope to the instruments and procedures of decision-making and implementation, one important result of such an awareness was the European Commission’s White Paper on Governance of the European Union of July, 2001, which critically examined the achievements and shortcomings of the existing complex system,<sup>18</sup> as well as the discussion and criticism the publication of it had provoked.<sup>19</sup> The White Paper proclaims “the five principles of good governance” which are generally applicable to analyses of functioning of democratic political systems: openness, participation, accountability, effectiveness and coherence, which would reinforce the

principles of the integration of the Union, those of proportionality and subsidiarity.

The White Paper, however, confirmed the two important scholarly findings: first, that “the decision-making process within the European Union is so complex that very few ordinary Europeans have more than a minimal grasp of it or could say with certainty just who should be held responsible for the policies that emerge”; second, that “how fully EU legislation is implemented across the EU is unknown...It is generally accepted, though, that implementation is far from uniform and perfect”.<sup>20</sup> But the White Paper, naturally, omitted to address the fundamental constitutional issues and choices of a political nature.

It has been demonstrated in the public discussion, however, that citizens feel alienated from the Union’s institutions and decision-making processes and that the turnout in elections for the European Parliament is constantly decreasing, that the decision-making process is too complex, slow and non-transparent, that the existing legal system is too complex and complicated to be efficiently implemented and that the fundamental principles upon which the Union has been established, such as solidarity, require reexamination and improvements in application. Altogether, it seems that the traditional “functionalist” approach would not respond to the needs of the Union in the modern world. The path for a serious consideration of the new European Constitution was thus open.<sup>21</sup>

#### **b. The Convention on the Future of Europe**

The demands expressed during the intensive public debate lead to the establishment of the European Convention on the Future of the European Union with the task to examine and elaborate possible solutions for the whole array of problems such as: the division of competencies and the principle of subsidiarity, a simplification of the Union’s instruments up to the demand for more democracy, transparency and efficiency in the European Union.

The organization of the Convention reflects the fundamental idea of establishment of a body legitimized and capable to do the initial, “expert” part of the job on elaborating the constitutional document. Its composition reflects the demand for legitimacy and representative character: representatives of governments of the member states, representatives of the candidate states, representatives of the national parliaments of the member states as well as of parliaments of the candidate states, representatives of the European Parliament and of the European Commission. The organization of the working groups, according to the specific issues, reflects the demand for expert knowledge on particular issues: subsidiarity, fundamental rights, legal personality, national parliaments, complementary competencies, economic governance, foreign affairs, defense, simplification of procedures and instruments, judiciary and social policies. The Praesidium consists of politicians of prestige and experience, which would have enough authority to formulate a common proposal upon a synthesis of numerous opinions and confronting views.<sup>22</sup>

Under the enthusiastic chairmanship of Valéry Giscard d’Estaing the Convention advanced far more efficiently than expected. The first draft of the final document was published already on October 28, 2002<sup>23</sup>. Reactions were quite suspicious and even hostile. Posing the question “can these bones live?” the editorial of *The Economist* commented: “He’s a bit of a cadaverous figure himself, Valéry Giscard d’Estaing, the former French president dug out to head the group of Euro-notables



charged with producing the first outline of a constitution of the new soon-to-be-enlarged European Union. This week he offered its first results: "the skeleton", not much more than a few general headings, of what he hope for."<sup>24</sup> Under the title "Skeleton gives bare bones of future EU constitution" *Financial Times* concludes, "the real test and the real debate is to come"<sup>25</sup>.

But the first draft served well as an indicator of the Convention's intentions and during the next months the Convention continued its work with much more public attention of the nature and ambitions of the undertaking. Ministers from the important countries begun regularly to attend and the whole atmosphere surrounding the Convention became much more hopeful. "From talking shop to crucible of high politics: Europe's convention is evolving into a historic undertaking" commented *Financial Times*.<sup>26</sup> Despite the traditional approach being still present, as had been demonstrated by the Franco-German deal on the basic arrangement of selection and authority of the president of the European Council and of the Commission, proclaimed in January 2003 and soon rejected by the European Parliament, it seems that a great part of the European public has turned its interest, hopes and fears into the Convention.

