The Convention Method

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Article: Draco IV-7(2)[1]

Since the ratification of the Treaty of Maastricht, the 'democratic deficit' is used as a term to describe the democratic deficiencies of the European integration process. What is the influence of the citizens on the process of governmental and constitutional decision-making? Due to the distance between the powers of the Community and the nation state, the power of the executive over parliamentary bodies and the fact that a lot of decision-making takes place behind closed doors, greater democracy and transparency is needed.

The Nice Treaty included a declaration on the future of Europe. Member States called for a deeper and wider debate about the future development of the EU. To prepare the next IGC, the European Council agreed that there should be representatives of national parliaments, the Commission and the European Parliament in a Convention. In the European Constitution, the use of the Convention method to examine treaty amendments has become mandatory, except when convening it is not justified by the extent of the proposed amendments. When the Convention is convened, it must examine the proposals for amendments and adopt, by consensus, a recommendation to the conference of representatives of the governments of the Member States (Article IV-7 (2)).

Is this use of a Convention for making and revising the treaty a way to bring the Union closer to its citizens? The history of the Convention, which prepared the Treaty establishing the European Constitution, at least gives part of the answer.

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[1] All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

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Unaccomplished objectives of the Convention establishing the European Constitution

No chain is stronger than its weakest link. The beginning of the chain of events, at which this article takes a closer look, was the meeting of December 2001 of the European Council. This meeting, called the Laeken meeting after the small Belgian town in which it was organised, launched the so-called 'Convention on the Future of Europe'. The Laeken councillors directed the Convention to draft a series of provisions for amendment of the EC-Treaty and EU-Treaty by June of 2003. The Convention was to concentrate on the changes that could be necessitated by the 2004-enlargement.

The end of the chain of events occurred when the Convention transmitted its final report to the Council. Unfortunately, this happened too late and the report was not complete. Some elements of the draft treaty were dispatched by the end of June, but some were dispatched during the first half of July and the rest at various points during the summer – or early fall – of 2003. The Convention labelled the whole thing the draft 'Treaty establishing a Constitution for Europe' (hereinafter the Convention's treaty-constitution). It remains to be seen whether the re-titling was visionary or controversial or both. The new requirements set up a 207-member body of which one half were ordinary members and the other half their alternates. The result took the amendment process out of the hands of bureaucrats and busy ministers and entrusted it, for the most part, to all sorts of peoples' representatives.

Through its innovative move, the Laeken Council sought to accomplish three important objectives. The first was to bring the treaty reform process closer to the citizens. A second objective was that inspiration and initiative would come from the bottom up. The citizenry were meant to be the beneficiary of this new method. The third objective was to create a forum likely to generate more visionary proposals for treaty reform. The Laeken Council hardly reckoned its convention-move to be a risky enterprise: one that could and would eventually run out of control. Disaster and crisis were certainly not looming, if only because the disparately made up, hydra-like Convention was very unlikely to unite behind a unanimous proposal for radical treaty reform. On this assumption, the final initiative to pick and choose among a plethora of drafts coming from the Convention was to be in the hands of the intergovernmental conference, scheduled to begin in October of 2003 and last until early December 2003. The fact that the Member States thought they only needed two months to finalize a real politically acceptable version of the new treaty certainly corroborates the suggestion that they envisioned enjoying jolly free hands.

None of the Laeken councillors' dreams came true.

First, the Convention did unite behind a unanimous proposal for radical treaty reform. Whether, behind the facade of consensus, there was division remains anyone's guess. Any disagreements that may have existed were not permitted to come to the fore, especially as regards the tough issues on the institutional agenda. Instead, the Presidency laconically concluded that voting was not required in a situation where time was running out and in the face of a noticeable 'large consensus' behind the proposals that it had tabled. It would be a good topic for research to find out whether the leadership drew the correct conclusion as to what the rank and file members actually had on their minds.

Once it was bound to deal with a draft treaty-constitution in one piece, unexpectedly thick clouds of problems gathered over the heads of the intergovernmental conference. In the end, the whole thing proved to be indigestible by the European Council when it met in December of 2003. This meeting developed into a shouting-match and ended in a *cul-de-sac.* During the meeting on 17-18 June 2004, a compromise was found.

