

Can the EU be Democratic?*

Lessons from the constitutional process ... and its failure

BEN CRUM, Vrije Universiteit Amsterdam.

Introduction

Democratising European Union politics is essentially a learning process. Over time our diagnosis of the challenges involved evolves, institutional reforms are brought into place, and the attitudes of elites as well as of the public at large adjust. Thus the contours of what a truly democratic EU democracy requires are only slowly emerging. Even if it has not led to the entry into force of a European Constitutional Treaty, the constitution-making process has yielded important steps forward in understanding the requirements of a democratic EU. This paper seeks to sketch the insights that have been gathered and how they can be build upon. Basically, I conclude that in terms of 'normal' EU politics the Constitutional Treaty offers some very valuable overtures, even if it falls short of determining the EU's democratic finality.

1. Where did we come from?

Thinking about democratic EU decision-making has generally been caught between two models. On the one hand, there is the traditional Intergovernmental Model in which democratic control remains concentrated in national parliaments that effectively scrutinise the engagement of their respective governments in EU affairs. On the other hand, there is the Supranational Model in which democratic control of decision-making is ensured through a specially established supranational, European Parliament (EP).

As EU decision-making intensified over the years, and especially once national governments ceded their veto power with the introduction of (qualified) majority voting, the Intergovernmental Model came under increasing pressure. The Supranational Model emerged as a logical substitute; as national parliament would loose control over European affairs, the European Parliament would gain control. Most concretely, this shift could be read in the principle that any adoption of (qualified) majority voting by the governments in the Council, would be matched by the European Parliament acting as an equal co-legislator (Corbett et al. 2000: Part III, ch.14). Even if this principle has not always been fully adhered to, the powers of the European Parliament have steadily expanded since the 1985 Single European Act. The codecision procedure has evolved to bring the EP on as good as a par with the Council in the legislative process, the scope of the procedure has been expanded with each new Treaty, and the European Parliament has also steadily developed its powers of scrutiny of the Commission.

Still, there remains a European democratic deficit in the strict sense that the democratic capacities taken from national parliaments have been insufficiently compensated by new European mechanisms of democratic control. Formal gaps persist in that certain powers have

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come to be shared at the European level without the EP becoming fully involved, as is for instance the case in the common commercial policy and the Common Agricultural Policy. However, the real problem lies beyond the extension of formal powers to the EP. As has been pointedly observed by former MEPs Michiel van Hulten and Nick Clegg “While [the EP] has steadily increased its powers in the legislative and inter-institutional arrangements of the EU, it has not yet succeeded in translating its authority into a more visible role amongst Europe’s electorates” (van Hulten & Clegg, 2003, p. 4). Thus it is quite clear that the comprehensive introduction of the supranational model will not suffice to bridge the EU’s democratic deficit.

Indeed some have suggested that parliamentary solutions will not do the job for the EU and that instead the EU is to rely on third, alternative model of non-parliamentary interest mediation (cf. Héritier, 1999).¹ In particular, hopes have been pinned on the structures of interest mediation that are involved in the policy-making process in the Commission and the Council’s committees (cf. Commission, 2001). A great diversity of interests gets involved through these channels and exchanges often prove intense and of high quality (cf. Joerges & Neyer, 2001). Still, these channels suffer from limited public transparency and visibility. While they certainly may add legitimacy to political decisions, it comes as a complement to that conferred by the main political institutions.

2. What lessons can be gleaned from the Constitutional Treaty?

The great advance of the Constitutional Treaty is that it no longer falls in the trap of playing a Supranational Model of democracy off against an Intergovernmental or even a third, ‘Deliberative’ Model, but that it transcends this debate by recognising the merits and complementarity of each of the three models (cf. Crum, 2005).

For a start, the Constitutional Treaty proposed to complete the emancipation of the EP as a co-legislator by recognising the codecision procedure as the standard procedure for EU legislation. This move implies that any exceptions to the procedure are clear aberrations and need to be justified. Also in other respects the Constitutional Treaty expands the power of the EP, for instance as regards the election of the Commission President and the budget.

