

Taking stock of the European Convention What added value does the Convention bring to the process of treaty revision?

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Introduction

According to Article 48 of the Treaty on the European Union (TEU), the founding treaties of the Union can only be amended through a three-step procedure. First, the Council calls an Intergovernmental Conference (IGC), after having consulted the European Parliament (EP) and the Commission. Second, within the framework of the IGC, representatives of the governments of the Member States negotiate and sign the amendments to the treaties by common accord. Third, the agreement is submitted to national ratification procedures. When all three steps are concluded, each Member State having ratified the amendments to the treaty, the changes enter into force.

However, recent developments have shown that the legal text of Article 48 does not fully reflect the political reality of treaty revision.¹ Since the end of February 2002, a so-called European Convention, composed of 105 full members, representing the EP, national parliaments, the Commission and national governments, has been discussing how the basic treaties should be reformed. The result of the discussions, a draft constitutional treaty intended to replace the current treaties, was formally submitted in June at the Tessaioniki European Council by Convention President Valery Giscard d'Estaing. The draft treaty will constitute the starting-point for an IGC, beginning this autumn and finishing next spring, before the next elections to the EP.

The potential importance of these developments can hardly be overestimated. By letting a body composed of a majority of parliamentarians elaborate a draft treaty,

¹ Admittedly, the departure from the formal procedure used for treaty revisions is no complete novelty. Previous IGCs have been prepared by different kinds of ad hoc bodies, such as the Reflection Group before the 1996 IGC and the group of Wise men before the Nice IGC. But the European Convention brings these informal arrangements to a completely new scale, being much larger and with much more political weight than previous bodies.

governments have already, for all intents and purposes, come to share their traditional prerogative to draft international treaties with European and national legislatures. Moreover, many actors now work actively for an institutionalisation of the Convention method by integrating it as a formal part of the treaty revision procedure.² Should the Convention method be institutionalised as such, national governments will have permanently reduced their freedom and power as “Masters of the Treaties”. However, it should be noted that the Member State governments still have the last word, for, as it stands, the destiny of the Convention method and the draft constitutional treaty still rest entirely in the hands of the IGC. Indeed, it remains an open question whether this new institution is really necessary in the already complicated architecture of the EU. What value does the Convention in fact *add* to the procedure used for treaty revision? Only when we know the answer to this question, can we really discuss the future of the Convention method and the draft constitutional treaty.

This article will assess the Convention method’s added value by examining its contribution to the process of treaty revision from three different perspectives: (I) rule by the people; (II) rule for the people; and (III) acceptance by the people. As will be argued throughout the article, all these aspects are of fundamental importance for the good functioning of the EU. If the Convention adds significant value along any of these parameters, this would strongly support the use of the new method also for future treaty revisions. The conclusion of the article will sum up of the assessment and discuss possible reforms of the treaties’ revision clause.

I Rule by the people

Since the EU treaties indicate that the Union is “founded on the principle of democracy” (Art 6 TEU), an important role should be given to popular input in the process of treaty revision; if the fundamental process of treaty revision is not democratic, the Union’s democratic credentials would appear seriously undermined indeed. As the EU is a very large political system, the popular input can realistically only take place indirectly, through the intermediary of representatives.³ For such representative democracy to work properly, it is crucial that the decision-making

² A study from a Swedish think-tank for example concludes that “the Convention method has come to stay.” (Johansson (2003:74))

³ As Robert Dahl (1989) has showed, representative democracy replaced direct democracy through the “second transformation” of democracy, resulting from the increased size of the State. Although some people look for a “third transformation”, resulting in something else than representative democracy, little concrete evidence has been presented to support that this is actually possible without losing what is actually “good” with democracy.

process is transparent and that there are procedures through which the representatives can be held accountable. To what extent, we must ask, are EU treaty revisions carried out by elected representatives who are accountable to the citizens?

The traditional process of treaty revision, as described in Article 48 TEU, is based mainly on indirect representation of the citizens, through the intermediary of national governments. In an IGC, government representatives meet regularly throughout a given period of time to negotiate on the basis of instructions, or "national positions". The instructions are normally thoroughly prepared internally in the government structure and, at least in some cases, rather broadly based within the national institutional system. Furthermore, the procedure described in Article 48 is characterized by a rather high level of accountability. As mentioned above, agreements reached in the IGC have to be ratified according to the constitutional provisions of the different Member States. This normally implies either that it must be accepted by a directly elected parliament, or by the national citizens in a referendum.

