

The Ongoing Institutional Reform Process of the European Union: *EU-Reform
Legitimacy, Transparency and Accountability*

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Preliminary Note

This paper will concentrate on specific aspects of the internal governance of the European Union more than on “the EU’s contribution to global governance” to quote the subtitle of the *Chaillot Paper* N°100 by Martin Ortega of April 2007. This orientation finds some justification in the fact that another planned lecture will bear on international aspects. But, of course, those aspects cannot be ignored. One of the dominant features of the EU is the central role of law in the relations among its Member States (see Ortega, p. 92). The European unification has produced a new category of law called the law of integration (Pierre Pescatore, *The Law of Integration*, Sijthoff, 1974) but it has always combined elements of supranationality and of intergovernmentalism. This is due to have an influence on the way EU plays in the international system both as an actor and as a “model”, a word to be used with caution (see Richard Higott, “Alternative Models of Regional Cooperation? The Limits of Regional Institutionalization in East Asia”, in Mario Telò (ed.), *European Union and New Regionalism*, 2nd edition, Ashagte, 2007, p. 75-106, p. 78) but that corresponds to the fact that European integration is the more achieved and successful example of intertwined relations between States that keep their international personality, of an institutional framework including a kind of allocation of powers that most recall a State structure and of a constitutional setting that associates the citizens to the management of the system.

I. About Reform Processes

A. A first period without horizontal Treaty reforms

During the first thirty years or so of the EC, and especially after the failure of the Fouchet Plan, a French proposal for an intergovernmental Union at the beginning of the sixties, and the “empty chair crisis of 1965”, there was a reluctance to engage in a reform of the Treaty of which no one dares to predict the result. The governments in favour of a supranational construction feared a regression in comparison with the Rome Treaties. “*Quieta non movere*” was the leit motive and when reasons for change were evident, like after the wake up call of the events of May 1968, the first energy crisis and the challenging of the Bretton Woods system, the Community reacted with the help of the so-called sweeping clause of the Treaty (235 EEC, 308 EC, in the TFEU, 352). The Paris Summit in 1972 included an invitation to the institutions to liberally use this article in order to meet the new challenges. One will have to wait up to the SEA to see new policies inscribed in the Treaty. It is not a surprise that the Court of justice adopted in its opinion 2/94 on the accession of the EC to the European Convention of Human Rights, and in Opinion 1/94 on the EC competence to conclude the Uruguay Round agreements, an interpretation of this clause that was considered by many as more restrictive than needed. The conclusion of the Maastricht Treaty and the preparation of Amsterdam demonstrated that a revision of the Treaty was not only possible but also planned... So it seems that the Court thought that a liberal interpretation of article 308 was not advisable.

B. A large period of ongoing reforms

The Lisbon Treaty led to a provisional end the reform process started more than twenty years ago by the Single European Act (1986), the first horizontal reform of the EEC Treaty, about QMV for the completion of the internal market, a strengthening of the legislative role of the EP by the “cooperation” procedure, a recognized monetary capacity for the Community, new policies and an article on political cooperation that raised at treaty level the *acquis* of the cooperation deriving from the process inaugurated by the Davignon Report of 1970 (see Mario Telò, “European Union, Regionalism, New Multilateralism: Three Scenarios”, loc. cit., p. 298). Other treaties followed this first step at a rapid tempo triggered by internal as well as external challenges, like the huge change in the Continent provoked by the fall of communism and the perspective of widening. The need for unanimous agreement among Member States led to the practice of opting outs and “left overs” with *rendez-vous* clauses. Five treaties were signed over fifteen years: the treaties of Maastricht (1992), Amsterdam (1997), Nice (2000), Rome (2004) and, after a prolonged crisis opened by the negative referendums in France and in the Netherlands, Lisbon (2007). We will come back on some elements of their content. It obviously recalls the classical model of economic integration developed by Bela Balassa that

defines institutional regionalism as proceeding through a mixture of intergovernmental dialogue and continual progressive treaty revision. There is nevertheless a great difference: here we are not only speaking about economic integration but about foreign policy, cooperation in Justice and Home Affairs, development cooperation, humanitarian aid and so on. Reforms are a way to politicize the EU, a still unachieved business.

