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Democracy and Accountability in the Enlarged European Union

THE CONVENTION METHOD: A MODEL FOR DEMOCRATISING THE EUROPEAN UNION?

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Presentation

I have been asked to reflect on the question "the Convention method as a model for democratising the EU?". I agree to place the title between question marks, even though I would have not chosen this title. The reason is that I can only propose an ambiguous response to this question. On the one hand, the Convention brings some undoubted improvements to the traditional "democratic deficit" of the EU and, specifically, it increases the democratic quality of EU constitutional politics. But, on the other hand, the democratic credentials of the Convention itself suffer certain democratic shortcomings. In particular, the formal and informal mechanism linking this new deliberative assembly and the citizens have not been worked out satisfactorily. Hence, I have doubts on the value of the Convention as a "model" (i.e. something that may be copied and/or adopted by other instances) even though it improves largely the democratic credentials of EU constitutional politics.

My argument will try to link three ideas in order to substantiate this argument. The first is that the Convention responds more to efficiency rather than democracy considerations in EU reform politics. Secondly, I will discuss some limitations linked to the working procedures and, in particular, the method of deliberation and consensus. Finally, I will introduce some critical remarks on the democratic shortcomings of the Convention model that relate closely to the ongoing debate on the democratic profile of deliberative politics within the EU (and elsewhere). My central argument is that whilst deliberative democracy represents a large improvement of traditional representative democracy, it cannot substitute it and we need to reflect further about formal participatory mechanism. Underlying my position, there is an acceptance and adhesion to the large improvement that by any standard that the Convention represents for EU constitutional politics (and the already mentioned question mark for its model value).

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1. Democracy in EU Constitutional politics

Constitutional politics are the process of creation and modification of foundational and fundamental rules and institutions of the EU. From the Rome Treaty to the Nice Treaty, constitutional politics have proceeded through the mechanism of Intergovernmental Conferences (IGCs). New institutionalism authors have convincingly argued that the choice of the institutional setting for constitutional politics decisively determines both procedures and outcome. IGCs ensure that national governments are able to maintain tight control over outcomes and negotiations. This mechanism insures the legitimacy provided by unanimous agreement of all parties involved (i.e. member states represented by their governments) and, in this way, it directed EU constitutional politics towards an exercise of aggregating actors' concrete choices and preferences (Moravcsik, passim).

Paradoxically, this procedure produces pay-offs to all these involved but it created a large gap with the citizenries that exploded in the ratification processes. The ratification of the Treaty of Maastricht saw the first divergences between public opinion and national governments (in Denmark and Frances, but elsewhere too), Amsterdam posited similar problems and, finally, the Treaty of Nice reached a plateau in possible level of citizens' tolerance and acceptance. The negotiations at Nice prompted a public and political reaction against the Treaty, which was decisive in persuading European leaders to relax a method (the IGC) that "fed the democratic deficit in the broadest sense of the word".[1]

Despite these antecedents, the reasons for turning towards the Convention method are not directly and immediately related to the remedy of the democratic deficit, rather efficiency considerations had a large role in this decision. In fact, several issues limited the efficiency of the last two IGCs:[2] Firstly, the divisions among Member States increased in depth and the EU institutions had a reduced or minimum influence, in particular, the mediating role of the Commission. More decisively, the increasingly inflexible positions of national governments coincided with issues that do not produce win-win situations for all parties involved. This was the case, in particular, with the issues confronted at Nice (namely, the distribution of shares of power and votes). Realistically, it is debatable whether these issues could be settled through the automatic application of a constitutional principle (such as proportionality) rather than as result of tough strategic bargaining and exchange between actors. In any case, Nice negotiations, in particular, cast doubt on the capacity of "top level" negotiators defending national interests and guided only by strategic considerations to settle the kind of framework issues that define the fundamental design of the EU. And the forthcoming enlargement to 25 member states made "fundamental constitutional change" a pressing concern, not a question of principle but a question of necessity. Hence, efficiency considerations rather than a choice of democratic means backed the relinquishment of the traditional IGC mechanism.

The limitations of the intergovernmental negotiations contrasted with the smooth and solemn elaboration (and after, proclamation) of the Charter of Fundamental Rights. This had the effect of translating a very positive perception of the outcome to the actual the method itself followed to draw up the Charter (despite its shortcomings and many criticisms). Notwithstanding some initial scepticism, and even criticism, the comparison between the IGC and the Convention

turned to the latter's advantage[3] and it appeared as an alternative to traditional diplomatic negotiations.[4] No doubt, the first Convention benefited from a number of factors, being not a minor one a strict and clear mandate and an "identification" technique that helped to the success of the exercise.

