



Project no. CIT1-CT-2004-506392

NEWGOV

New Modes of Governance

Integrated Project
Priority 7 – Citizens and Governance in the Knowledge-based Society

Assessing the Legitimacy of the EU's Treaty Revision Methods
reference number: 03/D22

Due date of deliverable: January 2006
Actual submission date: 19 July 2006

Start date of project: 1 September 2004

Duration: 48 months

Organisation name of lead contractor for this deliverable:
Freie Universität Berlin. Authors: Mareike Kleine, Thomas Risse

Project co-funded by the European Commission within the Sixth Framework Programme (2002-2006)		
Dissemination Level		
PU	Public	X
PP	Restricted to other programme participants (including the Commission Services)	
RE	Restricted to a group specified by the consortium (including the Commission Services)	
CO	Confidential, only for members of the consortium (including the Commission Services)	

Summary

How legitimate are treaty revision procedures in the European Union? Since the 1980s the EC/EU has been in a semi-permanent reform and subject to various revisions of its constitutional structure. Several multilateral negotiations were convened in order to amend the founding treaties or to create new policy areas outside the Communities, respectively. The considerable effect that EU's policies have on the European citizen's daily life implies asking for the legitimacy of the method of those minutious adjustments. In this paper we focus on two basic models for treaty revisions, namely Intergovernmental Conferences (IGC) on the one hand, and the combination of an IGC with a Convention as its preparatory body on the other. We therefore ask, whether and how the Convention may add legitimacy to the original intergovernmental procedure.

Contents

I. INTRODUCTION	3
II. LEGITIMACY IN EUROPEAN GOVERNANCE – WHY BOTHER?.....	3
III. LEGITIMACY AND ACCOUNTABILITY IN THE EUROPEAN UNION.....	4
IV. THE CONVENTION METHOD: A MORE LEGITIMATE MODE OF EU GOVERNANCE?.....	6
V. CONCLUSION.....	8
VI. REFERENCES	9

I. Introduction

How legitimate are treaty revision procedures in the European Union? Since the 1980s, the EC/EU has been in a semi-permanent reform and subject to various revisions of its constitutional structure. Several multilateral negotiations were convened in order to amend the founding treaties or to create new policy areas outside the Communities, respectively. The considerable effect that EU's policies have on the European citizen's daily life necessitates asking for the legitimacy of the method of these adjustments. In this paper, we focus on two basic models for treaty revisions, namely Intergovernmental Conferences (IGC), on the one hand, and the combination of an IGC with a Convention¹ as its preparatory body, on the other. We therefore ask, whether and how the Convention method such as the Constitutional Convention adds legitimacy to the original intergovernmental treaty-making and constitutionalization procedure. Yet, since the rejection of the Constitutional Treaty in France and The Netherlands in 2005 the excitement about the Convention method has fallen silent. This innovative treaty revision method is even blamed for the current crisis, and a recurrence to good old intergovernmental procedures in turn appears as the a way out of the current dilemma. We argue instead that the Convention method indeed increases the legitimacy of EU constitutionalization considerably by

- shortening the lines of accountability from the citizens to their representatives at the EU level through the participation of national and European parliamentarians (better input legitimacy and accountability);
- increasing the transparency and publicity of the EU treaty-making process as well as introducing elements of deliberative democracy in this process (better throughput legitimacy);
- enhancing the problem-solving capacity of the European Union through better institutions and improved decision-making procedures (better output legitimacy).

At the same time, the Convention method cannot solve the fundamental legitimacy problem of a European Union of 25+ member states that deeply affects the daily lives of the citizens: the lack of a fully politicized and transnational public discourse on EU policies and politics as a pre-condition for a developed European democracy beyond the nation-state.

We proceed in the following steps: First, we ask why we should bother at all about the legitimacy of European governance. Second, we clarify the concepts of legitimacy and accountability as applied to policy-making beyond the nation-state. Third, we compare the legitimacy of traditional intergovernmental conferences with the Convention method using the Constitutional Convention as our illustrative model. We conclude with some notes on the larger legitimacy deficit of the European Union.