Arguably, the weakest point in the traditional revision process is transparency, since IGCs are normally very secretive. But even though it might be difficult for the national parliaments or the citizens to know exactly what is happening in an IGC, they know at least that their government can block any decision with its veto. In principle, this means that citizens and the national parliaments can hold their governments accountable for all decisions made by the IGC.

Now, the question is whether the integration of the Convention method in the treaties' revision procedure strengthens the ideal of "rule by the people". At first sight, this seems to be the case. To 69 % composed of parliamentarians, the Convention is arguably more representative of the European citizenry than an IGC. In contrast to an IGC, the Convention includes 16 representatives from the EP, drawn from all different political groups. Moreover, each national parliament has two representatives in the Convention, which opens up the possibility for national opposition parties – a group that is normally excluded from an IGC – to participate in the discussions. Turning to the criterion of transparency, the Convention also seems to meet relatively high standards. Not only were the Convention's plenary meetings open to the public, but debates could also be followed on the internet and there were verbatim records from all the plenary meetings, covering the debates word for word.⁴ Finally, a great amount of work was invested in keeping the Convention website updated. Virtually all the documents that the Convention members sent in were published more or less immediately on the website. Even the speeches held in

⁴ See the web page of the EP's delegation, http://www.europarl.eu.int/europe2004/index_en.htm

the plenary were published. The website also includes a search engine, which makes it relatively easy for citizens to find information about the Convention.⁵

However, when it comes to the crucial criteria of accountability, the Convention suffers from some serious flaws. To understand this, one has to look closer at the decision-making procedures in the Convention, characterised by the dominating role of the presidium and the vagueness of the decision-making rules. The presidium was an exclusive twelve-member group, responsible for leading the whole Convention process.⁶ Its tasks included planning the work of the Convention; the establishment of an agenda for the meetings; the setting up working groups for dealing with different topics; the chairing of these working groups; and – most importantly – the drafting of the treaty text, on the basis of the contributions from the Convention members.⁷

In other words, the presidium was a very powerful and exclusive group within the broadly composed Convention. Moreover, in contrast to the transparent Convention, it met behind closed doors, which meant that the other Convention members often did not know what it was doing or how different decisions had been made.⁸ From the perspective of “rule by the people”, the situation was also made worse by the fact that the Convention took all its decisions through “consensus”. This concept is normally taken to mean something in between simple majority and unanimity, but as the exact meaning of the concept was never established in the Convention, it implied a great freedom of manoeuvre for the presidium – and especially for its president – to “weigh” the voices of the different Convention members in the way it found suitable. In practice, there were no accountability mechanisms to ensure that the presidium kept to the view endorsed by the Convention plenary.

In sum, the Convention’s qualities in terms of rule by the people are largely reduced by its decision-making procedures. In fact, it is practically impossible to hold

⁵ See the Convention’s website: <http://european-convention.eu.int/bienvenue.asp?lang=EN&Content=>

⁶ To be more precise, the presidium was composed of nine Convention members drawn from the Convention’s four different components – two national parliamentarians, two MEPs, two commissioners and three government representatives (from the three countries holding the presidency during the Convention’s work). The three last presidium members were the “troika”, composed of President Valéry Giscard d’Estaing and the two Vice-Presidents Giuliano Amato and Jean-Luc Dehaene.

⁷ CONV 9/02, Note on working methods.