However, the Constitutional Treaty also recognised that a democratic EU cannot emerge at the cost of the dwindling away of national parliaments, but that this trend rather needs to be reversed. The Constitutional Treaty thus sought to re-engage national parliaments with EU affairs. The most striking expression of this recognition is the proposal of an ‘early warning mechanism’. This mechanism gives national parliaments a formal right to register their objections against any European legislation in progress and requires these objections to be properly addressed, at least when they are shared by a significant group of national parliaments (one third of them). The main merit of the early warning mechanism is that it provides a formal structure

¹ There is an obvious parallel (though not necessarily a one to one correspondence, especially not in the case of the third model) between the three models distinguished here and the three strategies of legitimation outlined in Eriksen & Fossum (2004).

and essential guarantees for the involvement of national parliaments in the EU legislative process. In that respect the value of the power to file a complaint is eventually secondary to the guarantees that national parliaments shall receive all proposals for legislation simultaneously with their governments and that during the first six weeks it is up to them to express their opinion while governments are prohibited from reaching any agreement on the proposal during that time. These guarantees – combined, moreover, with the proposal that all legislative Council sessions are to proceed in public – provide a basic structure for a much more assertive role of national parliaments in EU decision-making.

Thirdly, in a special section on ‘the democratic life of the Union’ the Constitutional Treaty also provided for a formal structure for civil society engagement in EU decision-making. The draft Constitution ensures EU citizens opportunities for political participation through European political parties and representative associations and civil society. Provisions are inserted ensuring that the Union institutions will operate as openly as possible and that actions will be preceded by wide-ranging consultation of the relevant societal actors, giving particular attention to the roles of social partners and of churches and non-confessional organisations. If fully followed through, these provisions can lead to an ever more systematic and wider-ranging direct involvement of societal groups in the Union’s decision-making process. Furthermore, a new political right is introduced with the insertion of a legal basis for a citizens’ initiative, whereby no less than a million European citizens coming from a significant number of Member States can invite the Commission to prepare a legislative proposal on a specific issue.

All in all then the Constitutional Treaty suggests that democratising day-to-day EU politics depends on a three-pronged strategy in which the European Parliament, national parliaments and civil society complement each other. Contrary to earlier tendencies to push for a single Supranational Model of democracy, the Constitutional Treaty conveys the key insight that democratising the EU eventually does not so much involve connect people directly to Brussels, but rather the dispersion of involvement in EU decision-making across multiple fora across Europe. Thus EU democracy is not coming to be embodied by a single institution but rather finding expression in ‘a multilevel European democratic field’.²

3. Where do we go from here?

As the ratification of the Constitutional Treaty has become stalled after negative referendum outcomes in France and the Netherlands, the institutional reforms envisaged by the Constitutional Treaty have been prevented from formally entering into force. Still, whatever will come of the Constitutional Treaty, its lessons on democratising EU politics will not be lost. Most notably, the very rejection of the Constitutional Treaty has triggered national parliaments into exploring ways to increase their involvement in EU decision-making, including the informal introduction of the ‘early warning mechanism’. The ability of the EP to expand its powers without formal authorisation was proven again last year by the retraction of the candidacy of Rocco Buttiglione

² This term elaborates on the notion of a ‘European parliamentary field’ that I owe to John-Erik Fossum.

for the European Commission following a dissatisfactory hearing in the EP. Also civil society is unlikely to wait patiently for the section on ‘the democratic life of the Union’ to enter into force. The options of mobilising for a citizens’ initiative with or without a Constitution are already extensively being explored. At the same time, the recent Commission’s initiatives on transparency are not only likely to affect the structure of interest mediation in Brussels, eventually there are also likely to contribute to an increase of its legitimacy.

While EU democracy can thus gain strength even without the Constitutional Treaty entering into force, the suspension of the actual enactment of formal reforms does pose a severe handicap. Some changes, like the extension of codecision to become the standard legislative procedure, critically depend on formal Treaty reforms. Only after that can their implications actually be understood. Also then it will be possible to calibrate the workings of the various forms of democratic engagement to each other by exploring ways in which they can work to each other’s reinforcement and preventing ways in which they may indeed undermine each other

What is more, even with all three fronts getting fully developed and calibrated to each other, we are unlikely to see the finality of EU democracy. In the end, we probably have to see this as just a new iteration. Challenges are bound to remain. In particular, as much as representative bodies will forge their way into the EU process of legislation, they fall considerably short of overcoming the problem of ‘pooled sovereignty, divided accountability’ (Peterson, 1997; cf. Benz, 2003). In contrast with the domestic scene in which much democratic politics revolves around the scrutiny of parliament of executive power, the (excessive) focus on the legislative process of representative bodies at the European level betrays their incapacity to act as watchdogs over clearly defined EU loci of executive accountability. Thus, once the overtures of the Constitutional Treaty have been fully played out, new challenges for EU democracy are bound to arise.