C. The living Constitution

The new treaties alone have not shaped the institutional development of the Community, now the Union.

1° The more important development, at least potentially, was the direct election of the European Parliament (Act of 1976; first election in 1979) that had already received powers in the budgetary field by the Treaties of Luxembourg (1970), introducing the distinction between compulsory and non compulsory expenses, and Brussels (1975) giving to the EP the last say on non compulsory expenses and conferring to it the right of rejecting the whole budget as well as creating the Court of Auditors. But, one should not forget that the election was the implementation of a provision already included in the Paris Treaty creating the ECSC. The direct election has triggered the Spinelli report for a Treaty on the European Union (1984) that was at the origin of the start of the reform decided at the European Council in Fontainebleau in June 1984 and that received a first –limited - answer in the SEA.

2° Institutions evolve not only through formal reforms. There is an impressive list of institutional creations and practices, of which we will only mention examples, that are due either to the legislative process (like comitology, Lamfalussy procedure), decisions of the governments (European Council created by the Paris Summit of 1972), or inter-institutional agreements (pluri-annual budgetary perspectives, intervention of the EP in international agreements, relations of the EP with the Commission). And the institutional or quasi - institutional realisations of this kind have, on their turn, shape new sets of “rules”, many of them of a “soft law” (in the definition of Linda Senden, *Soft Law in European Community Law*, Hart, Oxford/Oregon, 2004, p. 112: “Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects”) type (for example, Stability and Growth Pact EC resolutions of 1997 and 2005, Eurogroup resolution of 1997, Lisbon Strategy resolutions of 2000 and 2005). Sometimes exercises of reflection are conducted that are followed by apparently modest political conclusions but that eventually proved to be useful steps in the evolution of the ideas and policies in the following years by keeping alive the objectives of the European construction (see for example, the Tindemans report on the European Union of

1975 or the Genscher-Colombo Stuttgart Declaration of 1981 adopted by the European Council after the first move by the EP under the impulsion of Altiero Spinelli). The EU constitution is a living constitution, that retains some new elements and rejects others, a sedimentary one (to quote Deirdre Curtin) in a way. The Court of Justice has legitimised some of the innovations (like the different original forms of comitology) and opposed others (like the creation of agencies with a discretionary power, considered as contrary to the institutional balance, as early as in 1958 in the famous *Meroni* cases). And it is not necessary in the present context to underline the role of the Court, as the architect of the constitutionalisation of the Community legal order, like primacy and direct effect and the affirmation of implied powers for the conclusion of international agreements. Many of the innovations mentioned supra found their way in primary law (like the creation of the European Council, timidly in the SEA, resolutely in the Lisbon treaty; Comitology in the SEA; the multiannual financial framework in the TFEU, article 312; implied powers for the conclusion of international agreements fully recognized by the Lisbon Treaty, etc). The introduction of the general enhanced cooperation clause in the Amsterdam Treaty is another example of reform triggered by the practice. It was conceived as a way to canalise this kind of cooperation that without rules would continue to take place outside the treaties. Another case in point is the European Neighbouring Policy that found its way in article 8 of the new EU Treaty. Practice is sometimes in advance on the Treaty without anyone objecting, like for the procedure of appointment of the Commission by the EP. The Treaty provides for a vote on the appointment of the Commission as a college. In the practice, with the consent of the other institutions, individual hearings of commissioners are organised and the EP does not hesitate, as the history of the composition of the Barroso Commission shows, in rejecting an individual “application”. This obviously is in conformity with the spirit of the new powers acquired by the EP in the appointment of the Commission, and recognised by the treaty.