⁸ For example, Jens-Peter Bonde, MEP, complained that he “is not informed by Hänsch and de Vigo about what happens in the presidium,” and that, consequently, “we don’t even know what is going on in the presidium and can’t take part in the real negotiations.” (Lecture by Jens-Peter Bonde, 24 March 2003).

the Convention members accountable for the output of the Convention since it is unclear who actually made the final decisions and, therefore, was responsible for them.⁹ When compared to the traditional Article 48 Procedure, the convention's contribution to rule by the people must therefore be considered to be very modest.¹⁰

II Rule for the people

In the literature, rule *for* the people is often seen as something distinct from rule *by* the people. While the latter implies that the decision-makers should address the concerns of the citizens, the former means that the decisions should deal with the given problems in the best possible manner, taking account of all relevant facts. Notwithstanding the obvious difficulties associated with assessing the quality of decision-making in a satisfying manner, it seems quite clear that weaknesses in terms of "rule by the people" have become a serious problem for the traditional revision procedure. One trouble is that the need to reach common accord among governments - negotiating on the basis of rigid national positions - reduces the quality of the deliberations in the IGC, as well as the quality of its output.¹¹ Another difficulty appears to be that governments feel little incentive to engage in negotiations during most of the IGC.¹² The lack of serious discussions during the prepara-

⁹ For another opinion see Hoffman, who argues that "due to the Convention's inherently transparent character and the fact that submitted documents are made public in the name of the Convention's members, the level of accountability is undoubtedly higher than in an IGC." However, he seems to have a rather peculiar view on accountability, since he also states that "Convention members hold their position only temporarily, which has the great advantage that they do not have to perform in a way that ensures their re-election or re-nomination". (Hoffman, 2002:18)

¹⁰ To be fair, it should be admitted that the Convention included a certain measure of direct participation. In particular, there was an internet based "Forum" established in parallel to the European Convention, through which civil society organizations could publish their contributions. The Convention also dedicated one day (24-25 June 2002) to the hearing of representatives from civil society organizations. However, there is little reason to believe that the civil society organisations had an important direct influence on the outcome, beyond that of normal "lobbying".

¹¹ de Witte (2002: 44). See also Louis (2001: 89), who describes IGCs as the combination of an exaggerated "search for the emergence of areas of consensus, with a minimum concern for their actual content and their coherence with some global principles".

¹² In an account of the Amsterdam IGC, Bobby McDonagh (1998) describes how virtually all the important issues to be dealt with were left to the final weeks, since the successive presidencies wanted to avoid submitting draft texts that risked being attacked by "the jackal pack waiting to tear it apart the moment it faltered in its stride." Jean-Victor Louis (2001: 88) confirms that there was "little real negotiation during a large part of the [Amsterdam IGC]" and that there was a "feeling of absence of time constraint during parts of the Conference."

tions helps to explain why IGCs tend to finish in the middle of the night, under fairly chaotic forms and extreme time pressure.¹³

Considering the problems facing the traditional IGC, there seems to be quite some room for improvement of the treaty revision procedure. Arguably, a large part of this room can be filled by the European Convention. To begin with, the Convention spent rather lot of time to discuss the various problems of the EU's way of functioning. Starting with a long "listening phase", lasting during the spring and summer 2002, the Convention then spent several months split up in 11 different working groups, discussing topics such as "Subsidiarity", "External Action" and "Social Europe". Once the working groups had presented their recommendations to the Convention during the last quarter of 2002, the presidium started drafting treaty articles, which were then submitted to the plenary for discussion. The Convention members then proposed amendments to the presidium's texts, which were then revised and submitted another time to the plenary. Finally, during the last week of the Convention, its three main components – national parliamentarians, MEPs and government representatives – met separately to try to find some kind agreement on the final deal.

The Convention's elaboration of a draft constitutional treaty has several important implications for quality of the "rule for the people" in the process of treaty revision. The most obvious consequence is that the IGC that will follow the Convention will be facing a less immediate time pressure, as it will have a worked through proposal to fall back on. Put another way, the existence of the draft constitutional treaty implies that the outcome of the IGC will probably be rather constructive and productive. Several of the Convention's important proposals will almost surely live through the IGC: just to mention a few examples, the draft treaty reduces the number of legal instruments; the EU is given a single legal personality; the national parliaments are given a role to play in the check of the subsidiarity principle, including the possibility to refer the case to the Court of Justice; the competences of the EU is written more clearly into the treaty; and a post of Foreign Minister, located within the Commission but with instructions from the Council, is created. On all these important points, the agreement in the Convention was mainly the consequence of discussions in the working groups, most of which seem to have been remarkably fruitful. In fact, virtually all available sources indicate that there has been a good

¹³ See, for example, Stubb's and Gray's (2001) account of the Nice IGC.

