

Beyond Treaty Revision: Shifts in the Institutional Balance?

- Some reflections -

Paper presented at the ECSA Sixth Biennial Conference

Pittsburgh, Pennsylvania

June 1999

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(The views expressed in this article are strictly personal and do not necessarily reflect the position of the European Parliament)

I.

Almost exactly one year ago I surprised the participants of a seminar at the Harvard Law School with the following thesis: the intergovernmental conferences do not change the institutional balance. Looking back at the budget treaties of the seventies, the Single European Act, the Maastricht and Amsterdam Treaties, this seems to be an almost frivolous statement.

And yet, looking at the mandate for the last IGC formulated by the Turin European Council, you find the phrase: "... respecting the balance between the institutions ...". And at the end of the Amsterdam conference, there is the satisfied conclusion that the institutional balance has been maintained. Going back to the previous IGCs, one finds the same kind of affirmations.

Of course, it is possible to describe the budget treaties as the introduction of the system of own resources, to state that the Single European Act was about the internal market, the Maastricht Treaty about economic and monetary union and the single currency and the Amsterdam Treaty about filling in the gaps left by Maastricht and integrating an employment chapter and the social protocol. However, this offers only a partial view. One might as well analyse the budget treaties as giving the European Parliament all its budgetary powers, the Single European Act as introducing the cooperation and assent procedures, Maastricht as making the step towards codecision and Amsterdam as the IGC that made codecision perfect and the standard legislative procedure.

We live in one world and both sides of the descriptions of the IGCs have to be combined. Even if there are sometimes very important developments in interinstitutional relations outside IGCs, the terminology of the governments of the member states on the occasions of European Councils remains somewhat puzzling. We need to get beyond the differences of terminology and understand what the phraseology of the European Council Presidency Conclusions really means.

One interpretation has to be excluded immediately: it is certainly not a slip in the use of language. We have to be aware of the bitter fights on any and every comma in the text of the Presidency Conclusions. Everything is there for a reason, nothing comes into these texts by accident. A key to the deeper meaning of the wording chosen by the governments may be found in the contrast with public perception and a sometimes relatively loose use of language. There, and we should certainly not exclude ourselves, you hear analyses that one institution has won over the other or even over the member states. This is a public judgement which may have a certain justification and is certainly unavoidable. Yet it is basically unacceptable to the governments of the member states as well as to the institutions, or at least those who are indicated as being the losers. If a government were to accept even tacitly, that it has lost in an institutional battle, it would be faced with serious consequences, extending the possibility of being defeated at the next national election. The government would or could be portrayed as not being able to protect the interest of the state.

The tentative conclusion is, there can't be a loser. If that is so, there can't be a winner either. And that is why you have to look for a presentation in which all the participants and that means first of all the governments, and at some distance, the institutions as well, can agree that they have achieved progress in a joint effort.

Another nod in the direction of this explanation is to be found in the use of the argument about improper changes to the institutional balance. If you look at the IGCs you will find that the member state governments use this devastating argument only as a last resort, i.e. in a position where the government concerned lacks any other argument or possibility of influence. On this understanding, the reference to an improper shift in the institutional balance can be decoded as meaning: "we do not want this kind of development, at least not under the given circumstances". To those for whom this kind of behaviour does not seem relevant, it is worth recalling that any development needs consensus. That is why the argument is so strong. To avoid the brutal word of a veto, you find something that sounds somewhat more conciliatory and in any case very technical to outsiders.

A slightly more elegant description of the meaning of the necessary respect of the balance between the institutions would be the following: it is too crude to talk of shifts in the institutional balance in the sense of one or other institution winning out. Rather the nature of the balance is redefined with everyone able to find new opportunities to make their voice heard. It is a dynamic, not a static phenomenon and it is not zero-sum.

The idea of a balance implies a 'mechanism' whereas what in fact it is is an idea around which the institutions gather and argue. It provides a forum for all to debate what should be the rules governing the operation of the whole system. Rules change, but if the change is an agreed one, all can accept that there is a continuing balance. Only if there is a threat that the rules will be changed against the express wishes of one party can one talk of imbalance. S/he who speaks of imbalance means a rule-change contrary to his or her interest.

The idea of balance does not therefore explain anything, but rather marks out the field of combat, with the parties constantly accepting to move from one stadium to the next!

This may remind some of us of the often used image of the integration process as a bicycle which only keeps its balance when in motion. What this description contains is not just another expression for the functionalist approach. It is also a description of the dialectical culture that the governments and the institutions have created and refined.

It has already been mentioned above that the more colloquial use of the term of changing the institutional balance does not only relate to IGCs. And that is true in more than one sense. First it is clear that IGCs draft texts. The real shifts can only come into existence once these text have come into force. The true importance of the date of entry into force of a new treaty is sometimes underestimated because of the anticipation found in the theoretical debate and as well in the practical preparations for the entry into force. Nevertheless it is only from the 1 May of this year that we can speak of a codecision procedure with Parliament and Council on equal footing. It is only now that it has become the typical

legislative procedure even if a certain number of important areas, such as agriculture, indirect taxation and trade, are still not covered.