A Provocative Postscript on the democratic character of EU Constitutional Politics

While the democratisation of rules of ‘normal’ EU decision-making can thus be sketched as an iterative process that has been moved up another stage by the Constitutional Treaty, the democratisation of the EU’s ‘constitutional’ politics would seem to follow a whole different trajectory. Here we have a set of procedures that displayed hardly any change from the 1957 Intergovernmental Conference (IGC) leading to the Treaty of Rome to the 2000 IGC ushering in the Treaty of Nice. However, after the Laeken Declaration introduced a Convention into the process, the ultimate form of this process seems to be within sight (cf. Fossum & Menéndez, 2005). As is probably most explicitly expressed in the EP-reports on the Constitutional Treaty and the present ‘reflection period’, the only remaining reforms would involve fully liberating the Convention model from the constraint that this time the rules of the game and the unwillingness of member states to cede controls still required an IGC to formalise the Treaty revisions.

In contrast and extending the line of argument above, I rather tend to think of the Convention model as constituting only one new step in a longer-term learning process rather than considering it to constitute the democratic *finalité* of EU Constitutional politics. More

particularly, I think that the sorry state that the Constitutional Treaty is in at the moment obliges us to critically reconsider of the Convention's merits. If one recognises

- a) that the negative referendum results in France and the Netherlands were more than local incidents – as is indeed suggested by the response of the European Council to suspend further ratification) – and
- b) that the Convention was the main author of the Constitutional Treaty, which was only marginally affected by the subsequent IGC – an opinion that is for instance expressed in the EP resolutions,

then one is inevitably led to consider whether the very causes that have brought the EU to its current constitutional crisis need not be traced back to the Convention itself.

No doubt, the Convention was a very exciting event from the inside – I would be the first to admit as much. It probably reached unprecedented levels of sophistication in discussing fundamental questions of EU politics. Moreover, given the size of the forum, the Convention involved whole new groups into this debate, most notably the new member states and national parliaments, while significantly upgrading the role of MEPs. Most remarkably of all, the Convention members eventually found each other in a joint sense of purpose of reaching a Convention-wide consensus on a single comprehensive text that would decisively set the agenda of the following IGC.

However, much suggests that Convention members were only able to build these internal bridges by suppressing internal differences and external 'noise' and by disassociating themselves from any popular constituencies. Political controls in terms of accountability were minimal; beyond protecting institutional self-interests, few members brought a clear popular mandate to the Convention. In turn the Convention also fell markedly short in engaging public debate. For sure, most Convention members did do their briefings in public meetings, but many of these tended to be one-way traffic, informing the public about the Convention's proceedings but not expecting it to make any difference on it. Civil society organisations were disillusioned by the perfunctory ways in which they were engaged. Newspaper coverage of the Convention meetings was generally low and even as the Convention neared its conclusion, less than 30% of the EU citizens had heard of it, and much fewer of them could comment on its work (Eurobarometer, 2003: 82ff.). Clearly then an unprecedented high level of internal deliberation did not suffice to convey public legitimacy upon the Convention's work.

Thus, rather than embracing the Convention model as the *finalité* of EU Constitutional politics, I think it is imperative to take its lessons to heart and to try to look beyond it. I do not have a clear solution to this. However, for the mere sake of opening up the debate I would suggest considering a mixed model of an IGC with public proceedings and of which the membership would be elected, for instance by national parliaments (on a proposal by the Head of Government). Such a model might secure the two major merits of publicity and deliberation of the Convention model, while at the same time instilling a sense of representation and accountability, both on its members as well as on the public. The supranational institutions, more particularly the EP, should not be sidelined from this process but, rather than acting as drafters, its

role should be a controlling and advisory one, which can for instance be assured by requiring it to approve the IGC-mandate as well as ratifying its result.³

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³ Apart from these reforms, a solution is needed to prevent one or two member states from keeping the rest of the Union hostage by failing to ratify agreed upon Treaty changes. But that is again a different story (see Crum 2003).