II. Legitimacy in European Governance – Why bother?

For almost fifteen years, since the French and Danish referenda on the Maastricht treaties, the notion of a “democratic deficit” resounds through the European academic and political landscape. Yet, scholars as well as politicians could not differ more in their assessments. On the one end of a continuum, it is argued that the EU constitutes a federal polity in the making. According to this view, the EU's democratic deficit stems from an institutional setting that does not meet basic standards of governance common for liberal democracies. Consequently,

¹ In 1999 a Convention elaborated a Charter of Fundamental Rights. In 2002/2003 the European Convention negotiated a Proposal for a Constitutional Treaty. In the following we will mainly focus on the latter.

the EU should improve the democratic quality of its decision-making processes through, e.g., European-wide referenda, the direct election of the EU Commission president, and the like.² On the other end of the continuum, the EU is seen as not much more than an international organization that accommodates cooperation among its diverse member states. In its extreme form the argument of a democratic deficit goes that immoderate delegation as well as the craving for power of supranational bureaucracies has turned this organization into a technocratic super-state that short-circuits democratic processes at the national level. It thus runs the risk of overstressing the limited acquiescence of its member states' citizens. Accordingly, the solution is not to improve the democratic quality of EU policy-making, but to reduce the supra-national powers of the EU.³

Yet, as Andrew Moravcsik reminds us, these contributions are generally based upon stylized ideal-types that are rarely met in reality. The debate, therefore, runs the risk of largely exaggerating the severity of the problem. In fact, one might even contend that the “near consensual criticism of European integration as democratically illegitimate is (...) unwarranted” (Moravcsik 2004). So why bother? While the debate on the “democratic deficit” indeed sometimes appears shrill and biased, there is nevertheless a widespread sentiment of an erosion of the permissive consensus that shows up in decreasing numbers of support for the EU in public opinion as well as in growing social mobilization and protests during European summits. Moreover, the *acquis communautaire* has reached such a degree of intrusion in the lives of European citizens including regulatory policies with severe distributive effects that we may indeed ask whether the democratic quality of EU policy-making matches the severity of its decisions. This question has to be raised in particular if one is convinced – as the authors of this paper – that scaling down the supranational quality of EU integration is not an adequate solution to the challenges Europe faces in a globalized world.

In fact, the growing awareness of a legitimacy problem among European policy-makers was the origin for the Post-Nice-Process and the Laeken Declaration in 2001. Even the Heads of States and Governments declared that the Union needed to be brought “closer to its citizens” (European Council 2000 [Declaration #23]; European Council 2001 [Laeken]). What is more, the style and outcome of the 2000 IGC in Nice seemed to have aggravated the problem. Against this background, the Convention method that had just proven surprisingly successful in the elaboration of the Charter of Fundamental Rights appeared as a panacea to achieve better and more legitimate outcomes. Before we evaluate whether the Constitutional Convention did indeed improve on the legitimacy of EU treaty-making, however, we need to clarify what we mean by legitimacy and accountability.

III. Legitimacy and Accountability in the European Union

Following Max Weber (Weber 1921/1980), a social or political order is legitimate if the members consider its rules both appropriate and binding. Legitimacy then generates voluntary compliance with costly rules because of a logic of appropriateness irrespective of either sanctioning mechanisms or the utility of the rule for those who have to comply (Hurd 1999). In this context, Fritz Scharpf and Michael Zürn have further distinguished between *input*,

² Cf. e.g. contributions by federalist policy-makers and MEPs, such as Andrew Duff, Jo Leinen, Alain Lamassoure etc. to the debate. For academic contributions cf. (Lodge 1994) and (Williams 1991).

³ This is the line of reasoning often voiced in the British debate. In more modest academic contributions it is maintained that the EU's main task is the fulfilment of its delegated functions. See eg. (Majone 2005; Moravcsik 2002). From this point of view a democratic deficit would only arise if governmental actors did not any longer represent their citizens' interests.

throughput, and output legitimacy (Scharpf 1999a; Zürn 1998; Zürn 2000). *Input* legitimacy refers to the probability that those being ruled have some say in the process of rule-making itself. Notions of input legitimacy that stem from models of representative democracy are generally based upon the assumption of a congruence between rulers and the ruled through mechanisms of representation and public contestation. Beyond the nation-state, however, power wielders must be held accountable in a way that crucial features of representative democracy are institutionalized without simply replicating them. Input legitimacy and accountability, thus, are closely linked concepts. According to Ruth Grant and Robert Keohane, accountability “implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met” (Grant and Keohane 2005).