And then of course we are in for surprises. Not everything that has been predicted as the consequence of the entry into force materializes, at least not at once. And sometimes things develop in an unexpected way. An example of the former case is the discharge procedure. The European Parliament obtained the power to give discharge to the institutions including the Commission thanks to the budget treaties of the seventies. Some of the authors of those treaties at the time expected the European Parliament to use this new power immediately on the first occasion. What they did not expect was that the Parliament would use the power to give the discharge. What they expected was the opposite, namely the refusal of discharge. But for this, we had to wait until 1983 for the first time. And the second time we have just lived through. Now, the reason for this kind of development is twofold:

- On the one hand, we are confronted with a misunderstanding: the use of a newly achieved power is often construed as being the negative use, a decision not to do something. This is just wrong. You use your assent power for instance for an enlargement as much when you vote in favour as when you say no. The same is true of the assent on Customs Union with Turkey. These were political results arising from the use of a prerogative that had entered the treaty some time before. The use of the rights acquired under the codecision procedure (Michael Shackleton's paper gives fuller details) was of course to a very large extent a constructive and positive use. Only in three isolated cases was the final result a negative one, which corresponds to less than 2% of the total! It is not just that the European Parliament itself is interested in achieving results and therefore sometimes accepts doubtful compromises, preferring this to no legislation at all. The Parliament is also under pressure to "behave well". If it were not to do so, it might be afraid of a negative outcome at the next IGC which would constitute a serious interruption in its institutional development.

- On the other hand, an additional element is sometimes required for prerogatives to be used negatively. This can be, for example, the extremely bad behaviour of the institution under scrutiny. Look at how the Commission behaved over its 1996 discharge procedure. And for the discharge refusal of 1983, one important explanation for Parliament's behaviour is probably to be found in the first direct elections which did not change Parliament's prerogatives explicitly, but certainly had a tremendous impact on its conception of its own role. Other examples of this new search for its identity were the first rejection of a Community budget, which came immediately after the first direct election, and the 1984 Draft Treaty establishing European Union, the so-called Spinelli draft.

II.

After these preliminary considerations one can move on and ask whether there are shifts in the institutional balance, why and how they have occurred and finally, where these shifts may take us.

Let us listen to what people say:

- We very often hear these days that the European Parliament is the big winner of Amsterdam. Following the Commission's collective resignation and on the occasion of the end of the legislative term, various statements have been claiming that we are at the end of a maturing process for the European Parliament (L.J. Brinkhorst, MEP), that Parliament has become a real co-legislator with the Council, that Parliament has come of age and that this is now a real Parliament (the latter comment is clearly hinting at the unfortunate slip of the tongue by Mrs Bjerregard just before she was expected to become a Commissioner in early 1995).

- On the Commission, we hear that recent events were a serious blow to the Institution, that it is weakened and may never recover. But we hear as well that the European Commission has evolved in 10 years from a legal, regulatory institution into a multinational handling billions of Euros (L.J. Brinkhorst, MEP). Others, however, prefer to consider it as a secretariat (see below) which is in stark contrast to the officially confirmed view that "we need a strong Commission".
- On the Council we do not hear that much. But it is certainly still broadly considered as being the strongest institution.
- On the Court of Justice, some governments recognize that their wish for a lower profile had been heard.

With regard to the Commission it has been shown that the successful development of codecision and especially conciliation culture has somewhat reduced its impact on the legislative procedures (see Michael Shackleton's paper). This is almost entirely the consequence of the Maastricht Treaty provisions and will not be reversed, however, even if the three political institutions adapt their organisation under the Amsterdam Treaty. As for the blow to the institution leading to its collective resignation, this was due much more to poor management arising out of a relatively minor problem. Governments and the Council still hold that Parliament should not have pushed the Commission out of office. But given the extremely clumsy way in which the Commission, between December 1998 and March 1999 managed the institutional crisis, the resignation became unavoidable, at least in the eyes of the European media and the interested public as well as in the European Parliament's (I'm quite fascinated by the high numbers of scholarly analyses and the way they elaborate on strategic "choice" between the creation of a committee of independent experts, the possible recourse to an inquiry committee and other options. Having been relatively close to the events, I can say with some confidence that at the time most of these strategic subtleties were remarkably absent from the minds of the actors.)

With regard to the European Parliament, it is undeniable that the institution has developed enormously and has become a powerful actor in its own right. Curiously enough, I would not rank the different treaty changes highest amongst the reasons for this development. The most important factor for me still is the introduction of direct elections in 1979, even if this development did not bring about any change in Parliament's rights. But it was from this moment on, because of its changed legitimacy, that the Parliament became absolutely determined to use all the possibilities on offer to improve its position in order to provide the European project with the necessary democratic credentials.

