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The Evolution of Intergovernmental Cooperation in the European process.

The Luxemburg report, also known as the Davignon report, adopted by Foreign Ministers in October 1970 is a generally accepted departure point for intergovernmental cooperation among members of the European Community. It was the first time that the "Community method", devised by Jean Monnet and consolidated by the treaty of Rome on the basis of texts prepared by the Spaak Committee, was deliberately discarded, in the field of foreign policy, in favour of the traditional methods of diplomatic consultation, in an exercise initially known as "political cooperation".

The significance of that initial step can only be understood by a flashback to the failure of the Fouchet negotiations in the spring of 1962. That negotiation, launched and largely dominated by General de Gaulle, had been understood by his partners as a deliberate attempt to subordinate the nascent European Community to an intergovernmental construction established in Paris, presumably dominated by France, and without any of the supranational procedures or institutions which had made Monnet's proposals acceptable to the smaller countries. Its final failure was immediately perceived as a turning point, as a clear parting of the ways between the Gaullist concept of *l'Europe des patries* and the supranational concept developed in the fifties. It was moreover quite acrimonious: participants accusing each other of arrogant and irresponsible behaviour. In his memoirs Paul-Henri Spaak, who played a prominent role both as Belgian Foreign Minister and as foster father of the treaty of Rome, clearly puts the responsibility on the shoulders of Couve de Murville. Years later, in a reflective mood, he asked himself, in my presence, whether he had not, at the time, been too intransigent. Whatever the merits of the case, the exercise left all parties with the sour taste of an important failure.

The merit of the Davignon report was to find acceptable compromises on the issues which had led to that failure. The proposed concept was limited in scope: foreign policy *stricto sensu*, security matters being left to NATO. It would have no legal basis, no institutions and no seat: the model was that of a travelling circus moving from presidency to presidency. European Community and NATO competences were specifically safeguarded and the Commission associated in a limited way to the new exercise. On that basis ministers came to an agreement. The European Economic Community would henceforth be complemented by an intergovernmental exercise parallel to it, and therefore also distinct from it. Political cooperation was born.

All compromises, even good ones, contain an element of ambiguity. And ministerial decisions do not automatically dispel mutual suspicions. Political cooperation developed, quite successfully, in the seventies and eighties in an atmosphere of some ambiguity and some suspicion. These were mutual. The Commission and its friends, specially the Benelux countries, were afraid that ministerial meetings in the intergovernmental mode would encroach on Community competences and institutions. On the other side, France, frequently supported by Britain, was keen to avoid

interference by Community institutions in foreign policy matters. A maximum level of paranoia was reached on a certain day in 1973 when, at the insistence of the French minister Michel Jobert, ministers met in the morning in Copenhagen in political cooperation, and in the afternoon in Brussels as a Council.

Common sense and the habit of working together gradually reduced the suspicions, if not the ambiguity. The presence of the Commission, very limited at the beginning, was progressively extended to cover practically all working groups. Ministers agreed to answer questions on political cooperation in the European Parliament. Community activities and political cooperation were clearly separate, but not antagonistic.

But the very name of the Single European Act concluded in February 1986 shows how touchy the whole subject remained even after fifteen years of practice. That treaty was the first substantial modification of the treaty of Rome, including the first mention of monetary union, and it gave, also for the first time, a legal basis to political cooperation, with a permanent secretariat in Brussels as administrative support. Inquisitive young students must ask themselves why this document has passed down to new generations with the qualification of "single". The answer is that the two parts of the treaty (Community affairs and political cooperation) had been negotiated separately (basically by COREPER and the Political Committee) and the decision to bring them together in one legal text was only taken at the last minute and at the highest level. That decision had been uncertain. It seemed so momentous, hopefully putting an end to years of tiresome quarrels and dogmatic disputes, that negotiators, including myself, greeted it with enthusiasm. The fact that a legal text covered both Community affairs and political cooperation, which had never been the case before, suddenly became more important than its content, although that content was quite substantial. This explains the fact, possibly unique in diplomatic history, that a treaty is known not by the name of the town where it was signed (Luxemburg in this case) nor by a summary of its content, but by an adjective which underlines the bringing together of two separate texts. And the importance given at the time to that historical fact, which today would seem to justify no more than a footnote, shows that the wounds of the sixties were not completely healed. With hindsight, I feel that we were right to attach importance to what was happening because it was the first significant step on a road pursued to this day: gradual *rapprochement* between Community business and intergovernmental cooperation.