At first glance, the EU does not face problems of input legitimacy or accountability. The governments of the member states that are represented in the European Council and in the Council of Ministers are all democratically elected. The European Commission is accountable to these democratically elected governments as well as to the equally democratically elected European Parliament. Thus, citizens who do not like what they get in terms of European decisions, can sanction their representatives through voting them out of office. Of course, this is an idealized picture. The real problem of input legitimacy in the European Union is the combination of multi-level governance and supranationalism in the absence of strong transnational interest representation. As a result, citizens often have no clue who can be held accountable at what level of governance, particularly when their national governments can be overruled in the Council. This problem is exacerbated by the all too common “Brussels made me do it” attitude of national governments. One has to acknowledge, though, that EU treaty-making faces less problems of input legitimacy and accountability than everyday decision-making in the EU. First, member states remain the “Masters of the Treaties” as a result of which national procedures incl. referenda for the ratification of international treaties apply. Second, EU treaty-making requires unanimity of the member states so that the accountability problems of supranational decision-making are less severe.

Another aspect of legitimacy concerns the quality of the decision-making process itself, *throughput legitimacy*. Three components are of interest here. The first one is normally not disputed either at the EU or at the national levels, namely the *legality* of the process which is guaranteed by the rule of law in a democratic polity. The second component constitutes another ingredient of accountability, namely that it has to be crystal clear who is responsible for which decision at what level. In democratic polities, *transparency* of the decision-making process and publicity shall insure this ingredient of throughput legitimacy. In multi-level governance systems such as the EU, transparency of the process is often not insured, no matter how many documents are being posted on the internet. EU treaty-making also suffers from a lack of transparency more often than not, given the tendency to overly secret procedures and negotiations behind closed doors. The third component of throughput legitimacy directly concerns the *quality* of the process. Proponents of deliberative democracy (Cohen and Sabel 1997; Elster 1998; Habermas 1992) suggest that decision-making processes that systematically allow for arguing, reason-giving, and mutual learning rather than hard-nosed bargaining will have a substantially improved chance to lead to better outcomes. The main reason is that arguing and reason-giving provide a mechanism to probe and challenge the normative validity of actors’ interests as well as to check the empirical facts on which policy choices are based. Thus, *deliberative quality* constitutes a significant aspect of throughput legitimacy. There are few empirical findings available with regard to the deliberative quality of EU decision-making. As to EU treaty-making, intergovernmental conferences have usually been analyzed

in the framework of theoretical models which emphasize bargaining over arguing. (Moravcsik 1998). We will discuss below whether the Convention method has improved the deliberative quality of EU treaty-making.

This last component of throughput legitimacy is directly linked to the third aspect of legitimacy, namely *output legitimacy*. This concerns the effectiveness and efficiency of the policy-making process. Ultimately, political decisions are meant to improve the problem-solving capacity of a democratic polity. Politics and governance is about collectively regulating social issues and to solve political and social problems. A political order that does not perform well, will ultimately be considered illegitimate no matter how democratic the policy-making process. Scharpf has even argued that output legitimacy should be the sole criterion to evaluate EU policy-making, since the pre-political conditions for a democratic polity beyond the nation-state, such as a collective identity, cannot be taken for granted (Scharpf 1999b). This paper cannot evaluate the problem-solving capacity of the EU in general. Rather, we concentrate on a comparison between intergovernmental conferences as the primary method of EU treaty-making, on the one hand, and the Convention method as an innovative mode of EU governance, on the other. We now turn to an evaluation of the Constitutional Convention according to the legitimacy criteria outlined above.

IV. The Convention Method: A More Legitimate Mode of EU Governance?

But why should legitimacy be a problem at all in the case of treaty revisions? As mentioned above, IGCs comprise representatives of all member states that unanimously agree on a treaty under international law. When it entails a shift of competences from the domestic to the international level, such a treaty is subject to the various ratification procedures of each member state, that is, it requires approval by domestic parliament(s) and sometimes even national referendum. And in the case of an abuse of power Heads of State and Government may be sanctioned by being ruled out of office.

We maintain, however, that IGCs face various legitimacy problems. As to *input legitimacy* and accountability, the concerns are probably less severe than in cases of day-to-day EU decision-making, for the reasons stated above. Nevertheless and in spite of the fact that EU treaties have to be ratified through national procedures, the lines of authorization and accountability from ordinary citizens to their representatives at IGCs are unnecessarily long. More important, with regard to *throughput legitimacy*, IGCs face severe problems of transparency and publicity. Their deliberative qualities are at least questionable in light of the horsetrading that went on at the Amsterdam and Nice IGCs. Finally, concerning *output legitimacy*, most observers agree that the Maastricht IGC has been the last one prior to the Constitutional Convention which produced outcomes such as Economic and Monetary Union or the Treaty on the European Union moving the EU forward in terms of its problem-solving capacity. In contrast, the treaties of Amsterdam and Nice are widely regarded as rather modest accomplishments which failed to make the EU decision-making structures fit for enlargement and which produced many so-called “leftovers” to be dealt with at subsequent IGCs.