II. The balance of the reform (1986-2007)

A. The global concept of European Union

Born in the Paris Summit of 1972, studied in the Tindemans report of 1975, the concept of European Union found its way to article 1 of the SEA; it was an essential element of the architecture adopted in the Maastricht Treaty, the first treaty with constitutional ambitions, and it culminates in the Lisbon Treaty. The advantage of the EU concept comes from its unitary feature symbolised in article 47 of the new EU Treaty by the explicit attribution of the legal personality. The co-existence of the Community with the Union and the separation in pillars were just illegible and the cause of conflicts of interpretation.

B. *The ups and downs of the Community method*

The concept of the law of integration (Pierre Pescatore, 1974), and the constitutional principles (direct effect, primacy, implied powers) is extended, after a period of fragmentation of the EU legal order by the Maastricht Treaty, to the former third pillar with some specificity. There is a striking paradox between the extension of the Community method while at the same time the Community disappears, through the Lisbon Treaty, in favour of the EU. Only the CFSP and CSDP remain intergovernmental. The special effectiveness of the integration process endowed with the specific features deriving from the case law of the Court will benefit to most of the policies of the Union. Direct effect and primacy are part of the inherent logic of the founding treaties, a case law that was not put in question as such, except marginally, by the Member States in the successive revisions of the treaties. The Treaty of Lisbon confirms primacy as a structuring principle in an integration process. [Possible excursus on the so-called constitutional pluralisms as opposed to classical verticality and hierarchy of relations and rules (compare Matej Avbelj (German Law Journal, 2008, N°1) and Julio Baquero Cruz (EUI Working Papers, RSCAS 2007/13) and the distinction between supremacy and primacy in the case law of some constitutional courts.]

C. *The treaties are about law making.*

Despite of the multiplication of soft law procedures of which the Open method of coordination is a good example in the treaty and the policy of “Better regulation” (that in practice more and more seems to mean “less regulation”), adopted by the European Council as well as by the Commission, legislation preserves a prominent place (except of course in the CFSP). The direct election allowed for an increasing participation of the European Parliament in the legislative procedure that at the beginning was limited to the (sometimes difficult) dialogue between the Commission and the Council, with a minimal intervention of the EP. For the first time, the SEA involved the EP in the procedure by the “cooperation procedure” that will be followed by the so-called “co-decision” in the Maastricht treaty, a formula that becomes the “ordinary legislative procedure” in the Lisbon Treaty although there are still (too) many special procedures.

D. *The role of national parliaments and where is the legitimacy?*

Increasing democracy in the Union goes in parallel with an accent on the role of national parliaments (a specific request of Declaration 23 annexed to the Nice Treaty and the Laeken Declaration of the European Council of December 2001), collectively (control of the application of the subsidiarity principle, conceived in its negative side, where national parliaments appear as the “*superlegitimate gatekeepers*”- to quote Edward Best- of national

sovereignty) or individually (in the possibility to block the use of the so-called passerelles from unanimity to QMV and from special legislative procedures to ordinary ones). National parliaments appear jointly to Union's institutions as elements of representative democracy (article 12 of the new TEU). One can discuss this development that apart from consisting in a supplementary burden on the decision-making process could lead to a lesser coherence of Community legislation. For some, the blockade of a decision by one national parliament, as provided for the use in the so-called passerelles (new TEU, article 48, paragraph 7) is to be considered as a manifestation of the democratic principle; this idea reflects a *State-centered collectivist approach of democracy* -- the expression is used by Niels Petersen, German Law Journal, vol. 6, n°11, p. 1507-1525 who opposes to it the individualistic concept of legitimacy/democracy enshrined in art. I-2 of the Constitutional treaty and in Article 2 of the new TEU and confirmed by the establishment of the citizens' initiative, in the provision on participative democracy in Article I-47, §4 of the CT and 11§4 of the new TEU; one should also refer to the Charter of Fundamental rights that recognise the political rights of the citizen -- that is still at the basis of the requirement of unanimity for treaty revisions (see, *infra*).