and constructive debate in the Convention.¹⁴ These positive judgements stand in stark contrast to the negative ones often made about the debate in IGCs.¹⁵

The superior quality of the debate is arguably linked to the fact that there was a “wide-spread perception among the members of the Convention that their mandates are personal and not binding”.¹⁶ This flexibility surely facilitated the process of discussion and problem-solving, as the Convention Members could be open to the arguments of the others and change their position whenever proven wrong in the debate.¹⁷ In the Convention, even the government representatives sometimes adopted a rather personal view, which they could change without consulting the capital.¹⁸ However, three other factors surely also contributed to the relatively constructive result. First, the coordinating and leading role of the presidium was clearly a necessary condition for producing a substantive output; all the presidium members were experienced politicians, all of which had extensive academic backgrounds, often including legal studies.¹⁹ Second, the role played by the Convention secretariat was arguably crucial for the success of the exercise. Composed of skilful civil servants and experts from different European and national institutions, the secretariat guided both the working groups and the presidium in the drafting exercise.²⁰ Finally, a certain importance should be referred to the hearings that were

¹⁴ See, in particular, Johansson, 2003: 65 and Magnette 2002. The good quality of the debate is also confirmed by interview with Klaus Hansch and Jens-Peter Bonde MEPs; Costa Pereira, assistant to Andrew Duff, MEP; and Jacques Santer, Bobby McDonagh and Gisela Stuart, government representatives.

¹⁵ For example, it has been claimed that IGCs “unhappily combines a narrow consultative base, a protracted timescale and a procedure which encourages negative criticism rather than constructive debate” (Walker, quoted in de Witte, 2002:57)

¹⁶ Johansson (2003: 49). An illustrative example of this is Jacques Santer, the representative of Luxembourg’s Prime Minister, who explained in an interview that: “Je représente le premier ministre à titre personnel. Mais je ne reçois pas de mandat impératif. Je suis entièrement libre de faire ce que j’entends, ayant naturellement en vue l’intérêt luxembourgeois. [Le Premier ministre] n’intervient pas du tout, mais je le tiens au courant.”

¹⁷ As Neyer (2002) argues, deliberation on the basis on flexible positions has certain advantages, compared to bargaining on the basis of fixed positions.

¹⁸ For example, a report from a parliamentary committee in Sweden explains that the government did not in its internal work prepare Swedish positions in the same way as usual, involving all departments. Rather, the government representative could use the government’s all resources, but chose herself what she wants to say. In the report it is even argued that it is “logic that the members of the Convention perceive their mandates as open and see the Convention as a possibility to discuss solutions that are not anchored in national negotiation positions”.

¹⁹ See bibliographical notes on the Convention’s website, <http://european-convention.eu.int/bienvenue.asp?lang=EN&Content=>

²⁰ *ibid*

held in the different working groups during the early stages. These hearings attracted people with great knowledge of the various topics under discussion and were arguably of great importance for pointing out different weaknesses in the current treaties.²¹

III Acceptance by the people

So far, it has been argued that the Convention adds to the rule *for* the people in the process of treaty change, while it does not strengthen the rule *by* the people.²² Yet, we have not examined if the Convention strengthens the link between the EU and the citizens. Just as a political system may be accepted by the citizens without embodying a rule by and for the people,²³ a democratic and efficient system may sometimes be incapable of winning the hearts and minds of the citizens.²⁴ It should therefore be of great interest to examine, separately to the issues discussed above, if the Convention can make the EU more popular in the eyes of the citizens.

Social acceptance is of particular importance for the process of treaty revision. During the last decade, lacking popular support has been a repeated obstacle for treaty change. In 1992, the Danish rejected the Maastricht Treaty in a referendum, and in 2001 the Irish refused to endorse the Nice Treaty in a referendum. In fact, the popular scepticism towards the EU and the critique directed against the last treaty revisions should be seen as major justifications for creating the European Convention. When the heads of State or Government took the decision to set up a Convention, during the Laeken European Council in December 2001, they stressed the need to bring the EU closer to the citizens. In the Laeken declaration, the Convention itself was justified by the need to prepare the next IGC "as broadly and openly as possi-

²¹ It is interesting to note that some experts were called by several working groups. For example, no less than four different groups (Subsidiarity, Charter/ECHR, Legal Personality, Simplification) heard Michel Petite and Jean-Claude Piris, Director Generals of the Commission's and the Council's legal services, respectively. The working group on complementary competences is the only one that does not report about any hearings.