How does the Convention method score as compared with traditional IGCs? At the Laeken summit in December 2001, the Heads of State and Government agreed on convening the “Convention on the Future of Europe” as a forum preparing the 2004 IGC. It was composed of four groups of participants: representatives of national parliaments, of the European Parliament (EP), representatives of the member states, and of the European Commission. When the Convention started its work, it quickly decided to interpret its mandate as excessively as

possible and to draft a Treaty for a European Constitution which the subsequent IGC only altered at the margins.

With regard to *input legitimacy* and *accountability*, the main novelty of the Convention as compared to traditional IGCs concerned the prominent role of members of the EP and of national parliaments. Since parliamentarians are directly elected by citizens, this considerably shortens the lines of accountability from the principals in a democratic polity – citizens – to the agents in charge of the negotiations. Moreover and probably more important, the participation of European and national parliamentarians vastly increased the plurality of interests represented in EU treaty-making. At traditional IGCs, interest representation takes place via national governments who – in theory – aggregate their respective domestic interests following a logic of “two level games,” from the national to the European level (Putnam 1988). In contrast, the composition of the Convention allowed for a broader representation of interests, not just along national lines, but also along party and ideological lines.

With regard to *throughput legitimacy*, the Constitutional Convention strongly increased the transparency of the EU treaty-making process. The deliberations mostly took place in public, and every single document was publicly accessible on the Convention’s website. Thus, citizens were able to follow and to trace back the origins of almost every single proposal for the Constitutional Treaty. The information available to citizens was enormous as compared to normal IGCs. Publicity and transparency are pre-conditions for the ability of citizens to hold their representatives accountable for their decisions.

In addition, we submit that the institutional setting of the Convention served to improve the deliberative quality of the process.⁴ The Convention method put a premium on reason-giving and arguing as opposed to interest-based bargaining: First, the rules of the game, as laid out by Convention President Giscard d’Estaing at the very beginning, stipulated that Conventioneers were supposed to speak on their own behalf rather than on behalf of their nation-state, party, or whatever group. Of course, such a rule does not preclude interest-based bargaining. But it requires that speakers have to appeal to commonly accepted principles and norms in order to make their points. In that sense, it privileges arguing over bargaining. Second and perhaps most important, the Convention’s decision rule was consensus (not unanimity, since it was never specified what precisely was meant by “consensus”). Given the plurality of interests and preferences represented at the Convention (see above), speakers could never be certain about the preferences of their audiences. They could not know for sure whether a particular proposal would meet the interests of a large majority of Conventioneers. In such a situation, arguing and reason-giving matters most, because speakers have to persuade their audience that a particular proposal is indeed in their best interest. Once again, the Convention’s setting privileged arguing over bargaining.

As to *output legitimacy* and irrespective of the political controversy surrounding the Constitutional Treaty, there are several indications that the Convention indeed produced a better outcome than previous IGCs. First, for the first time since the early 1990s, there are no “left-overs” to be dealt with in subsequent IGCs. Second, most observers agree that the Constitutional Treaty increases the efficiency of EU decision-making in a community of 27+ members (double majority etc.). Third, the Constitutional Treaty creates a single legal personality for the EU, an accomplishment that the Amsterdam and Nice IGCs failed to achieve. Fourth, the Constitutional Treaty improves the EU’s ability to speak with one voice in foreign and secu-

⁴ Case studies on the Convention’s deliberations strongly confirm this assertion. See (Göler 2006; Kleine and Risse 2006).

rity matters (EU foreign minister, EU diplomatic service etc.), even though it failed to introduce qualified majority voting in foreign and security policy.

V. Conclusion

In this paper we argued that the considerable effect decisions on the EU level have on the European citizen's daily life necessarily implies asking for the legitimacy of treaty revision procedures in the European Union. We tried to assess its legitimacy by comparing the Convention method with traditional IGCs. We claimed that the Convention method indeed scores better than IGCs with regard to

- input legitimacy (participation of members of parliaments leading to shorter lines of accountability and to increased plurality of represented interests),
- throughput legitimacy (better transparency and increased deliberative quality),
- and output legitimacy (no "leftovers", greater efficiency of EU decision-making through institutional reforms).