The dual legitimacy principle (States and citizens) is at the basis of the constitutional structure as it exists since the beginning and developed with the successive revisions of the treaties. The role of the Council as an institution where governments are represented could not only be explained, as it has been done, by the model of executive federalism (Niels Petersen, *loc. cit.*), i.e. the role of the States in the implementation of the legislation. Its nature is close to the one of the chamber of States (Senate) in a federal context. The co-decision in legislative and budgetary matters, as well as the intervention of the EP in the Treaty making process, demonstrates the increased role of the EP. But this power stops short at the level of the revision procedures. There is no "constitutional co-decision". On the other hand, it is true that the representation of the citizens of Europe by the EP includes a part of fiction: there is no European wide organised election and the citizens are not equally represented due to the so-called degressive proportional representation. There is still a "mediation by individual Member States". Of course, "true European parties" could play a role in the 'Europeanisation' of the direct election but the passive resistance of national parties to leave some autonomy to European parties and the importance of party-politics at national level do not encourage optimism. European integration has an impact on national democracies (Ph. Schmitter; on the change in national democracy, see also Vivien Schmidt). It has, in parallel with other factors (technological developments, party politics...), contributed to strengthen the role of the Executive and it has deprived national authorities (especially parliaments) from their input-

oriented democratic legitimacy. Some authors have seen the conferment of powers to national parliaments in European matters as a “compensation” for their loss of power. The role of these parliaments in the subsidiarity control is mentioned as the most spectacular element in this context. Considering the present limitation of democracy at European level, and in order to narrow the gap between the EU and the citizens, it was felt to be important to sensitize national parliaments on their role as controllers of the Executive branch of power acting in the Council. But that does not justify a systematic contribution of national parliaments to the EU legislative power, “becoming true actors in their own right in the EU, prised away from the grip of their governments” (Leonard F.M. Besselink, “Shifts in Governance: National Parliaments and their Governments Involvement in EU Decision-Making” in Gavin Barrett (ed.) *National parliaments and the EU: The constitutional challenge for the Oireachtas and other Member States*, Dublin, 2006) and collectively hold for a “new organ” of the EU (D. Jancic, Letter to Euractiv, 17 Dec. 2007).

In specific hypothesis, the implication of national parliaments, and especially of competent committees of national parliaments, in order to develop “national ownership” could be a way to improve effectiveness more than a means to increase democracy. Examples are to be found in the resolutions of March 2005 of the European Council on the reform of the Stability and Growth Pact and on the Lisbon strategy. The awareness of specialized committees of national parliaments of the orientations taken at EU level, for example, in budget matters can contribute to fill the gap between “Brussels” and national capitals.

E. *Is it justified to oppose “formal” to “social” democracy?*

The absence of one ‘demos’ and the existence of several ‘demoi’ are invoked in order to demonstrate that there is no “social” democracy (no European public space, no European public debate, no European media, no true European political parties, weak participation to the European elections, etc). This could by no means be an argument against a constitutionalisation of the EU charter. We share the view already expressed by others that formal democracy can shape the social one by giving to it the framework for action. In that sense to give more powers to the European Parliament should eventually contribute to the increased consciousness of the importance of this institution. In other terms, one could presume that the citizens should (be helped in order to) remember in going to vote for the EP the debates on the Services directive and the Reach regulation...On the other hand, the institutions do not use as they should consultative organs, like the European Economic and Social Committee and the Committee of the Regions for their contacts with both organised and general civil society. There obviously is a lack of trust in the EECS that was put under

full light when it became clear that the Convention would refuse the more reasonable requests presented by the Committee. Social partners, NGOs and institutions do not see the EEC as the most convenient place for deliberation and surely not for negotiation. Social partners want to preserve the flexibility of the social dialogue (between representative organisations, articles 11, paragraph 1 of the new TEU and 154 TFEU) and NGOs or other parts of the civil society (on the dialogue with civil society, see article 11, paragraphs 1 and 2 of the new TEU) are attentive to keep their independence (see Nieves Pérez-Solórzano Borragán, “Discourses on participation democracy and the European constitutional experiment”, in BECSA, *Adapting the Enlarged Union to the Citizen*, Krassimir Y. Nikolov (ed.), Sofia, 2008, p. 136-167, p. 156). It is far from certain that all the potentialities are drawn from the existing instruments for promoting the cooperation between the Commission and the EESC (see the Cooperation Protocol of 7 November 2005, CESE 1391/2005, signed by the Commission and the EESC).