²² Often, these two notions are considered from the perspective of legitimacy, and are then called *input* and *output* legitimacy (see for example Sharpf, 1999). Using that terminology, it has been argued that the Convention adds a fair amount of output legitimacy, but does not significantly contribute to the input legitimacy.

²³ In some cases, people may come to accept or reject decision-making out of habit or tradition. In other cases the fact that a decision is made or defended by a charismatic leader may be enough to create acceptance.

²⁴ To use Joseph Weiler's (1997:251) words, "there is no necessary connection between the objective strands of legitimacy/illegitimacy and its social manifestations."

ble".²⁵ Did these hopes in the Convention method materialise; did the Convention bring the EU closer to the citizens?

Although it might be too early to determine the impact of the Convention before the IGC has even started, it must be noted that little evidence so far supports the idea that the Convention would increase popular acceptance in a significant manner. Arguably, an institution can strengthen popular acceptance only if the citizens hear about the institution in question. However, roughly two months after the Convention had been launched, in April 2002, only 28% of persons interviewed by the Eurobarometer claimed to have heard about the Convention. In October 2002, this level of awareness had not changed.²⁶ These poll results can be compared to polls made during the early stages of the Amsterdam IGC. Asked if they had heard about the IGC in the media, 17% of European citizens gave a positive answer in October 1994. However, in April 1995, just after the launch of the IGC, this figure had risen to 31%. According to the Eurobarometer, this indicated that "as the public debate intensifies so public awareness has increased."²⁷ In sum, these statistics indicate that the Convention does not reach more citizens than an IGC.

This result might appear surprising since the Convention is a very transparent institution, deals with matters of great importance and includes both European and national parliamentarians. However, the low level of public awareness is explained when examining the legal status of the Convention, and its internal decision-making process. According to the Laeken declaration, the Convention was not to change the treaties, but merely "consider various issues" and 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*. (emphasis added)"²⁸ The fact that the Convention could only make recommendations if it reached consensus meant that it faced a dilemma if it wanted to attract the media. On the one hand, it would have very little influence, and thus limited attention, if its proceedings were characterised of a high level of conflict. On the other hand, the interest of the media would be fairly limited even if it did reach consensus, since there would be no great conflict to report about.

²⁵ See the Conclusions of the presidency on the Laeken European Council: <http://europa.eu.int/council/off/conclu/index.htm>

²⁶ Standard Eurobarometer nr 57 and 58

²⁷ Standard Eurobarometer nr 43 and 44

²⁸ See the Conclusions of the presidency on the Laeken European Council: <http://europa.eu.int/council/off/conclu/index.htm>

The European Convention ended in consensus rather than conflict. Consequently, when President Giscard d'Estaing presented the final draft, after an extended process of compromise in which proposals had been made and adjusted several times already, it was not given great attention in the media.²⁹ In comparison, IGCs - and especially their endgames, during which the heads of State or Government make the final deal - are considerable media events. For example, according to some sources, over 3000 journalists were present during the end-game of the Amsterdam IGC.³⁰

Conclusions: what next?

This article has presented a rather mixed assessment of the Convention's added value, including both negative and positive results. To start with the negative results, we have found no evidence that the Convention has managed to bring the EU closer to its citizens, which was the original intention with the setting up of the Convention. On the contrary, certain statistics indicate that the European Convention has not reached more citizens than a traditional IGC. This is clearly a disappointing result for those who had hoped that the Convention would guarantee that the constitutional treaty would not be rejected in a popular referendum in any of the Member States. There is still a real risk that, say, Poland or Denmark, which have both declared that they will organise referendums to ratify the constitutional treaty, will reject the treaty and thereby block the whole revision process.

