Assessing the Legitimacy of the EU’s Treaty Revision Methods

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1. Introduction

Since the 1980s, the EC/EU has been in a semi-permanent reform and subject to various revisions of its constitutional structure. The considerable effects that the EU’s policies have on the European citizen’s daily life make it necessary to ask whether the method of these adjustments is legitimate. The initial excitement about the Convention method fell silent after the rejection of the Constitutional Treaty in the two referenda in France and the Netherlands. A recurrence to good old intergovernmental procedures in turn appeared to be the way out of the ensuing dilemma. In these referenda, however, the citizens argued about everything but the actual content of the Constitutional Treaty. A renunciation of the original Convention method therefore hardly seems justified. Here we endeavour to assess the legitimacy of both Intergovernmental Conferences and of the Convention method.

We find that the Convention method increases the legitimacy of EU constitutionalisation considerably by shortening the lines of accountability from the citizens to their representatives and increasing the plurality of represented interests (better input legitimacy and accountability); increasing the transparency and publicity of the EU treaty-making process and 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).

Yet the Convention method cannot solve the fundamental legitimacy problem: the lack of a fully politicised and transnational public discourse on EU policies and politics as a pre-condition for a developed European democracy beyond the nation-state.

2. Why Bother?

For more than a decade, the notion of a ‘democratic deficit’ has resounded through academic political debates. At one end of the spectrum, the EU is conceived of as a federal polity in the making, whose institutional setting does not yet meet basic standards of governance common for liberal democracies. This democratic deficit can be alleviated by engineering institutions in such a way as to improve the quality of its decision-making processes. At the other end of the spectrum, the EU is often described as a supranational bureaucracy that has turned into a technocratic super-state that short-circuits democratic processes at the national level and overstretches the limited acquiescence of EU citizens. The solution to the democratic deficit, then, does not lie in the improvement of the democratic quality of decision-making processes, but in the disempowerment of supranational institutions.

These different views are based upon stylisations that are rarely matched by reality. So why bother? First, there is a widespread sentiment that the almost unconditional support for European integration is showing signs of erosion, which is mirrored in, for instance, decreasing turnouts for elections to the European Parliament and protests during European summits. Second, the acquis communautaire has reached such a degree of intrusion in the lives of European citizens that we may ask whether the democratic quality of EU policy-making matches the severity of its decisions. Third, an increasing alienation and disillusionment of citizens from the policy-making process, at both the national and European levels, make ‘Europe’ an easy target for populist and simplistic arguments. As
far as the EU is concerned, this problem is exacerbated by its opaque character and the well-known scapegoating behaviour of national policy-makers.

In short, it is time to ask the question how legitimate and accountable the EU decision-making process is, particularly if one is convinced – as are the authors of this article – that neither scaling down nor adventurous social engineering is an adequate solution to the problem. Indeed, the growing awareness of unease with European integration resulted in the post-Nice process and the Laeken Declaration in 2001. The heads of state and government declared that the Union needed to be brought ‘closer to its citizens’. Yet intergovernmental methods, and the style and outcome of the 2000 Nice IGC in particular, seem in fact to have aggravated the problem. Against this background, the Convention method, which 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.

3. What are Legitimacy and Accountability?

Following Max Weber, 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 sanctioning mechanisms. Legitimacy may be generated in three ways: through input, throughput, and output.

**Input legitimacy** refers to the probability that those being ruled have some say in the process of rule-making itself. Beyond the nation-state, power wielders must therefore be held accountable in a way that institutionalises crucial features of representative democracy without simply replicating them. Accountability implies that some actors have the right to hold other actors to a set of standards, to judge in this light whether they have fulfilled their responsibilities and to impose sanctions if they determine that these responsibilities have not been met. Technically, all power wielders in European decision-making can in one way or another be held accountable. But this is an idealized picture: for day-to-day decision-making, the real problem of input legitimacy in the EU is the combination of multi-level governance in the absence of strong transnational interest representation. As a result, citizens often do not even know by whom they are represented.

**Throughput legitimacy** concerns the quality of the decision-making process itself. Two components are of interest here. The first one is the requirement that it be crystal clear who is responsible for which decision at what level. As mentioned above, in multi-level governance systems such as the EU, transparency of the process is often not ensured, no matter how much information is officially available or how many documents are being posted on the internet. The second component of throughput legitimacy directly concerns the quality of the process. Proponents of deliberative democracy suggest that decision-making processes that systematically allow for arguing, reason-giving and mutual learning have a substantially improved chance of leading to better accepted out-
comes. The 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. 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 another aspect of legitimacy: output legitimacy, that is, the effectiveness and efficiency of the policy-making process. A political order that does not perform well will ultimately lose its acceptance no matter how democratic the policy-making process. Some even argue that, since the EU lacks a collective identity, output legitimacy should be the sole criterion for evaluating EU policy-making.

