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Internal Reform and Constitution building Capacities



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Introduction

The multi level system of the European Union derives its legitimacy from democratic and efficient institutions. In order to assess the legitimacy of the Convention it seems very useful to draw on some of the features of the often perceived “democratic deficit” of the Union, which is also the source of the legitimacy deficit, presented by Paul Craig (1999, p. 24), as a normative point of reference:

- the ‘distance issue’: The extension of the Community competences has involved the transfer of authority to Brussels and thus away of the nation state. This means that matters are further removed from the citizens thereby questioning the Community’s legitimacy.
- the ‘executive dominance issue’: The integration process enhances the power of the executive bodies (Council of the EU, European Council and Commission) at the expense of legislative bodies. The national parliament’s power to scrutinize their governments is hampered by their incapability to keep pace with the European legislative process. The European Parliament due to its rather limited powers, lack of voters’ interest and absence of a developed party system does not remove the problem.

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- the ‘bypassing of democracy argument’: The “underworld” (Weiler 1999) of the complex committee structure known as Comitology serves as the most prominent example of this argument. Technocrats and interest groups dominate the policy-making process excluding regular channels of democratic governance.
- the ‘transparency and complexity issue’: The complexity of the various legislative procedures means that it is virtually impossible even for experts to understand them. In addition, much of the decision-making of the Union to a large extent takes place behind closed doors.

Since the Treaty of Maastricht, the issue of legitimacy has become increasingly prominent. The strive to tackle this problem took place within the institutional boundaries of two Intergovernmental Conferences producing numerous new Treaty provisions. The dissatisfaction and disappointment of this endeavour was widespread and deep – especially after the Intergovernmental Conference in Nice.²

But this have not been very successful. This time a different approach has been taken. In order to reform the political system of the Union the European Council has set up the Convention on the Future of Europe (hereinafter the Convention). But we have to ask: Is the Convention a legitimate institution to bring Europe closer to its citizens, to reduce the dominance of the executive, technocrats and interest groups and to enhance transparency and what may be the impact on the next Intergovernmental Conference (IGC) in 2004?

Legitimacy

The issue of legitimacy of the European Union can be addressed in at least two different ways: First, one can challenge the democratic quality of its *institutional arrangement* and/or, secondly, one can discuss the *method* of achieving institutional settings. Due to the fact that the future institutional arrangement of the Union is still heavily discussed I will refrain from speculating on possible outcomes and will merely deal with the second aspect thus focusing whether this newly established body is legitimate or not. In order to assess the legitimacy of the Convention it has to be judged against the background of the normative quality of its institutional counterpart, the Intergovernmental Conference.

The IGC method or the tradition of Treaty amendments

The current amendment procedure of the Treaties of the Union falls within the competence of the Intergovernmental Conference. According to Art. 48 TEU, Treaty amendments need a consensus of the Member States at the occasion of an Intergovernmental Conference.³ This stage is preceded by a so-called Community phase, in which the Council, after a proposal by the Commission or another Member state, and after consultation of the European Parliament and the Commission “delivers an opinion in favour” of calling for an Intergovernmental Conference. This leads us to the conclusion that the Member States are, if not the sole but the primary actors in this process. The amendments will not enter into force until all Member

² The President of the Commission Prodi deplored that the Treaty of Nice “is not understandable” (Agence Europe, 11 December 2000). The British Prime Minister Blair admitted that the EU could not “continue to take decisions as important as this in this way” (European Voice 46/2000, p. 1). The British weekly “The Economist” (16 December 2000) stated that the negotiators themselves were taken by surprise about the confrontational style of the negotiations, which might have been a “foretaste of the power struggle to come”.

³ Apart from this general rule, there are several Treaty provisions whose amendment does not require the setting up of an intergovernmental conference. These cases include acts concerning the European citizenship (Art. 22 EC), election of the European Parliament (Art. 190 p. 4 EC), acts on the Community’s own resources (Art. 269 EC)

States “in accordance with their respective constitutional requirements” have ratified them.⁴ This means that the parliaments of the Member States have to approve the proposed amendments.⁵ In some cases referenda will have to be held. The approval of the European Parliament is not required.

An Intergovernmental Conference provides “an arena for diplomatic negotiations between Member States in which each party sought legitimately to maximise its gains without regard for the overall picture” (Giscard d’Estaing 2002, p. 14). In concrete terms this work is done by national ministers and their bureaucracies whereas the most contentious items are left to the Heads of State and Government. Supranational institutions (Commission and Parliament) as well as actors from the civil society have always played a minor role in this amendment procedure.

In the light of the last two Treaty revisions in Amsterdam and Nice, it is now widely accepted that the traditional IGC method to amend the Union’s Treaties (Art. 48 TEU) has not only reached its limits but also lost its legitimacy thus contributing to the – above mentioned – issues of distance, executive dominance and lack of transparency.

