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# Introduction: a Convention Without a Constitution?

This is a book about European political constitutionalism and the ‘Convention on the Future of Europe’ (hereafter, Convention). This may require some explanation both on the approach of this book and on its purpose. We start with the latter, since the main object of our analysis – the setting up of the Convention, the way in which it worked, and its significance and impact – may strike readers as a ‘historical’ rather than a ‘political’ topic. Moreover, it may seem as if this is the history of a failure. For, at least at the time of writing, the Convention’s efforts have not materialised into a Constitution.

So, this was a Convention without a Constitution. Does it matter? Part of the purpose of this book is to show that it may not, or at least not in the sense that many think. It is one of the central contentions of this book that the end product is not all that matters in the story of the Convention, and that, indeed, what the Convention in itself represented and how it operated are very much part of this story. Besides, and this is another central contention of the book, this is a story in progress. The Constitution’s obituaries may have been rather premature in the aftermath of the French and the Dutch referendums. As we argue in the Conclusion, these were powerful blows to the project of giving the EU a written constitution, while raising significant issues for the European integration project as a whole, but at the time of writing there is plenty of evidence that the question of the European Constitution has not gone away, and that a political battle is being fought over it. Indeed, there are signs that, in spite of the remarkable political difficulties faced, the attempt to provide the EU with a constitutional text is still on the political agenda – albeit in the likely form of a more traditional ‘treaty’, playing down its more ‘constitutional’ features. This was one of the declared objectives of the German presidency of the European Union for the first semester of 2007, as also agreed by the member states in the Berlin Declaration signed on the occasion of the 50th Anniversary of the Treaty of Rome.

Moreover, recent European polls show that in countries where the ‘Treaty establishing a Constitution for Europe’ has not yet been approved, the majority of citizens (53 per cent) are in favour of an EU Constitution. This is also true

in France and the Netherlands, where the percentages of those in favour of the EU giving itself a Constitution have increased since the referendums that rejected the Treaty took place (Eurobarometer 66: Autumn 2006). Although these figures do not guarantee that the Constitution will be eventually approved, they are a general indication that the constitutional issue is an important aspect of the European *political* agenda in ways that it was not before the establishment of the 'Convention on the Future of Europe'. In this sense, the Convention represents a watershed in the history of constitutional politics in the EU.

## **Constitutional politics**

But there is another sense in which the Convention matters, and cannot be dismissed as a kind of 'non-event'. This is because, regardless of whether or not it achieved its ostensible purpose of producing a Constitution, the Convention represents an important moment in European constitutional politics. Indeed, the other main purpose of this book is to analyse the Convention as such a moment. This requires some words of explanation of our approach, and of what we mean by 'constitutional politics'. As further explained in the section on terminology in the Preface to this book and in Chapter 1, the phrase 'constitutional politics' has various meanings, with overlapping empirical and normative connotations. Most of these meanings are relevant to various parts of our analysis, but, as a whole, the book approaches the question of 'constitutional politics' by taking it in the sense of the 'political' process through which constitutions are made. This is the meaning in which we intend the title of this book to be understood, for we study the Convention as a 'moment' of European constitution-making. From this perspective, as the rest of the book will demonstrate, the study of the Convention as a particular process, with its own internal and external dynamics, is an important part of the history and politics of European integration regardless of whether the Constitution in its present form is eventually ratified.

Most of the chapters in this book analyse the way in which the Convention operated, how it related to its external referents, and what it meant for the European constitution-making process. Most of the questions it addresses have an empirical and analytical dimension, but because of the particular 'foundational' elements that are associated with the 'constitutional' dimension of politics, it is inevitable that our analysis deals with normative issues. This is done more consistently in Part I of the book, and intermittently in Chapters 10, 11 and 12. But such a dimension is never completely absent from the horizon of the other chapters. There are two important normative considerations that underlie our study of the Convention and how this has contributed to shaping constitutional politics in the EU. One concerns the nature of the European Union itself, the other the form that constitutional politics has taken. With regard to the nature of the European Union, our analysis of the

Convention engages with the analytical, but also normative, question of whether the EU is still predominantly an international organisation, or whether it has entirely constitutionalised itself as a 'polity'. With regard to the form of constitutional politics, we address the parallel question of whether the way in which the EU is giving itself a 'constitution' reflects (or should reflect) an intergovernmental method based on separate sovereign powers, or a more democratic and deliberative method, which presupposes some commonality of purposes and interests.