4. How Legitimate Are Treaty Revision Methods?
Against the background of these three aspects, we find that IGCs face various legitimacy problems: As to input legitimacy and accountability, the problem is less severe than in cases of day-to-day EU decision-making, the lines of authorization and accountability from ordinary citizens to government representatives at IGCs are unnecessarily long. More importantly, with regard to throughput legitimacy, IGCs face severe problems of transparency and publicity. Their deliberative qualities are at least questionable in the light of horse-trading behind closed doors. Finally, concerning output legitimacy, most observers agree that the IGCs leading to the treaties of Amsterdam and Nice were rather modest accomplishments which regularly produced ‘leftovers’ to be dealt with at subsequent IGCs.

How does the Convention method score as compared to traditional IGCs? 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 citizens to those in charge of the negotiations. Moreover, 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. Publicity and transparency are preconditions 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, as it put a premium on reason-giving and arguing as opposed to interest-based bargaining. First, Conventioners were supposed to speak on their own behalf rather than on behalf of their nation-state, party, or whatever group to which they belonged. Such a rule requires that speakers have to appeal to commonly accepted principles and norms in order to make their points. It may thus privilege arguing and reason-giving over bargaining. Second, the Convention’s decision rule was consensus and not unanimity. Given the plurality of interests represented at the Convention, speakers could never know for sure whether a particular proposal would meet the interests of a large majority of Conventioners. Under such circumstances, speakers have to use persuasive arguments to convince their audience that a particular proposal is indeed in their best interest.

As to output legitimacy, there are several indications that the Convention indeed produced a better outcome than previous IGCs: for the first time since the early 1990s, a negotiation produced no ‘leftovers’ to be dealt with in subsequent IGCs. What is more, most observers agree that the Constitutional Treaty as produced by the Convention (which has now been transformed into the Lisbon “Reform” Treaty) would increase the efficiency of EU decision-making in a Community of 27-plus members, for instance through the use of a “double majority” standard for Council votes where qualified majority voting applies and an improved ability to speak with one voice in foreign and security matters, to name just a few.
5. Conclusion

We have argued that the considerable effects decisions at the EU level have on the European citizen’s daily life necessarily imply asking whether the treaty revision procedures of the EU are legitimate. We have tried to assess the legitimacy of these procedures by comparing the Convention method with traditional IGCs. Our claim is that the Convention method indeed scores better than conventional IGCs with regard to:
- input legitimacy (shorter lines of accountability and plurality of represented interests);
- throughput legitimacy (better transparency and deliberative quality);
- and output legitimacy (no ‘leftovers’ and greater efficiency through institutional reforms).

Ultimately, however, legitimacy is about people’s beliefs that a political order is indeed appropriate and worthy of voluntary compliance. In the light of the rejection of the Constitutional Treaty in two of the national referenda, one might ask whether these rather abstract considerations of the legitimacy of the Convention matter much. Was the whole project doomed to failure? Would the legitimacy deficit disappear if elites just stopped bothering about it? In the referenda, the Dutch and French people rejected the treaty for many reasons, but hardly for its content. This fact suggests that the failure of ratification demonstrates a more fundamental problem that even the Constitutional Convention – for all its merits – failed to address: the large gap between an elite consensus on European integration on the one hand, and the scepticism among many citizens on the other. Ad hoc public relations efforts cannot alleviate the problem, but a retreat to intergovernmental and elitist methods which we have now experienced with regard to the Lisbon Treaty will ultimately backfire. At best, such a retreat contributes to the increasing alienation of citizens from the policy-making process, both at home and in Europe. At worst, it invites the exploitation of European issues by populist parties on the – right-wing or left-wing – fringes.

Rather than keeping silent, policy makers should actively contribute to the politicisation of European issues and stimulate debates. Given the significance of EU decisions for people’s lives, European policies must become similarly subject to contestation and controversy in the transnational public sphere. Public debates and political controversies are healthy in any polity, and the EU is no exception. Populist parties commonly exploit the lack of public debate, and they have little to contribute to open and frank discussions in a lively public sphere. It might slow down European integration in response to globalisation challenges, but if this is the price 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.

Further reading

This policy brief is based on research carried out within the NEWGOV project no. 3 on “Arguing and Persuasion in EU Governance”. This project concentrated on one particular form of non-hierarchical decision-making, namely arguing and persuasion. Through comparative case study research it has probed central assumptions of the literature on deliberative democracy, which claims that reason-giving and arguing in non-hierarchical settings help overcome collective action problems, improve the democratic quality of EU governance, and increase its problem-solving capacity. The empirical domain of the sub-project concerned constitutionalization processes in the EU, namely EU treaty- and constitution-making.

Further information can be found on the NEWGOV Website in the special section of project no. 3.