### **c. Application of the federal principle**

The Draft of the first 16 Articles on February 6, 2003<sup>28</sup> demonstrated further progress of the Convention in tackling the most sensitive issues of constitutional nature. The Article I of the Draft defines the Union and its objectives:

"1. Reflecting the will of the peoples and the States of Europe to build a common future, this constitution establishes a Union (entitled...), within which the policies of the Member States shall be coordinated, and which shall administer certain common competencies on a federal basis.

2. The Union shall respect the national identities of its Member States.

3. The Union shall be open to all European States whose peoples share the same values, respect them and are committed to promoting them together."

Thus the proposed text of the first Article opened the most crucial and also the most inexorable issue: is Europe ready to accept the federal principle in its organization and functioning, and simultaneously ensure a respect for the national identities of its member states? And, even more important, to what extent European states share the same (constitutional) values, which would justify the choices made by the Convention? This seems to be the questions above all questions, because it focuses to the core of the issue of sovereignty that has been cautiously avoided during the years of constructing the union. This thus represent the fundamental constitutional choice that has to be done.

Of course, the decisions of the European Court of Justice, on the primacy and direct effect of the European legislation, have affected the issue before. But it have never been posed in such a definite manner: how to organize government of the Union in a way to ensure a needed degree of unity and simultaneously ensure a necessary degree of autonomy and participation to the members of the Union, disregarding the fact whether large or small, economically powerful or weak, old or new. Thus, according to T.C. Hartley: "Interestingly, the federal elements are strongest with regard to judicial and legal system of the Community; they are the weakest in the political area, including such vital matters as legislative and executive powers, taxation, and defence."<sup>28</sup>

This opens a whole array of constitutional issues, among which: how far

can majority voting in the Union's institutions be extended; should the right to veto legislation be maintained and in which, most sensitive areas; shall a right to withdraw from the Union be guaranteed to member states, together with the question on effects of a possible rejection of a ratification of the very Constitutional Treaty by some states; which principle to apply regarding the procedure of amending the Constitutional Treaty, that only illustrate the complexity and political sensitivity of choices the Convention faces.<sup>29</sup>

#### 4. Open issues

The first Article of the Draft constitutional treaty shows the complexity of issues to be resolved: the very mention of the federal principle demonstrates the dramatic importance of those issues. The very mention of the federal principle seems unacceptable for the better part of members and would be members, at least without a precise definition of its meaning, and has provoked a number of contradictory proposals.<sup>30</sup>

Europe is ready to agree on issues of economic development, full employment and social policies. It could even be ready for a common Bill of Rights. But the crucial issues of common foreign policies and common defense remain open, and they rise again the questions of federation versus confederation, or the scope of sovereignty that member states are ready to transfer to the common bodies. The recent developments related to the question of support to the intended American armed intervention against Iraq demonstrate that there exists no consensus on those matters in Europe. The crucial issue, as in any political process remains the struggle for power and a distribution of power within the future union.<sup>31</sup>

The number and nature of reactions from the member and the candidate states to the first draft article demonstrates the problems, which may be caused by the too optimistic euro-federalists. Let me, as an instance, quote Slovenian professor Ciril Ribičič's comment on the radical proposals to impose a federation forwarded by the: "I cannot wave my hand and turn my head off from the incredible radicalism of the Union of European Federalists (UEF), organized in 14 European states. They have formulated and proclaim demands, which would most likely endanger not only enlargement, but also the very existence of the European Union. These are demands which cannot and must not prevail... these demands deserve a decisive answer: Yurope, no thanks."

