

MODIFYING OR LEAVING IN FORCE THE CONSTITUTIONAL AND INSTITUTIONAL BALANCE OF THE EUROPEAN UNION?

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Possibly the most important question raised by the institutional reform proposed by the Draft Bill of the Treaty establishing a constitution for Europe², drawn up by the Convention, is to what extent we find ourselves with a new institutional blueprint, which would modify or even replace the traditional institutional balance between Council, Commission and Parliament, and which would constitute one of the fundamental pillars of the system of division of powers belonging to the European Union. Though advances in setting up a hierarchy of regulations are not to be sniffed at, since a clearer distinction between the legislative and executive functions in drafting and enforcing laws has been made, and greater clarification of legislative instruments has also been achieved, the new institutional blueprint would be proposing a framework for institutional relations and those with member States, which might have negative effects on the democratic legitimacy of the system and the general aims of integration. From this viewpoint of considering aspects which raise the biggest questions, we are going to refer in particular to the following questions:

- A. The constitutional structure of the European Union and its relationship with national constitutions.
- B. The constitutionalisation of the European Council and the institutionalisation of its functions of political direction and co-ordination and the defence of the Constitution.
- C. The watering-down of Council functions and difficulties in implementing the separation between legislative Councils and Executive Councils.
- D. The redefinition of the nature of the Commission and its progressive loss of the monopoly of legislative initiative.

A. The constitutional structure of the European Union

In an oversimplified manner the Draft Constitution rests on the idea of a double legitimacy, the one stemming from the member States and that deriving from the citizens, in accordance with the model of a “Federation of nation states”, or “intergovernmental federalism” to which the draft bill seems to make implicit reference. According to this model, the democratic will of the European “demos” would be directly expressed through European citizens and their representative institutions (the European Parliament and national parliaments), to which one would have to add the immediate expression of that will by means of the citizens’ initiative of legislative proposals, and *indirectly* through the member States meeting in the Council of Ministers and the European Council.

However, this construction of a double legitimacy which in turn stems from a double will to exercise is a reaction, in my opinion, to a conceptual error. Thus it is clear that institutions as such do not represent self-serving wills or interests, and neither is the basis of the European popular sovereignty fragmented. Even if those who find themselves represented in the Council are basically the Member States, the will of the citizens is also expressed through

them, just as it is not conceivable to exclude from the European Parliament the presence of Member States, which is quite explicit for example in the codes used for sharing out seats.

The construction of a double legitimacy of the Union and its personification with regard to the European Council/Council of Ministers and in the European Parliament gives rise to the Commission losing its place as the axis of interinstitutional balance. Whereas in the treaties of Rome, the agent responsible for consensus among the different interests in dispute is the Commission, in its role as representative of the community interest and guardian of the treaties, this function opts for the European Council in the Bill. From this fact also stems one of the greatest architectural defects of the Project, the manifest difficulty of harmoniously linking, on the one hand, the exercise through the community method of the competencies awarded to the Union by the States, and, on the other, co-ordination of the policies of member States.

The construction of a double legitimacy of the Union is aimed at preventing the Union being understood as a Federation, that is, that there should be full integration of the national state structures as part of the Union. This aim is behind the attempt to define the national identity of member States by virtue of what is considered to be the intangible nucleus of national identity, a nucleus which would be made up of the fundamental political and constitutional structures of the member States and the essential functions of State, especially those which are geared to guaranteeing the territorial integrity of the State, maintaining public order and safeguarding internal security.

However, this defence of an intangible nucleus of the constitutionality of member States is hard to fit in with the selfsame dynamic of integration and with the process of European constitutionalisation. Even if limits were still set on the judicial revision by the Justice Tribunal on these matters, establishing room for freedom, security and justice enables a rapprochement of national legislatures in questions closely related to the maintenance of public order and the safeguarding of internal security. To this are added clauses on the inviolability of the internal frontiers of the Union and solidarity among member States in the event of terrorist attacks or natural or human disasters (and, in the future, the clause on mutual military aid among countries which may establish closer cooperation in questions of security and defence). This highlights the difficulties inherent in the separation of an external and internal environment to maintain security and public order¹.