F. *The role of the Commission*

The Commission is confirmed in its traditional role as the initiator of legislation and in implementing the legislation, although there are specific provisions on, for example, the role of initiative of a quarter of Member States in the field of cooperation in judicial cooperation in criminal matters and police cooperation. Niels Petersen (quoted supra) underlines that “the cooperation of the Commission on the one hand and Parliament and Council on the other is an example of balancing expertise and participation in the law-making process. In this context, the weak political accountability of the Commission is an advantage rather than a disadvantage because it increases the decision-making efficiency.”¹ I indeed accept the view that the existence of an independent Commission with the panoply of its powers is one of the main keys of the success of the “Community method”. A Commission that would be at the orders of either the Parliament or the Council would mean a rupture in the system. It is furthermore debatable if it is (still) justified to speak of its “weak political accountability”, considering the role of the EP in the appointment of the Commission and hence the greater meaning of the weapon of a possible motion of censorship of the EP against the Commission together with a strengthening of various ways of control of the EP on the day to day action of the Commission (let us only mention the Committee of budgetary control). The Santer

¹ The same author is reported to have adopted the view that national influence on Commission action – most visible in the College of Commissioners and their Cabinets – is in fact contributing to an enhanced legitimacy of the overall construction. *EU-CONSENT Newsletter* N°5/ 2008, p.6. Apart from the fact that this kind of influence is directly contrary to the status of the Commission as provided by the Treaty, we do not see how this kind of influence through the action of officials of national administration should be considered as an element of legitimacy.

Commission crisis has demonstrated that the simple threat to use the weapon of a motion of censorship is enough in some circumstances.

III. The reform processes under article 48 of the new EU Treaty

Article 48 of the new EU Treaty provides for ordinary and simplified procedures. The role of the Convention in the ordinary procedure deserves to be taken into account, as an element of deliberative democracy. There is a generally positive judgment on the intervention of both conventions (Charter of Fundamental Rights and Constitution). The result achieved by a convention should receive a supplementary weight due to the incorporation of this procedure in the treaty but due to its composition, it cannot bind the IGC, what would be unacceptable for the Governments. But it should be considered as an error for a Convention to try at any price to achieve a consensus. It has been said that the convention process gives the lead to arguing on bargaining. And effectively, on certain points good debates have taken place especially in working groups. It has been observed that the Convention was an example of transparency (a relative one because the confidentiality of the work of the Praesidium was rather well kept) more than of participative democracy (N. Pérez-Solórzano, *op. cit.*, p. 147). The criticism based on a lack of participation of the ordinary citizen to this debate could appear unfair if it presumes that the situation at national level is normally better. How many in France, for example, were mobilised by the debate on the Balladur report preparing the constitutional revision? All the means of communication were open at the time of the convention to make one's voice heard. And despite the limited interest of the Press, there were a lot of reactions. True, some had what could be seen as privileged ways of making their standpoint progressing through the Convention better than others (see the role of Finance Ministers and the Economic and Financial Committee² on the conclusions of the Hänsch Group on economic policy, in the description of Uwe Puetter, in the *Journal of European Public Policy*, Dec. 2007, pp. 1293-1310). And active lobbying with the usual personal contacts was perhaps more effective than other means of trying to influence the debate (N. Pérez-Solórzano, *op. cit.*, p. 148 and quoted authors). These practices raise problems of transparency and equal access to dialogue but this kind of intervention seems both marginal and unavoidable. Compared with the IGC 2007, the 2002-2003 Convention appears as a miracle of openness.