The next stage on this road was the treaty of Maastricht and the negotiation of that text was deeply scarred by the question of the relationship between those two forms of European activity. In the spring of 1991 the Luxemburg presidency, on the basis of several months of negotiation in the intergovernmental conference, put a draft treaty text on the table which divided the various activities of the Union in *pillars* : a Community pillar and two intergovernmental pillars for foreign and security policy on the one hand, justice and home affairs on the other. Each pillar would work according to different rules and procedures. This innovation was of course hotly debated. Belgium and the Netherlands saw a threat to the Community method which had served us so well over the years, but the majority of the Council seemed ready to go down that road. In the course of the summer the incoming Dutch presidency drafted an alternative text which rejected the pillar structure, brought foreign policy and justice into the Community fold but with much reduced objectives and ambitions. The presidency misread the political signals and ran straight into a wall, at the end of

September, when all member states, except Belgium, declared in Council that they preferred the Luxemburg approach. To this day that meeting is known in Dutch diplomatic circles as “Black Monday”. Much has been written on the causes of that failure but, for the purpose of this article, the central point is that the major drama of the Maastricht negotiation turned on the relationship between Community affairs and intergovernmental cooperation. As everybody knows the text agreed in Maastricht is based on the pillar structure, initially suggested by Luxemburg. It fixed the goal of a common foreign and security policy, which was, and remains, a very ambitious objective.

Again with hindsight it seems to me that we failed to take into account, at that time, the intrinsic difference between the second and third pillars. Foreign policy, justice and home affairs all deal with matters close to the core of national sovereignty, which explains, without necessarily justifying, why national governments wish to retain control. But they are very different. Foreign and security policy is essentially executive in nature : it is based not on legislation but on political decisions. In most countries Parliament has little effective influence on foreign policy. The field of justice, on the other hand, is essentially legislative in nature: it implies harmonisation of legislation, mutual recognition of acts and procedures, the sort of thing we have been doing for years to establish the single market. The implication is that intergovernmental cooperation, which basically means unanimous decision in Council, is much better adapted to foreign policy than it is to justice and home affairs. Establishing identical procedures in the two pillars was not an optimal solution.

That point was taken up by the treaty of Amsterdam signed in October 1997. The clear separation between pillars, which had been the essence of the compromise leading to Maastricht, was blurred in the field of what was now called the area of freedom, security and justice. Police and judicial cooperation in criminal matters remained in the third pillar, but migration, asylum and judicial cooperation in civil matters was incorporated in a new title of the Community treaty. However procedures in that title were not to be fully *comunautaire*, even after a transition period of five years. Unanimous decision remained the general rule, the power of Parliament and the jurisdiction of the Court were limited. Another significant result of the Amsterdam negotiation was to incorporate the acquis of the Schengen Convention into the treaty framework, with opt outs for Britain, Denmark and Ireland. But the protocol doing that is presented as an annex to both the European Community treaty and the European Union treaty, which is another example of ambiguity on the pillar structure. Foreign policy and security, on the other hand, remained clearly separate from Community business. The treaty created the post of High Representative/ Secretary General of the Council, in charge of CFSP, an innovation which was to have significant consequences in later years.

The relaxed attitude of the treaty of Amsterdam towards what had been in the past a subject of ideological confrontation between the Community method and inergovernmentalism was typical of a trend. After the climactic confrontation of the treaty of Maastricht, the advocates of the Community method accepted that some form of intergovernmental cooperation would coexist with it, even in treaty texts. And the advocates of intergovernmental cooperation accepted that European institutions could play some role, without compromising the nature of that cooperation. Intermediate solutions then became possible, such as the one retained for asylum and migration in

the treaty of Amsterdam. In *"The Case for Europe"*, published shortly after the signing of that treaty, I described *"a multiform network of procedures and heterogeneous constructions, providing flexible answers to differing needs."*

That trend was to be confirmed in the following years, not by the treaty of Nice which makes no relevant contribution in this debate, but by practice. Two examples are the Lisbon process and the role of Solana.