This experience of the Convention on the Charter made it a paradigm of an efficient mechanism to deal with preparation of constitutional issues. The interest of national governments derive, precisely, from this ability to perform efficiently and, interestingly, the democratic deficit did not feature as a reason for convoking a Convention in the usual rhetoric that involves and justifies EU reform. The absence of the usual rhetoric references to democracy as a justification for convening the Convention underlines further the "instrumental" perception by European leaders. Governments accepted the Convention on the expectation of a similar capability to avail of its results as it happened with the Charter (which was solemnly proclaimed and its incorporation into the treaties and its binding force postponed). National governments introduced several mechanisms that, next to the autonomy of the Convention, preserved their room of manouvre for control: national representatives outnumber those from EU institutions (to keep at bay any strong federalist coalition); a semi-open mandate, control of several organisational devices (composition of the Presidium, etc.); a directly appointed President; a large size membership that might hinder the emergence of a strong self-organising capability and would reinforce the role of the President; fixed time limits (including a cooling-off period) and, last but not least, national governments retained the power to accept and/or reject the outcome and decide on its binding force. Governments agreed because the process was unforeseeable, allowing them to hope they would be able to maximize their interests while retaining the opportunity to minimize costs at the subsequent IGC.[5] Hence, a priori the democratic profile of the Convention was not the driving force in its design.

In any case, the Convention may prove a clear case of unintended consequences of action. The Convention has turned some of these limitations to its own advantage and following its own interpretation and, in this form, has created a more democratic setting for EU constitutional politics. However, the Convention is still placed in the original position given by the European Council: it is the preparation of the next IGC (and not its substitute). What has happened is that EU constitutional politics has moved towards the differentiation between three stages: preparation, decision and ratification. So far, a certain degree of democratisation has advanced at the preparatory stage but the other two remain unconsidered so far. The democratic shortcomings of the procedure derive from the deficient articulation between the three stages and the kind of democratic requirements in each of these. I will come back to this idea, but I would like to review the democratic credentials of the Convention that most commentators identified in its working procedure.

2. The Convention procedures: consensus and deliberation

Although the Convention was no convened to remedy the democratic shortcomings of EU constitutional politics, most commentators agree on its democratic value that they assign to the deliberative method that it follows. Undoubtedly, this deliberative style contrasts very favourably with IGCs. In these, the agendas derive from unsettled issues plus those items that national governments themselves wish to include in order to reach an agreement. The possibility of veto

grants a lot of room for national governments to pursue goals of their own. Against this background, outcomes follow a logic of exchange and bargaining. Moreover, since parties seek to anticipate the future consequences of the constitutional provisions (for instance, the calculus of possible majorities following a given distribution of votes), the outcomes in each round of reform end up specifically tailored to suit the particular requirements of states and/or groups of states. This is not necessarily the best path or even a path to reach agreement on constitutional principles whose settlement might render ongoing constitutional negotiation unnecessary.

The Convention, in turn, appears as a deliberative assembly that activates the elements of the deliberative perspective: opinions are shaped and tested in public debate and, further, that actors may change their preferences when faced with qualitatively better arguments. Hence, authority is founded on the 'reasonable' public discussion.[6] Additionally, the Convention features participation and inclusive forms of open deliberation, it respects and integrates the relative importance of minority positions, it offers forum for parliamentary discourse and helps to include national parliaments at an early stage of system building.[7]

The primordial element of deliberation seems to be the procedure for decision-making. The mandate from the European Council offered two possible outcomes; either a list of options or, else, recommendations if backed by consensus. The Convention pursued since the very beginning the second option and sought to make its outcome as biding as possible, hence, it engaged from the very beginning in the search for consensus.

What does consensus exactly means? Apart from the explicit reference in the Laeken mandate to the fact that "*accession candidate countries (…) could not prevent any consensus that may emerge among the Member States*", nor the European Council or the Convention have defined what consensus explicitly means. In the implicit understanding of Laeken, consensus seems equal to agreement whilst the most common interpretation equates consensus to the absence of formal voting. Hence, the implicit understanding seems to be a large support manifested without taking a formal vote as it happened during the first convention, when it was understood that the level of consensus required lay between unanimity and a majority.[8]