Regarding the second major objective, namely that the new method should serve the needs of democratic governance, the flag bearer, and the citizenry, the German-born, impeccable Blairite, pro-European MP chosen to be Labour's parliamentary representative has confessed that '[n]ot once in the 16 months I spent on the convention did representatives question whether deeper integration is what the people of Europe want, whether it serves their best interests or whether it provides the best basis for a sustainable structure for an expanding union'.[2] Evidence has not come my way telling a substantially different story from that of Ms Gisela Stuart.

The trans-border public debate that the Convention should prepare and inspire was also stillborn. One conventioneer has aptly given voice to the deception he felt in this respect. He did so observing that while he and his colleagues were supposed to create a vivid trans-European public debate about the future of Europe, the Convention never got beyond the point of 'debating in public'.[3] Apathy could thus survive and is still alive and healthy given the historic low turn out at the poll stations on European Parliament election day.

Contingent and structural limits

Why was the Union so long in crisis after the Convention finished its work?

The courageous decision to select a group of 207 individuals and to organise them in the framework of something called a 'Convention for the future of Europe' was not probably in itself seriously flawed. It was not a self-evident good

[2] The Economist, 13 December 2003, quoting Ms. Gisela Stuart.
[3] The Economist, 14 June 2003.

idea but was acceptable – the purpose, the objectives and the rest of the context of the enterprise taken into account. The context was markedly made up of two squeezes: the alleged time pressure and the necessity not to see membership and entailing costs explode. We will never know whether more time spent on pondering over how to organise the Convention would have helped produce a more digestible draft treaty. Taking the most important decisions in a hurry always seems to be one of Europe's entrenched and gruesome curses.

The preceding, optimistic evaluation should not belie that the choice to invite a group of people with the conventioneers' hugely different backgrounds was not extraordinary and courageous – but, as said, was probably also necessary. If so, the inevitable costs have to be accepted. One of the method's drawbacks was that most of the Convention members had never spoken to each other before. Indeed, most had met just a few other members regularly. While they spoke many languages, it was unfortunately rare that they spoke the same ones with a reasonable level of proficiency. Another drawback was the failure of the Union to set aside time for professionally prepared, early job training for the Convention members; this might have performed miracles. It might, at least, have eliminated the malaise felt by all too many conventioneers who were unclear about the true nature and purpose of their new assignment and, most notoriously, were unfamiliar with the working cultures of large EU-gatherings. Unfortunately, many months of precious time was instead spent on socializing in bar rooms and restaurants and learning the job while doing it.

The convention-method should not be blamed for failure or, at least, not for all of it. This seems, however, to be the compelling conclusion in view of the fact that the Member States declined to internalise the amendment process to Union institutions and instead entrusted the drafting of a treaty-reform to, for instance, the peoples' representatives in the European Parliament. The task could have also been entrusted to a group of members of national parliaments, a method that was used in 1952/53 for the purposes of drafting the treaty for the establishment of a European Political Community. As it was, in 2001, the deployment of some sort of convention seemed inevitable.

Vestigia terrent may have been the intellectual reflex of those who still had a vivid recollection of the calamities of the Convention's sole predecessor. This was the Fundamental Rights Charter Convention of 2000 and the badly considered and thought through legal work done by this convention. However, the update of a European treaty is not an intellectual exercise but politics. Therefore, at this stage of the paper's analyses, it is unfair to conclude that it was the convention method as such that was the main root of evil.

If it was not the convention-method as such, the problems caused by the draft treaty-constitution can only be ascribed to an inept application of the new method. Another candidate for criticism was , in these circumstances, the loose

procedure that the Laeken councillors preferred to impose on the Convention's proceedings. Moreover, instead of just saying that the Convention's resulting majority and minority opinions should be submitted, they could have said that they wanted to be informed about the several opinions eventually prevailing. One consequence of this looseness was that time, which could have been spent on hard work, was instead spent, as said, on socializing.