The "open method of coordination" was devised by the Lisbon European Council in March 2000 because member states, while recognising that common efforts were needed in the field of economic and social policy and innovation, were in no way ready to accept the transfers of sovereignty which an extension of the Community method would have entailed. Yet the Lisbon process is not purely intergovernmental : it is based on benchmarking and peer review in which the Commission plays a role of scrutinizer of national policies and the European Council (of which the Commission is a member) a role of guidance and arbitration. Helen Wallace calls it "intensive transgovernementalism" in which "*the primary actors are leading national policy-makers, operating in highly interactive mode and developing new forms of commitment and mutual engagement*". Many observers consider today that the Lisbon process is failing to deliver its promises but, whatever its merits, the fact is that it was conceived as a sort of halfway house between the Community method and traditional intergovernmental cooperation.

When creating the post of High Representative for Common Foreign and Security policy, negotiators in Amsterdam had certainly no intention of departing from the intergovernmental character which had always been given to that policy. But when the European Council appointed to that post a former foreign minister and secretary general of NA TO, instead of the high level civil servant whom many had expected, a subtle element of change was introduced. With time, tact and political acumen, Javier Solana has created for himself a situation in which he is not simply a reflection of the common will of ministers in Council. When taking the floor in the Security Council, putting his signature on a treaty between Serbia and Montenegro or discussing nuclear issues in Teheran, Solana obviously avoids taking positions or making statements which would antagonise some member states. But he has a margin of freedom, and he is perceived, much more than successive presidencies, as the impersonation of the common European interest in the field of foreign policy. That growing perception, shared by member states and foreign powers, gives him a role not unlike that which the Commission plays in Community affairs. He heads an intergovernmental institution but the purists of the sixties and seventies, like Couve de Murville or Michel Jobert , would not recognise him as one of theirs. In a way he has become an institution!

The Convention, and the Constitutional treaty based on its conclusions, are clearly to be understood as confirming, accelerating and extending the trend identified above. The most spectacular example of this is the proclaimed abolition of the pillar structure. It is possible to argue that this move is more apparent than real: if pillars no longer exist as such, procedures remain different and separate. But the simple fact that what had been a fundamental element of the Maastricht compromise could now be, at least partly but openly, discarded, shows a considerable evolution in minds. An even more cogent example is the concept of a Foreign Minister simultaneously sitting as Vice

President of the Commission. One could hardly imagine a clearer way of blurring the lines between Community affairs and intergovernmental cooperation. It is certainly significant that this proposal was initially opposed both by the Commission and the Council secretariat. Both Solana and Patten expressed serious misgivings in the Convention working group discussing this proposal. It was going straight against long accepted orthodoxy on both sides. And yet it prevailed, and today is frequently put forward as a proposal which should be retained even if the treaty itself was never to come into force. There is no doubt in my mind that the role played by representatives of the new member states in the Convention is highly significant in this respect. They were naturally less connected to the fundamental debates of the early years of the Community. They did not bear the intellectual scars of long battles, won or lost, on that ideological battlefield. The issues were new to them and they addressed them with common sense.

It would be tempting to conclude that the ideological debate of the early years has now been settled, with some remains of ambiguity and mutual suspicion, by successive compromises. A word of caution is needed. Those compromises are fragile and the debate could flare up again on the basis of a new ideological cleavage. The founding fathers shared with de Gaulle, and all other European leaders at the time, a commitment to some form of social market economy (obviously not under that name). Their debate, described in this contribution, was about the level at which intervention and regulation is most appropriately exercised: transfer of powers to European institutions was felt by some to undermine the freedom and sovereignty of member States. Today the transfer, and even the exercise of existing powers by European institutions is felt by some, in Britain and elsewhere, to undermine the freedom and sovereignty of the market. That is of course another debate, fuelled by different views on the conclusions to be drawn from globalisation. That ideological debate reaches the very foundations of our societies. It concerns the legitimate role of all institutions. If it develops into a major issue at the continental level, the compromises described above will be of little use.

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