The second negative result is that the Convention does not really contribute to strengthening the democratic ideal of "rule by the people". The internal decision-making procedures in the Convention are simply too vague to allow a sufficient level of accountability. The fact that the powerful presidium worked behind closed doors and that its president was rather free to interpret the notion of consensus in a way that suited him, makes it very difficult to hold the Convention members responsible for the output of the Convention. However, it should be stressed that the traditional revision procedure, as described in Article 48 TEU, already meets rather high standards in terms of representation and accountability. On the one hand, this means, that it is no disaster if the Convention does not add value in this regard. On the other hand, it implies that the IGC, and the ratification procedures to which it is

²⁹ The main exception seems to have been British media which had extensive coverage, most of which, however, had very critical or nationalistic twist.

³⁰ Grünhage, in Monar & Wessels, 2001:23. In sum, if a journalist is to write an article about the Convention, he is likely to find a great deal of interesting information, but will find it hard to make an article that catches the attention of the reader. A journalist who is to write an article about the IGC, on the other hand, will have a more difficult time finding out the details about the negotiations, but will rather easily produce a story that is easy to understand and catches the readers' attention.

intimately linked, must continue to be part of the treaties' revision procedure. The proposals that have been put forward by some to let the Convention replace the IGC do thus not seem acceptable.³¹

Yet, the assessment carried out in this article also identified one very positive aspect of the Convention method. The debate in the European Convention was of relatively high quality and the various reform options were discussed during an extended period of time. This can be contrasted to the sometimes very hasty work conducted during the IGC end-games; when the heads of State or Government bargain until they are too exhausted not to agree on the final document, they sometimes hardly know themselves what has been agreed. Given the widespread critique of the output from the last IGC's,³² it seems necessary to prepare the conference more thoroughly. Since the methods were used to prepare the last IGCs failed to make a lasting impression on the subsequent negotiations,³³ it would appear reasonable to give this preparatory role to the Convention in the future. Indeed, the evidence presented in this article indicates that the Convention can significantly strengthen the "rule for the people" in the process of treaty revision.

However, it should be noted that all this does not necessarily mean that the Convention method should be institutionalised. Just as today, it can be used "informally" without basis in the treaties. Moreover, a very difficult question is what exactly should be regulated in the treaty. If the treaty only mentions that an unidentified Convention should prepare IGCs, one could question why it should be mentioned at all. At least in theory, the governments would be free to manipulate the Conventions' composition and working methods as they wish. On the other hand, it might be dangerous to specify too much in the treaties, since there will be a need

³¹ Another proposal that has circulated in the debate (most notably in a proposal from the European University Institute (2000)) is to reduce the IGC to one single meeting of the European Council. The heads of State or Government, would then in principle only say "yes" or "no" to the Convention's proposal. It should be noted, however, that this solution would radically increase the risk for rejection of the whole package by one of the governments. This would not increase efficiency, but, on the contrary, only block the whole revision procedure.

³² To mention only one example, it has been said about the Amsterdam Treaty that "For a Treaty intended to bring the EU closer to its citizens, [it] is a caricature of all that is wrong with the EU. More than 50 pages long, littered with arcane language and unexplained references to existing treaty provisions, and including numerous protocols and declarations, the Treaty is unlikely to endear itself or the EU to a sceptical public." (Dinan, 1999:305)

³³ According to McDonagh (1998), the importance of the Reflection Group that prepared the Amsterdam IGC was "historic" once the IGC started. Stubb and Gray (2001) report that, at the beginning of the endgame in Nice, "it seemed as if 18 months of preparation had been thrown out of the window and the negotiations started from scratch."

for flexibility in the future.³⁴ In any case, it might seem premature to discuss the exact wording of the new revision clause before the IGC has even started discussing the draft constitutional treaty. As it stands, the national governments still have the last word when it comes to reforming the constitutional treaty, including the revision of the revision clause itself.

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³⁴ The proposal included in the EPP's constitutional draft seems rather reasonable, with the exception, perhaps, of the number of MEPs that should take part in the Convention. Article 143 prescribes that "The amendment of the Constitution shall be prepared by a Constitutional Convention which shall be convened by the Council after consulting the European Parliament and the Commission, and which shall within one year draw up a final document containing a detailed draft text. The Constitutional Convention shall be composed of: (i) a Convention Chairman appointed by the Council with the approval of the European Parliament; (ii) a representative delegated by the government of each Member State; (iii) two representatives delegated by the national parliaments of each Member State; (iv) 54 members of the European Parliament. (EPP "A Constitution for the European Union, Discussion Paper, 10 November 2002)

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