As already said, the book as a whole offers both an empirical and a normative analysis of the Convention. But, overall, the message that the book conveys about these two questions is that the Convention represents a further moment in the transition of the EU from an international to a more supranational entity, from an intergovernmental to a more deliberative way of conceiving constitutional politics. And yet – and this is also part of the message that the book seeks to convey – these transitions are neither completed nor uncontested. In fact, the Convention is part of a longer and ongoing story, and this is why a study of it matters.

### **Fifty years on from the Treaty of Rome**

It is perhaps significant that the current phase of European constitutional politics, and the 'crisis' it has generated, comes more or less at the time of the 50th anniversary of what could be considered as the first 'constitutional' text of the European Union/Communities, this being the Treaty of Rome of 25 March 1957. From such a perspective, the Convention may be considered as part of a broader process of change and continuity in EU constitutional politics.

The anniversary of the signature of the two Treaties of Rome (the EEC Treaty and the Euratom Treaty) may also remind us that, in its fifty-year history, the European integration process has gone through several crises. The period between 1954 and 1957 was characterised by an ambitious attempt, which eventually came to nothing because of French resistance, to move to a more integrated Europe via the development of the European Defence Community. At the time, as now, fundamental questions about the aim and purposes of integration were asked. The ensuing debate focused on whether integration should be about grand projects or consist of smaller pragmatic steps; and whether European integration should be pursued more as part of a liberal economic project or through an increase in social protection. Perhaps not surprisingly, some of the political objectives which were eventually formulated during the Messina intergovernmental conference in 1955 sound very similar to those of today's EU agenda: 'a united Europe . . . seems indispensable . . . if Europe is to preserve the standing which she has in the world, to restore the influence and her prestige, and to improve steadily the living standards of the population'.

From today's perspective, it may be interesting to speculate on how quickly things changed: from the failure of the EDC project, to the signing of the Treaty

of Rome. It may also be intriguing to look at the role of political leadership at both national and supranational levels then and now, and how various international contingencies helped to shape the course of events. During the negotiations at Messina and Venice in 1955 and 1956, it became possible to reconcile different views so as to arrive at a broadly shared view of the main purposes of the integration process as set out in the Treaty of Rome. Nevertheless, the 'historical' significance of the Rome Treaty in March 1957 was hardly noticed at the time, while the Treaty itself was met with substantial levels of scepticism (Brunn, 2005: 117–18).

Here perhaps the parallels should end, since, as we argue in the Conclusion, but also in other chapters of the book, one of the main questions raised by the Convention, and as yet unresolved by the present constitutional phase, is the place of European citizens in this process. Indeed, an important question that we raise at various stages of our argument is whether the circumstances and forms of European integration have now changed sufficiently for the citizens of the enlarged European Union to have both a more distinctive voice and role in its constitutionalisation process, and whether ultimately the Convention has contributed to creating the conditions for this to happen. This is not the same question as whether Europe should or should not have a written constitution, but whether the institutional consolidation of the integration process should be the subject of public debate, or confined to member state governments and the institutions of the Union.

### **A brief overview of the book's arguments**

The latter is a question for the future. Most of the book is an analysis of the Convention and of its place in EU constitutional politics. In Part I we try to define what constitutional politics means in the EU, and whether the Convention contributed to the resolution of what can ultimately be described as the legitimacy crisis, which *de facto* started at Maastricht. Chapter 1 outlines different perspectives from which to judge the constitutionalisation of the European Union, and poses the problem of whether the more self-consciously open form of constitutional discourse and constitution-making embodied by the Convention experiment can be justified. Chapter 2 addresses the more specific problem of the nature of the 'Constitution' and constitutional legitimacy in the EU, and whether the Convention should be conceived as a moment of founding of the EU polity or as part of a more diffuse process of constitutionalisation. Part I is therefore an attempt to contextualise the Convention in the broader discourse of European constitutionalism. In doing so, it argues two things. First, that seeing the Convention as an isolated moment, as many of the critics and some of the supporters tend to do, misses the point that constitution-building in Europe has been an ongoing process for some time, and that this is only one of the forms that it takes. Second, however, that there is no inevitability to formalising the constitutional *acquis*

in a written document, but that such a move inevitably carries an interpretation of the future of the integration process, which in Europe remains a deeply contested issue.