It is also a well known fact that the rank and file conventioneers during the early months of 2003 bitterly complained that the Convention was run too much top-down and that they were kept under-informed about too many things. The Convention's Presidency took these objections into account to the satisfaction of most, although grumbling persisted in some quarters.

Worst was perhaps that as late as May of 2003, after 15 months of Convention-time and less than a month before the deadline, the Convention's crucial proposals about the institutional issues had not really reached the floor of the Convention. This was unfortunate in view of the importance that the Laeken councillors had attached to institutional innovation and the updating of the treaties to a 25+ EU-member political and legal reality. While a thorough overhaul was truly needed, longer and more penetrating plenary debates than those actually organised would probably have helped enormously to attune the Convention's proposals for reform better to the high political sensibilities of the institutional matters, not least to the issue of the Member States' and the institutions' relative influences and powers.

Noting this, the question imposes itself whether and how – in all honesty – a treaty-drafting convention might have constituted an instrument apt to improve the functioning of democracy in a society? The problem is, as it has been pointed out clearly, that major issues of distribution of powers among states and institutions may be too important to be solved in a forum as broad, varied and unprofessional as the Convention's membership. Some will say that this odd-forum argument is in itself a democracy-denying proposition. Perhaps, yet it is not without clout and value. If the odd-forum in-road cannot be rejected out of hand but, in part, must at least be endorsed, some consequences follow. One is that the 'monkey' must find a new shoulder upon which to sit. This should no longer be just the shoulders of the Convention's leadership. Since it is now suggested that this convention method is partly to be blamed for failure, the ape can also be seated on the Council's shoulder.

Consensus is not the way of democracy

A final observation about the enhancement of democracy by using the convention method is that the method seems to be vicious on one condition only. The condition is that it is designed to end, or actually ends, by formulating one

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single view or draft proposal for reform. Consensus is not the way of a genuine democracy. The post-convention calamities were, it seems, for the most part derivable from the fact that the proposal for a treaty-constitution did not permit minorities to express their views about the wisdom of the majority. The convention could, in this interpretation, have served democracy perfectly by offering more than one view about how to organise the future of Europe. This misfit is now incorporated in Article IV-7(2) of the European Constitution ('The Convention shall ... adopt by consensus a recommendation'). Admittedly, by reporting both majority and minority views, the Convention would have permitted the bureaucrats and busy ministers to pick and choose those proposals they liked best. If so, it might not have been worth all the bother and cost to have had a convention of the future of Europe in the first place.

Would it be labours lost entirely? Of course not, if only because the case would have been studied in depth by so many people. However, the answer should be given in the negative for a far more important reason. Indeed, even if the intergovernmental conference would be able to dictate the contents of the new treaty, the gains consisting in a substantive enhancement of democracy and of a cross-border public and political debate, generated by the deliberations of the Convention, could not and would not be eliminated. The value hereof could not be overestimated.

My final remark reminds the reader about the proverbial saying that nothing is so bad that it is not good for something. The good is, in my view, the seemingly unstoppable tendency of Member States' governments to submit the ratification of the draft treaty-constitution to national referenda. When this was written during the early days of June 2004, ten or more referenda were in the pipeline, including the UK one. More governments will undoubtedly join the referendum concert. They will be induced to do so for the following three reasons. First, they will be inspired to do so by their brethren who are already lined up. Second, many governments have already lined up in the referendum queue because the treaty-constitution is an irksome and nebulous and, therefore, difficulty accessible document. In face of such documents, it is good professional politicians' currency to ask the voters to assume co-responsibility for ratifying. Third, and most importantly, organising popular votes for or against the treaty-constitution is one way of compensating for the democratisation vacuum, which the Convention failed to fill. It is thought provoking that it required a chain of events as that discussed above to persuade so many governments that the Danish and Irish referendum practices might offer the best democratic avenue to a better peoples' Europe of the 21st Century.

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Questions

1. How essential is the non-binding nature of its proposals for the functioning of the Convention?
2. Would the democratic legitimacy of the Union's constitutional revision process be enhanced if the Convention, instead of having to adopt recommendations by consensus, could deliver majority and minority opinions?

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