By the new-coined term "Yurope", Ribičič points to the experience of Yugoslavia: "In their appeal to the founding members of the European Union, to adopt "federalist European constitution", federalists wrote that with the enlargement of the European Union, threatens with disintegration of the very Union. Milošević knew even more dramatically to express the same thought: "Yugoslavia would be a modern federation or will not exist. And it does not (exist)."<sup>32</sup>

This is an enormously important point and not limited to the countries who shared the unfortunate experience of the failed Yugoslav federation.<sup>33</sup> In making decisions of fundamental constitutional choices, the erroneous ones, which were made in history and resulted in tragic failures, such as Yugoslavia, should also to be taken into account. In the European context, it is not unimportant that the peaceful solution for disintegration of the Yugoslav federation was attempted in 1990 by a proposal to transform it into an association of independent states, on the model similar to the organization of the European Community of the time. Similarly, Jo Shaw turns attention to the processes in Canada, since the solution in a case of dissolution should be similar

to certain solutions from the European integration.<sup>34</sup>

In relation to the failure of federations, there are rather few such studies. In one of them Thomas Franck concludes: "The primary reason of failure or partial failure of all five federations which made a subject of our study cannot, it seems, be found with the help of economic statistics or on a basis of lists of social, cultural or institutional differences. It could be found only in absence of the sufficient political and ideological dedication to the primary concept on a value of the federation itself... Such a dedication could develop whether people themselves - as a charismatic value formed upon certain events or by a gradual growth or by a gradual integration of secondary values and factors - or it could be generated by charismatic leaders, and that the first appears rarely, except in situations of a prevalent common jeopardy from a foreign force or some other passionate historic challenge to the collective imagination."<sup>35</sup>

### **5. Conclusion: the process of constitutional choice continues**

We might conclude with Larry Siedentop: "The attraction of federalism, properly understood, for Europe is that it should make possible the survival of these different national political cultures and forms of civic spirit. But that can be the case only if federalism is approached gradually. For one of the pre-conditions of successful federalism is a consensus on which areas of decision-making belong to the center and which ought to be reserved to the periphery. Today in Europe there is no such consensus. The establishment of European Senate, charged with overseeing that question and the work of European Court, creating a common jurisprudence, could gradually help to create such a consensus. But it cannot be created overnight. Nor can a Europe-wide political class, able to defend such a consensus and make the exercise of governmental power accountable, spring up suddenly... The danger of premature federalism in Europe - of the rush to political integration which turns federalism into little more than a mask for an unitary super-state, is that could put at risk the complex textures of European societies. These are not matters for a few years. These are matters for decades, probably for generations. Federalism is the right goal for Europe. But Europe is not yet ready for federalism."<sup>36</sup>

Properly understood, the Convention and its resulting document may serve as an important step forward in the process of constitutional choice. It could be expected to bring important improvements in functioning of institutions and the legal system. But there should not be expected a miracle to happen. The president of the Convention said at the end of March 2003, that he would prefer several more months to elaborate the text, but the leaders of the Commission insist that the political schedule should be met, and the text prepared for the inter-governmental conference in June. It seems clear that after the Convention concludes its work, the process of constitutional choice in Europe would continue along the lines of a "reinvented functionalism" or "a Community Method" the European Union owes its successful for over fifty years, for long years to come.<sup>37</sup> The fundamental constitutional choice has been formulated by the Convention president in an interview to *Le Monde*: "The European Union must be a progressive project achieved in stages".<sup>38</sup>

Therefore, *si licet*, let me even forward a modest proposal to the Convention. In our opinion, it would be wise to include into the final document the following provision: "The Convention shall reconvene after the expiration of five years from its conclusion, in order to evaluate the progress made in implementation of the

Constitutional Treaty and consider the necessary revision of it". Such periodical meetings would make a work on the European Constitution a continuous effort in proper constitutional choice.