In the absence of voting to measure how many support an option, the search for consensus involves a simultaneous exercise of defining the substantial components on which coincident views appear and assessing the existence of a large supporting majority without counting. The advantage of this procedure is that it may stimulate deliberation and dialogue. Deprived from the equalising mechanism of voting, opinions have to be aired to substantiate opposition or support. Also, persuasion is essential to convince participants to maintain a certain opinion. Some procedural devices introduced in the Convention debates, such as "blue cards" (i.e. non scheduled interventions to question speakers) and "green cards" (i.e. speakers' replies to the former) no doubt produce a certain dialogue. When the Convention has entered in the constitution-drafting stage, new procedimental devices have introduced to stimulate further debate: reduction of the time for interventions and possibility of spontaneous interventions. The combined effect of arguing and the absence of formal voting produces a certain "endogenization" of preferences: at risk of exclusion, preference formation becomes shaped for the more cohesive environment in which occurs.[9]

Consensus, however, is not exactly the same as deliberation. If we have established that consensus means an agreement largely shared by most participants, this may perfectly result of aggregative choices. A broadly shared agreement implies the concurrence of most players and signifies that the outcome satisfies a large majority of them. As an example, the Spanish transition to democracy and its main landmark, the 1978 Constitution, is broadly defined as consensual. What lends it the characteristic of consensus is the attention paid to most concerns of different representative groups that share basic and fundamental principles. In this sense, consensus does not rule out voting (and in fact, the consensual constitution of Spain was voted), but it implies that large supporting majorities are sought around fundamental agreements. These supporting majorities occur because agreements grant some sort of satisfaction to all parties involved. What consensus requires is a clear identification of the parties, their representativity and their authority to carry consent to the prospective agreements.

Many of the arguments on deliberative democracy seem to be placed on the capability to reach "the best outcome that reasoning may provide". This, no doubt is a legitimate result but, by no means, more legitimate that aggregative ones. It is doubtful whether in constitutional politics, results can be the best one in terms of reasoning or, merely, the more acceptable one to all parties concerned since it integrates concrete choices.

3. Democratic shortcomings of the Convention deliberative model

Expectations on the democratic value of deliberative bodies in the EU derive mainly from the growing body of literature and study on EU committees. No doubt, the deliberative method improves the democratic credentials of EU constitutional politics, but deliberation by itself does not produce democracy. Rather, democracy derives firstly from the procedures that secure free and equal participation for all citizens. Or, in other words, the *demos* results from the practice of democratic procedures. Deliberation supplements the limited reach of formal democratic procedures but cannot substitute them.

The translation of this criticism to the Convention model implies that even recognising the improved method of constitutional politics brought about by constitutional deliberation, the democratic shortcomings remain in the formal mechanisms that link the deliberative "body" with the citizens. The positive and even enthusiastic evaluation of the Convention relies on the conviction on the value of deliberation to produce "legitimate" outcomes and it has neglected a deeper judgement on the legitimacy of the Convention itself. The foundational stone of the legitimacy of democratic systems remain the formal procedures that allow the free and equal participation of all citizens.

Prima facie, the combination of the mandate and the status granted to the outcome determine the legitimacy requirements of the Convention. Originally, the European Council entrusted the Convention with producing either a document of options or recommendations (if backed by consensus). Taking into account this preparatory mission, the Convention enjoyed an infinitely larger legitimacy than further preparatory mechanisms (for instance, the Westendorpf Group). Even in the absence of direct election of conventioneers, we may perfectly argue that the

designating organs transfer indirect legitimacy to the Convention and we may also accept that this indirect or derived legitimacy suffices for the "preparatory" function of the Convention.

Availing this legitimacy and the semi-open mandate as for the contents of the exercise, the conventioneers asserted their autonomy: "situated interests" are de-legitimated (i.e. representatives rarely speak on behalf of their respective bodies); a pragmatic discursive register dominates and there is a clear absence of rigid and stable groups.[10] Autonomy of conventioneers results essential for deliberation since the process of arguing and reasoning should not be restricted by mandatory instructions. In this respect, the Convention compares very favourably with traditional IGCs (in which veto shield mandatory instructions and gears towards a "negotiated" outcome). Thus, the Convention may result in producing a more efficient outcome than IGCs and this was the initial conception that saw it as a preparation for the next IGC without binding force upon it.

However, the initial setting has been subtly modified and this has effects on the legitimacy requirements for the Convention. Firstly, the Convention has transformed its mandate and it has constructively developed a self-mandate, i.e. the drafting of a Constitution. Since the Convention is performing on the basis of this new mandate, an essential issue is the status of the outcome *vis-à-vis* the forthcoming IGC. The question remains skilfully marginalized even though mounting pressure on the moral binding force of the Convention and the equally skilful moves by the Convention to exhaust any time-margin between Convention and IGC directs towards a position in which will be very difficult to find meaningful alternatives. If we are moving towards this scenery, the changing nature of the Convention through performance raises again the question of legitimacy that cannot be settled merely by its larger efficiency over IGCs. The turn towards a kind of "constituent assembly" may appeal to federalist spirits such as myself but it may find a strong opposition for these claiming the lack of legitimacy of the body to produce such an outcome. In plain words, the Convention did not have an explicit constitutional mandate.