² This raises the question of the transparency and legitimacy of committees working in the sphere of EMU, like the Economic and Financial Committee and the Economic Policy Committee and their subcommittees, as well of the Eurogroup itself, see Iain Begg, "Economic Governance in an enlarged euro area", DG Ecfm, European Commission, *European Economy. Economic Papers* N°311/ March 2008, p. 16.

The possibility exists for the Council to decide to revise the treaties without making recourse to a Convention. Such a decision has to be approved by the European Parliament and national parliaments will have to be informed on due time. One can presume that a revision without a convention would bear on unimportant matters. It is an open question if the European Parliament will prefer to stop a reform because it does not accept the proposed procedure or to accept the decision of the Council to renounce to a convention because it has an interest in the reform that it can initiate under the new TEU. National parliaments³ would normally ask for a convention to be convoked but in theory they have not the power to oppose a procedure decided by the Council but as they will have to decide on the reform in the ratification process, they have some elements of bargaining. Be they realised under the ordinary or a simplified procedure, every reform needs unanimity of the Member States, except for those specific and limited cases where QMV is provided (like for the revision of the protocol of the statute of the Court (TFEU, article 281, for example). Unanimity is a problem. It is the reason why (see supra) interinstitutional agreements could have an important role in the Union legal order. Of course, they have to respect the Treaty but they indicate the way institutions will make use of the powers given to them. Article 295 of the TFUE recognise the right of the institutions, in compliance with the treaties, to conclude such agreements “which may be of a binding nature”. It is a way of experimenting formulas that could be after a while inscribed in the Treaties. On the other hand, article 50 of the new TEU provides for the right of a Member State to unilaterally withdraw from the treaties, a right that it can exercise if it disagrees with a reform of the treaties, and that should have made easier the possibility of QMV for the revision of some provisions of the Treaties.

IV. What next?

Everybody knows that new elements of the Lisbon Treaty (stable presidency of the European Council, High Representative, future role of the rotating presidency exercised by teams of three countries, etc) raise a number of question marks.

The claims made when the Convention’s draft was adopted that the institutional balance was preserved is true in theory but, at the end of the day all will depend on the way the Lisbon Treaty will be implemented. If for Valéry Giscard d’Estaing, the future president of the European Council is to be “a new George Washington”, for the rapporteur of the European

³ On the specific veto power given to a single national parliament when passerelles are used, see section II D.

Parliament Jean-Luc Dehaene, its role should be, as initially thought by the president of the Convention, just the one attributed to “a chairman”, the text of article 15, paragraph 6 of the new TEU laying somewhere in between the two concepts, but nearer to the chairman’s thinking. The usual answer is to say that the function will depend from the personalities chosen for the two new posts and for the presidency of the Commission. But the job description is being made in secrete caucuses conducted within the institutional sphere. And the applications will be made accordingly. What is cautiously possible to tell is that the institutional creations will need an extra work to be done for the sake of coherence, especially on the international sphere, and that they seem to lead more in the direction of undemocratic intergovernmentalism. A next stage on the institutional field would be to give to the EP a role in the appointments and to make accountable the persons entitled with the new jobs.

The reform of the Council, as a branch of the legislator of the Union, is badly needed in an ever-enlarging Union. But considering the institutional reform fatigue of the Member States, the lack of inspiration and vision of the institutions (the new element being the right of initiative for revisions of the European Parliament) the limited attractiveness of such questions for the citizens, and the need for updating the policies in order to effectively cope with the new challenges, the next reform will probably not be primarily an institutional one.

The Community and the EU have demonstrated, against all odds the flexibility of their constitutional charter and its adaptability to new challenges. This ability is no doubt due to the development of an institutional structure and a legal order that are closer to an internal order than to one of a classical international organisation. That is surely the reason of the success of this experience in integration and a common good to be preserved.