Part II is more directly an analysis of the Convention itself. Chapter 3 offers a more historical contextualisation of the Convention, by showing how it relates to previous episodes of constitution- (and treaty-) making in the European Union/Communities. Such a foreground of the Convention experiment allows us to understand it as a moment of continuity with the past history of political integration, but also to appreciate the way in which it operates as a rupture of that same history. Chapters 4 and 5 analyse the formation of the Convention and the way in which it operated. Chapter 4 concentrates on the way in which the Convention gave body to the political interests of the various components of the European polity, and how this embodiment allowed it to operate politically in between the supranational and intergovernmental institutions of the EU. In spite of falling short of many standards of democratic representation, it is suggested that the Convention offered the opportunity for the process of constitution-making in Europe to become more open and more responsive to a wider range of interests and opinions in European society. Chapter 5 turns the attention to the so-called 'Convention method' both by describing the way in which the Convention deliberated and arrived at its conclusions, and by trying to find out whether such a 'method' has something distinctive in it, which makes the Convention different from past experiences of constitution-making in the EU. In many respects, the 'Convention method' reflects a shift towards a more deliberative and majoritarian, as opposed to bargain-based and intergovernmental, way of conceiving the constitutionalisation process in the EU. However, its practical application and the political conditions in which the Convention operated were fraught with difficulties and contradictions. Overall, the picture that emerges is one of cautious innovation. The 'Convention method' may have made a mark in the European constitutionalisation process, but it has not yet changed it dramatically.

Part III looks at how the Convention related more generally to European society. It focuses in particular on some of the aspects of diversity characterising the EU, comprising, as it does, many different nations, histories, cultures, religions and languages. The latter is at the centre of Chapter 6, which looks at how the multilingual nature of the EU affected the operations of the Convention, and the behaviour or attitudes of its members. Chapter 7 asks similar questions about the role of gender in the Convention, although it focuses as much on problems of substance as of process, by looking at some of the constitutional provisions discussed in the Convention, which have relevance to the gender issue. Chapters 8 and 9 look at the role that civil society and business organisations played as part of the Convention. Although there were no official members of these organisations in the Convention, the Convention itself provided for some form of representation for such organisations with the aim

both of increasing its visibility to European society, and of better reflecting the interests and views of society at large. These chapters assess how successful the Convention was in these two objectives. The final chapter (Chapter 10) of Part III looks at how the Convention dealt with the tricky problem of the values embodied by Europe, and the implications of engaging in this kind of discourse within the present process of constitution-making, insofar as it has the potential of both uniting and dividing the EU polity. From a more substantive perspective, all chapters of Part III offer as much of a mixed assessment of both the operating methods and the results of the Convention as that offered in Part II. Indeed, because of its relative openness and transparency, the Convention better reflected the diversity of European society within the constitutionalisation process, but ultimately this remained a process directed and controlled by the institutional players. Its capacity for innovation remained circumscribed to the form rather than affecting the substance of the Constitution or the democratic legitimacy of the entire process.

Part IV, finally, concludes the book by making an assessment of both the legal and political impact of the Convention. Chapter 11 looks at the way in which the particular moment of constitution-making relates to the more diffuse way in which the EU legal corpus has developed. This chapter returns to some of the problems discussed at the beginning of the book, by raising the question of whether a written constitution is all that there is to the constitutionalisation process. In fact, it suggests that even in its draft form the Constitution interacted with the way in which community legislation and judicial interpretation shape the 'living law' of the EU. The suggestion is that the constitutionalisation process is a fluid and dynamic one, which depends as much on its constitutional formalisation as on the way in which the law is shaped and interpreted by the judges. Chapter 12 deals more directly with the immediate aftermath of the Convention, by analysing the relationship between the Convention and the IGC, and the following (and more dramatic) phase of ratification. It looks at how the work of the Convention impacted on these later phases, and what all this may mean for constitutional politics in the EU. The overall assessment is that in the course of moving from the Convention phase to the IGC, more traditional and intergovernmental practices came to the fore. This was partly inevitable and also a reflection of the mixed nature of the EU, still divided between intergovernmental and supranational *modi operandi*. More ominously, the ratification process highlighted the still unresolved issue of democratic legitimacy in the EU, and how this can be addressed, if at all, at a more constitutional level. This, of course, is an issue on which future events will shape our understanding of the past. We hope, however – and this is partly the rationale for this book – that our understanding of the present may give us some of the intellectual instruments through which to shape the events of the future.

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