Besides legitimacy, other desired issues such as efficiency have also been negatively affected. Taking place behind closed doors, an intergovernmental conference provides a perfect setting to pursue traditional national interests without taking the overall European interest properly into account. Hoffmann (2002, pp. 3-5) has argued this has been due to the fact that (a) the issues the IGC of Amsterdam and Nizza were dealing with are more likely to lead to deadlock in negotiations, (b) the division between the Member States has been increased (c) the influence of the European institutions has been kept to a minimum within the context of an IGC.

A new method on the rise

Both the Declaration of Nice and particularly the Laeken Declaration called for a reorganisation of the entire Treaty structure of the Union putting more emphasis on transparency and efficiency thus increasing the degree of legitimacy of the whole integration project. These two Declarations along with the Humboldt-Speech by the German Foreign Minister Joschka Fischer have triggered a so far unprecedented constitutional debate in Europe.

The European Council in Laeken decided to “convene a Convention composed of the main parties involved in the debate on the future of the Union” (...) “in order to pave the way for the next Intergovernmental Conference as broadly and openly as possible”.⁶ The method designed to conduct this debate is at least as important as the results of the process itself. This process of constitutionalisation is important even if its results are perceived unsuccessful. Thus, the quest for legitimacy of the Union involves more than the adoption of a more or less proper institutional arrangement. In addition, it is essential to arouse a constitutional awareness among the citizens of the Union. In order to achieve this, it is necessary that the

⁴ This means that a Member State is free to decide whether its national parliament or any other political entity like regions should have a say over this issue.

⁵ An exception is the UK where the government is entitled to ratify Treaty changes without prior parliamentary approval.

⁶ Laeken Declaration - The Future of the European Union by the European Council, 15. December 2001, SN 273/01.

debate within the Convention is communicated to the outside by the political elites both at the European and the national level and the media.

Composition

The composition of the Convention includes not only the national executives and their transnational counterpart, namely the Commission, but also the directly elected and thus legitimised national and supranational legislatures. In view of the next enlargement it is highly remarkable that the Laeken Declaration has given full membership instead of mere observer status to the representatives of the future members albeit these countries are not entitled to prevent a possible consensus reached in the Convention. Another aspect of this Convention is the involvement of the civil society via the so-called Forum, i.e. NGOs, NPOs, think tanks⁷, lobby groups from the business world and social partners, which is deemed to deliver an “input into the debate”⁸ of the Convention. Compared with an IGC, the sheer number of different actors and institutions represented in the Convention has increased the possibilities of forming alliances during the policy and decision making process within the Convention (Hoffmann 2002, p. 7). Additionally, the composition of the Convention including the Forum reflects not only the polycentric character of contemporary societies in terms of interests, cultures, regions but also mirrors the institutions involved in the daily decision making process. Consequently, it is rather impossible for an IGC to mirror this range of interests and feelings that coexist in the Union (Dehousse 2001, p. 182).

Thus, we can agree with Lenaerts and Desomer (2002, p. 1238) who argued that the inclusion of legislative powers has led to a “parliamentarization of the Union’s constitution-making procedure and thus, in principle, to an increase in input legitimacy”. Although we have to acknowledge that the Convention, in the words of its chairman, V. Giscard d’Estaing, is neither an Intergovernmental Conference because it has “not been given a mandate by governments to negotiate on their behalf the solutions which we propose” nor a parliament because it is “not an institution elected by citizens to draft legislative texts. [...] A Convention is a group of men and women meeting for the sole purpose of preparing a joint proposal.”⁹ In sum, it seems to be fair to say that the Convention is “closer” to the citizens than an executive dominated Intergovernmental Conference at least in terms of composition.

Transparency

Besides the composition of the Convention, it is the issue of transparency which contributes to the legitimacy of the ongoing constitutional debate.¹⁰ All plenary sessions which take place two times a month are open to the general public.¹¹ Acknowledging the fact that only a minority of people has the opportunity to attend the plenary sessions in Brussels, the more important aspect with regard to transparency is the establishment of an internet site publishing the entire Convention’s debate. This includes not only the plenary sessions but also (nearly) every intervention by the (full and alternate) members as well as the ones brought forward by other actors or institutions involved. This kind of openness of and access to the Convention’s

⁷ A quick look on the Futurum-homepage shows that the debate among think tanks is dominated by the Brussels-based European Policy Centre.

⁸ Laeken Declaration - The Future of the European Union by the European Council, 15. December 2001, SN 273/01.

⁹ Introductory Speech by President V. Giscard d’Estaing to the Convention on the Future of Europe, 26 February 2002. SN 1565/02. p. 12.