- With regard to the Council, despite its worsening problems of internal organisation, I share the view that it remains the most powerful institution. It is the institution which has the power to make governments cooperate. The fact that the Council now has to share its legislative powers with the European Parliament should not be considered a loss of power. Taking into account that the legal acts now benefit from increased legitimacy, i.e. parliamentary legitimacy, and some noticeable improvement in their quality, one may even consider that Council has benefited from the establishment of the codecision procedure and the relatively large extension of its field of application.
- With regard to the Court of Justice, I agree with the above mentioned comments.

One may wonder how it is possible to see apparently more winners than losers in the game. Well, the solution here is that it is not zero-sum game but - as seen above - that we are in a never ending debate with the parties constantly accepting to move from one stage to the next.

Having made some remarks on the shifts in the institutional balance which have occurred and speculated about their causes, I will now move to what is the object of even more speculations, i.e. the question of where these shifts may lead us to.

There are two possible approaches to this question. One is to analyse past development in terms of treaty changes and the like and then try to extrapolate the emerging trend. This method corresponds to the so-called "small steps approach". The other way is to look at the underlying vision. Various people are quoted as saying that people who have visions should consult an ophthalmologist (President Bush, Chancellor Schmidt). I do not share this position. Without the Spinelli draft, the whole institutional development since 1984 would have lacked direction. A comparison of what emerges after 30 to 40 years of small steps with the more realistic visions can surprise us by how similar they are.

The European Council of Cologne which is about to take place (3/4 June 1999) seems likely to decide about a procedure for drawing up a declaration of fundamental rights and another one for an IGC restricted to the three questions which remained unanswered at Amsterdam. Both procedures are to be concluded before the end of the year 2000 under French presidency. Remaining institutional developments will be postponed to another IGC which would then involve a number of new member states. Looking at the results of treaty changes since the seventies and hoping for a positive outcome at the next IGC, one can predict the following scenario:

- The Commission will retain its monopoly of the right of initiative. There is some uncertainty concerning Article 250 EC (ex-article 189a) in so far as in a union of 25 member states it might sound odd to see that the sole state of Estonia together with the Commission would be able to block a Council amendment to a Commission proposal. But then, isn't this question highly theoretical? We all know that in such a situation the Commission would revise its own proposal without too many difficulties. The Commission will continue to be part of the Union's executive especially to the extent that it will have to supervise the implementation of EU law by member states' administrations. (As a consequence of the forced collective resignation of the Commission, the idea may come back to give the Commission the power to dissolve the

European Parliament¹. If this were to be carried through to its logical conclusion, it would mean that one would have to recognize the Commission's role as a government, and that of course would mean that the Council would have to give up most of its executive powers.)

- European Parliament and Council will be the joint legislative authority with Council adopting all ordinary legislation by qualified majority. The codecision procedure will apply to all areas of ordinary legislation. The budgetary procedure will also move towards codecision. The results of the negotiations on the Agenda 2000 package and especially the new interinstitutional agreement enabling the European Parliament to have a say in the funds for rural areas seem to justify this optimism.
- The Council will retain some executive powers, especially in the area of foreign affairs.
- The European Parliament will further improve its participation in nomination procedures (see Francis Jabobs' paper). The treaty revision procedure will remain the same. Article 48 TEU (ex-article N) will not be replaced by an entirely new system and will probably not provide for European Parliament's ratification of the results of an IGC.

To describe in a few words a vision, one is first obliged to choose one out of the many existing. To take the 1984 Spinelli draft would be misleading because it would turn the exercise, at least in part, into a historical analysis. That is why I would present the views of the German Foreign Affairs Minister, Mr. Joschka Fischer. His views have developed considerably since he took up office and more particularly so, since he became President-in-office of the Council of the European Union. Relatively shortly after having been appointed Foreign Affairs Minister and Vice-Chancellor, he went public (much to the horror of his administration) with his conception of a European constitution: a legislative authority made

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Mr Kimmo SASI, Finnish Minister for European Affairs, and that means the President-in-Office of the Council from 1 July 1999 on, has even suggested that the member states may have the possibility to dissolve the Parliament (Agence Europe, 22.5.1999)

administration) with his conception of a European constitution: a legislative authority made up of two parliamentary chambers, one with representatives from the national parliaments, the other being the European Parliament, the Council (believe it or not!) as the government and the Commission as a secretariat. The most recent version of his vision results from his appearance at the open Institutional Affairs Committee meeting of 20 April 1999. There, he presented an enlarged European Union as one that will necessarily be "parliamentarized". There would be two legislative chambers, one being the European Parliament and the other one being a revised Council, either made up of representatives from the national parliaments or by the governments according to a formula yet to be decided. The Commission would retain its current role. Though pressed hard by the members of the Institutional Affairs Committee, Mr Fischer was not able to develop further his views of the future structure of the Council. He confirmed that there could be no third legislative chamber. He did not specify where the government function would go either. But in the logic of his scheme, based on a bi-cameral legislature, the government would have to be the Commission.