<sup>1</sup> Giovanni Sartori: *Comparative Constitutional Engineering*, Macmillan Press Ltd., 2nd ed., 1994, p. 196. <sup>2</sup> Branko Smerdel: *Republic of Croatia: Three Fundamental Constitutional Choices*, Croatian Political Science Review, 1, 1(1992), 60-78. <sup>3</sup> See more in Vincent Ostrom: *The Political Theory of a Compound Republic*, University of Nebraska Press, 1987. and B. Smerdel: *American Theories of Federalism*, introduction to the Croatian translation, Informator, Zagreb 1989, 5-49. <sup>4</sup> In this sense cf. Lawrence H. Tribe: *Constitutional Choices*, Harvard University Press, 1985. <sup>5</sup> Alexander Hamilton, James Madison, and John Jay. *The Federalist or The New Constitution*. Ed. William R. Brock. London, Charles E. Tuttle Co. 1992; Herbert A. Storing: *What the Anti-federalists Were For*, University of Chicago Press, 1981. <sup>6</sup> Cit by Vincent Ostrom: *Meaning of American Federalism. Constituting a Self-Governing Society*, ICS Press, 1991, 11-5. <sup>7</sup> Jon Elster: *Political Psychology*, Cambridge University Press, Chicago 1993, 121-2. <sup>8</sup> See the warnings against "aspirational constitutions" in Giovanni Sartori, op. cit. pp. 199-201. <sup>9</sup> Best known is the classic Catherine Drinker Bowen's book: *Miracle in Philadelphia*, New York, 1968. But there are new attempts on the similar line. See, for instance, Carol Berkin: *A Brilliant Solution: Inventing the American Constitution*, Harcourt, 2002. <sup>10</sup> Larry Siedentop: *Democracy in Europe*, Penguin, 2000., p. 10-4. <sup>11</sup> See Union of European Federalists: *Federalist Letter to the European Constitutional Convention*, at constitutional-convention.net, March 12, 2002. <sup>12</sup> Branko Smerdel: *American Constitution and the Lessons for New Democracies* (in Croatian), introduction, Ustav SAD, Panliber, Zagreb 1994. <sup>13</sup> Maurice Duverger: *Institutions politique et droit constitutionnel*, Tome II, Le système politique français, Presses universitaires de France, Paris 1975, 41. <sup>14</sup> Valéry Giscard d'Estaing: *The Henry Kissinger Lecture*, Library of Congress, Washington, February 11, 2003, *The European Convention*, 74464.doc, p. 3. <sup>15</sup> See Renaud Dehousse: *Rediscovering Functionalism*, Jean Monnet Working paper (Symposium: responses to Joschka Fisher), Harvard Law School. 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Hartley: *The Foundations of the European Community Law*, 4th ed., Oxford 1998. at p. 9, fn. 37. <sup>29</sup> See: *Convention wrestles with treaty ratification*, [www.euroobserver.com.index](http://www.euroobserver.com.index) <sup>30</sup> The summary of amendments proposed to the first 16 Article has over 100 pages - CONV 574/03 Annex. <sup>31</sup> See Kirsty Hughes: *The Battle for Power in Europe - Will the Convention Get it Right?* CESP/EPIN working paper, February 2003. <sup>32</sup> Ciril Ribičič: *A Mosaic of Constitutional Change*. from Slovene to European Constitutionality, GV Založba in pravna praksa, Ljubljana 2003, (in Slovenian, with English summary) p. 105. <sup>33</sup> See: *Last chance for seven EU dwarves to voice concerns*, on the coalition of the small EU member states (Benelux, Portugal, Austria and Finland), meeting in Luxembourg beginning April 2003, [Euroobserver.com](http://Euroobserver.com), 02. 04. 03. <sup>34</sup> Jo Shaw: *Relating Constitutionalism and Flexibility in the European Union*, in *Graine de Burca*, Joanne Scott (eds.): *Constitutional Change in the EU*, Hart Publishing, Oxford 2000, p. 338. <sup>35</sup> For instance Thomas M. Franck: *Why Federations Fail: an Inquiry Into the Requisites for Successful Federalism*, London University, London 1968, p. 177. <sup>36</sup> I. c. pp. 230-1. <sup>37</sup> See: *Reforming the Institutions: Principles and Premises*, contribution submitted by a group of Convention members AND Government representatives from the small and candidate countries on March 28, 2003, CONV 646/03 CONTRIB 288 <sup>38</sup> [Euroobserver.com](http://Euroobserver.com), 14. 03. 03.