Ultimately, however, legitimacy is about people's beliefs that a political order is indeed appropriate and worthy of voluntary compliance. One might ask, therefore, whether these rather abstract considerations of the legitimacy of the Convention matter much in light of the rejection of the Constitutional Treaty by a majority of French and Dutch citizens which put the entire Constitutional project in jeopardy. If the citizens do not believe in the legitimacy of the European project, what can be done? We suggest that the current crisis demonstrates a more fundamental problem of EU policy-making that even the Constitutional Convention – for all its merits – failed to address: The increasing gap between an elite consensus on European integration, on the one hand, and growing Euro-skepticism among the citizens, on the other. This gap has little to do with information deficits, since there is no lack of transparency of EU policy-making, at least not as compared to national politics. Rather, the Euro-skepticism as expressed in the two negative referenda on the Constitutional Treaty suggests a growing uncertainty and even uneasiness of European citizens about the European project.

This uneasiness cannot be overcome through renewed public relations efforts. The current elite silence on Europe makes things even worse. On the contrary, a fundamental politicization of the European project is required. European policies must become similar subject to contestation and controversy in the transnational public sphere as domestic policies are in the national publics.⁵ As long as European elites including the European Commission are too afraid to debate Europe, they will exacerbate the current legitimacy crisis. Politicization might slow down European integration quite a bit. But if this is the prize to pay for increased legitimacy of European governance, so be it. Only if the Convention method is embedded in a lively transnational public sphere, will it be able to translate its potential into increased legitimacy in the eyes of European citizens.

⁵ Here we fully agree with the latest contribution to the debate by (Follesdal and Hix 2006).

VI. References

- Cohen, J. and Sabel, C. (1997) 'Directly-Deliberative Polyarchy'. *European Law Journal*, Vol. 3, No. 4, pp. 313-42.
- Elster, J., ed. 1998. *Deliberative Democracy* (Cambridge: Cambridge UP).
- Follesdal, A. and Hix, S. (2006) 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik'. *Journal of Common Market Studies*, forthcoming.
- Göler, D. (2006) *Deliberation - Ein Zukunftsmodell europäischer Entscheidungsfindung? Analyse der Beratungen des Verfassungskonvents 2002-2003* (Baden-Baden: Nomos).
- Grant, R. W. and Keohane, R. O. (2005) 'Accountability and Abuses of Power in World Politics'. *American Political Science Review*, Vol. 99, No. 1, pp. 1-15.
- Habermas, J. (1992) *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt a.M.: Suhrkamp).
- Hurd, I. (1999) 'Legitimacy and Authority in International Politics'. *International Organization*, Vol. 53, No. 2, pp. 379-408.
- Kleine, M. and Risse, T. 2006. 'Constitutional Talk'. The Impact of Institutions on Negotiations. manuscript Berlin.
- Lodge, J. (1994) 'The European Parliament and the Authority-Democracy Crisis'. *Annals of the American Academy of Political and Social Sciences*, Vol. 531, No., pp. 69-83.
- Majone, G. (2005) *Dilemmas of European integration: the ambiguities and pitfalls of integration by stealth* (Oxford; New York: Oxford University Press).
- Moravcsik, A. (1998) *The Choice for Europe: Social Purpose and State Power From Rome to Maastricht* (Ithaca NY: Cornell University Press).
- Moravcsik, A. (2002) 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union.' *Journal of Common Market Studies*, Vol. 40, No. 4, pp. 603-24.
- Moravcsik, A. (2004) 'Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis'. *Government & Opposition*, Vol. 39, No. 2, pp. 336-63.
- Putnam, R. (1988) 'Diplomacy and Domestic Politics. The Logic of Two-Level Games'. *International Organization*, Vol. 42, No. 2, pp. 427-60.
- Scharpf, F. W. (1999a) *Governing in Europe: effective and democratic?* (Oxford; New York: Oxford University Press).
- Scharpf, F. W. (1999b) *Regieren in Europa* (Frankfurt/M.: Campus).
- Weber, M. (1921/1980) *Wirtschaft und Gesellschaft*. 5 ed (Tübingen: J. C. B. Mohr).
- Williams, S. (1991). 'Sovereignty and Accountability'. In R. O. Keohane and S. Hoffmann (eds.) *The New European Community* (Boulder CO: Westview).
- Zürn, M. (1998) *Regieren jenseits des Nationalstaates. Globalisierung und Denationalisierung als Chance* (Frankfurt/Main: Suhrkamp).
- Zürn, M. (2000) 'Democratic Governance Beyond the Nation-State: The EU and Other International Institutions'. *European Journal of International Relations*, Vol. 6, No. 2, pp. 183-221.