Originally, the value and meaning of the Convention came from its relationship with the IGC. As the Laeken mandate stated, the European Council and the remaining actors concerned (including the Commission and the EP) conceived it as a preparatory body at the service of the IGC. Although it has not challenged its constitutional position as a preparatory body, the Convention has redefined its mandate and the formal status of its outcome. Whilst we may accept the legitimacy for doing so, an open question remains: what is the relationship between the outcome of the Convention and the IGC? Has the Convention the legitimacy required if its outcome is to be binding on the IGC?

We may accept that it may exist a moral obligation but the claim for legitimacy of the Convention has been constructed on superior efficiency that produces deliberation plus a larger representative assembly. The claim of efficiency (reaching the best solution that reasoning may provide) is a central tenet in the construction of the model of legitimacy of deliberative politics. Efficiency, however, seems to be acceptable as the paradigm for the outcome if we define "problems" that require "efficient" solutions. Most political issues, though, refer to the integration of choices and values (and, not doubt, deliberation is a very useful instrument for this). Integration of political choices and values does not need to be the most efficient one but it has to be the more legitimate one if claims of illegitimacy are to be met.

Translated to the Convention, this means that it may perform successfully in the task of drafting in an efficient manner a Constitution through deliberation. However, this does not secure *a priori* a larger legitimacy in front of the citizens that traditional results of IGCs. Pragmatically, it is difficult to conceive why citizens may accept the deliberative quality of the outcome can become a perception of a more legitimate "outcome" than traditional treaties. Rather, it seems that the practice of formal mechanism that relate the citizens to constitutional policy-making will stand a larger option for success. Thus, the democratic shortcomings relate to the involvement of citizens: a direct election of the representatives in the Convention plus the ratification in a common EU referendum since a constitutional Treaty will require the explicit backing of EU citizens through a vote. We may end up with a consensual text that resulted from deliberation and has been accepted by the IGC but that can risk the danger of being rejected by citizens.

CONCLUDING REMARKS: HOW MUCH OF A MODEL?

To restate my ideas, the Convention improves greatly the EU constitutional politics by introducing deliberative procedures that enhance the search for common grounds and shared understanding in a more efficient form than traditional IGCs. However, the Convention shows remarkable democratic defects in particular if it is aiming towards a kind of Constitution for the EU whose legitimacy basis should be more firmly anchored in the mechanisms that secure formal participation by citizens.

Notes

[1] Dinan, D. (2002) Institutions and governance 2001-2002: Debating the EU's future *Journal of Common Market Studies* 40 Annual Review pages 29-43. The Irish referendum and anti-globalisation demonstrations both in Göteborg and at the G-7 meeting in Genoa reinforced the perception of rejection and aloofness from large sections of public opinion. In his speech at the inaugural session of the Convention the President of the Council, Aznar, recognized explicitly that *Nice is the reason for which we are here.* Speech to the opening session, 28 February 2002, Brussels; *05/03/2002*; CONV 4/02.

[2] Hoffmann, L. op. cit.

[3] Deloche-Gaudez, F. (2001) *The Convention on a Charter of Fundamental Rights: a method for the future?* Groupement d'Etudes et de Recherches Notre Europe Research and Policy Paper No. 15

[4] In this line, de Schutter writes that the general impression was that the drafting process of the Charter compared favourably with the classical intergovernmental negotiations that preceded EU constitutional changes, even when such intergovernmental conferences were prepared by 'reflection groups'. De Schutter, O. (2002) Europe in search of its civil society, in Eriksen, E.O.; Fossum, J. E. and Menéndez, A. (eds.) *The Chartering of Europe, The Charter of Fundamental Rights in context* ARENA Report 8/2001 pages.155-181

[5] Magnette, P. op. cit.

[6] Eriksen, E. O. and Fossum, J. E. (2002) Democracy through strong publics in the European Union? *Journal of Common Market Studies* 40:3 pages 401-424 at 403

[7] Maurer, A. (2003) Less bargaining-more deliberation. The Convention method for enhancing EU democracy. IPG page 168

[8] Delouche-Gaudez, F. op. cit. page 25

[9] Hoffmann, L and Verges-Bausili, A. op. cit.

[10] Magnette, P. op. cit.