¹⁰ See above the “transparency issue” mentioned by Craig (1999, p. 24)

¹¹ Conversely, the Philadelphia Convention operated in secrecy in order to ensure the tranquillity of the public and the freedom of speech of the single members of the Convention (Lenaerts/Desomer 2002, p. 1242).

debate enables civil society and the press to monitor and scrutinize the constitutional debate. Moreover, the Laeken Declaration stated that a Forum should be set up which gives civil society an additional possibility to raise its voice and contribute to the constitutional debate. Thus, there exists a huge debate outside the institutional boundaries of the Convention which is also covered by the Forum's website set up by the Secretariat of the Praesidium.¹² But we have to bear in mind thus even this debate is confined to EU experts and does not include the general public.

Impact

Despite the numerous questions derived from the Laeken Declaration, the mandate of the Convention can be considered as rather wide and open. However, the Laeken Council has attached several "safety features" in order to keep the Convention at bay. First, the Convention has no *carte blanche* but is rather obliged to operate in the light of the 56 questions formulated in the Laeken Declaration.¹³ Secondly, the selection of Valéry Giscard d'Estaing as Chairman of the Convention by the European Council can be interpreted as a strong argument in favour of a more intergovernmental Europe and against any attempt towards a more federal institutional architecture. Thirdly, the rather short time frame of 12 months given to the Convention can also be interpreted as a further attempt by the European Council to prevent the Convention from dealing with issues not formulated in the Laeken Declaration (Hoffmann 2002, pp. 7-9). Fourthly, creeping advance of foreign ministers (Villepin, Fischer) is also an indicator that the Convention's work is taken seriously and is subject to be supervised and influenced by the national governments concerned.

The Laeken Declaration itself states that "[t]he Convention will consider the various issues. It will draw up a final document which may comprise either different options, indicating the degree of support which they received, or recommendations if consensus is achieved. Together with the outcome of national debates on the future of the Union, the final document will provide a starting point for discussions in the Intergovernmental Conference, which will take the ultimate decisions." But we know from the experience from the first Convention drafting the Charter of Fundamental Rights that the impact of its work will largely depend on the extent of approval the draft enjoys among the members of the Convention. The chairman Valéry Giscard d'Estaing is fully aware of this when he argued that "there is no doubt that, in the eyes of the public, our recommendation would carry considerable weight and authority if we could manage to achieve broad consensus on a single proposal which we could all present."¹⁴ But as Lenaerts and Desomer (2002, p. 1237) have pointed out the Convention has chosen to adopt a maximalist approach operating "as if"¹⁵ it were drafting a Constitution (Praesidium 2002). If the Convention is successful to reach a consensus and comes up with a powerful and plausible draft that is capable to convince the citizens of the Union it will be very difficult for the IGC to ignore the Convention's suggestions.

An important issue revolves around the problem with regard to the adoption of this constitution. We can identify three different options so far: (a) maintenance of the present system of treaty change under Art. 48 TEU which means that every amendment of primary

¹² See europa.eu.int/futurum_convention/index_en.htm

¹³ This is particularly clear from the debate revolving around national parliaments (Philippart 2002, p. 2).

¹⁴ Introductory Speech by President V. Giscard d'Estaing to the Convention on the Future of Europe, 26 February 2002. SN 1565/02. p. 11.

¹⁵ This term is borrowed from the European Commission qualifying approach of the Convention which drafted the Charter of Fundamental Rights of the European Union as the "as if"-doctrine. Commission Communication on the legal nature of the Charter of Fundamental Rights of the European Union, 11 October 2000, COM (2000) 644, p. 4.

law requires unanimity among the member states. (b) adoption of treaty changes by the majority of a certain number of member states, e.g. fifth-sixth according to the Feasibility Study of the Commission (Lamoureux 2002, p. 29), or population, e.g. assent of the member states representing four-fifth of the Union's population (EPP Convention Group 2003, p. 94) and (c) holding a Union wide referendum (Duff 2002, Art. 18). From a realistic point of view it is rather unlikely to assume that the Member States will renounce their right to vote. And it is also an unsettled normative question whether the people of a single member state should be outvoted by a majority of the Union's population at such a decisive question like the adoption constitution. Considering the difficulties of the two options (b) and (c) it seems reasonable to believe that the current amendment procedure will prevail. But the problem still remains. After enlargement the Union will have 25 members. This means that future Treaty amendments will be - under the current requirement of unanimity - a rather cumbersome procedure that makes ambitious constitutional changes highly unrealistic.

A possible solution in the medium term may be that the current convention method serves as a role model for future treaty changes which means that it should prepare and thus complement the current amendment procedure but still leaves the final say to every single member state (Hoffmann 2002). Therefore, I advocate an institutionalisation of the current 'Convention method' in order to ensure a broad discussion both at the level of the Union and the Member States. Only this process-oriented approach is able to maximise the input of complex contemporary societies into fundamental political decision making. We hope that the permanent establishment of the "Convention method" will sharpen the awareness of the Union's citizens as well as the media on the envisaged amendments concerned and thus raise the ambitions of the IGC (Lenaerts/Desomer 2002, p. 1246).

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