But the greatest questioning of the safeguarding of an intangible national identity stems from the Union's control of the adaptation of member States to the higher values laid down in the community constitution, which may lead to suspension of the right to belong to the Union if there is violation (or if there exists a clear risk of serious violation) of these higher values by a Member State². The Union becomes the final defender of community "supraconstitutionality", which along with a full legal efficacy granted to the Charter of Fundamental Rights and the constitutionalisation of the principle of community supremacy, means notable and irreversible progress in the integration process of the national constitutional orders, in the sense of a common constitutional system, ("gemeinschaftliche Verfassungsordnung"), which perforce is cooperative.

¹ See article 11.5,1, in conjunction with articles 1-41 and article III-299.

² See articles 1-29 in conjunction with articles 1-2 and article III-272.

The principle of supremacy is completed with the duty of member States to adopt all necessary measures to ensure compliance with the obligations derived from the Constitution or resulting from acts of European institutions, as well as by a new common policy (“administrative cooperation”) the aim of which is to guarantee the effective national enforcement of Union Law by member States³. In this sense, the inclusion of the charter with full legal efficacy in the Bill represents an essential element in the new outline between the Union and member States, and with reference to the new institutional blueprint.

Thus, even if a specific judicial appeal to protect fundamental European rights is not created (“European appeal on the grounds of unconstitutionality”) before the Justice Tribunal or in the ordinary courts, nor is there a basic modification of the former article 230, by which protection of rights will have to be effected by means of existing channels in national and community legal bodies, there has been established in the Bill the legal obligation of member States to ensure effective legal protection in the area of Union Law, which may be used in the future to foment the creation of specific national or European appeals.

The introduction in two of the horizontal clauses of the charter (articles II,51.1 and II, 51.2 of the Bill) of modifications aimed at guaranteeing that the Charter must not extend the scope of application of Union Law beyond the competencies and policies defined in the Bill, raises contradictions which are difficult to resolve. As well as supposing a contradiction with the obligation laid down in article 51.1, for member States to “promote” the enforcement of fundamental rights, these regulations can hardly eliminate the effects of community constitutionalisation which the charter will exercise over the whole of the actors and institutions of the community. Similarly it will be difficult in practice to establish a dividing line between acts of member States exclusively applying Union Law or domestic law, which means a significant extension of the potential scope for applying fundamental European rights.

In this way even though the bill lays down a Constitutional Treaty formally geared at Union level, the tension inherent in the constitutional dynamic created by it may bear within it a significant displacement of constitutional balance (“multilevel constitutionalism”) between the Union and Member States.

B. The constitutionalisation of the European Council and the institutionalisation of its functions of political direction and coordination and defence of the constitution

The Bill is included for the first time in the constitutional text of the European Council, which as such, was created and developed on the fringes of the community legal system, and will now take the shape of an institution which adopts decisions which might be taken unanimously, by consensus or by qualified majority. Also introduced is the possibility of appeal to the member States before the Justice Tribunal against decisions verifying the violation of higher rights of the Union. Though limited to its procedural aspects, this appeal means the beginning of a process of judicial examination of the acts of heads of State and Government meeting in the European Council.

The European Council adopts decisions by qualified majority particularly when electing its president and laying down its own internal rules. The decision-making procedure by qualified

³ See articles. 1-10 and III-180.

majority is the same as that used for qualified majorities in the Council of Ministers. The Council unanimously adopts another series of decisions, among them the two “footbridges” of legislative procedure: the step from the special legislative to the ordinary legislative procedure, and the Council’s authorisation to pronounce by qualified majority on the political areas reserved for unanimity⁴.

To these elements of constitutionalisation of the European Council is added a formal definition of its functions as a Union institution. These functions are political in nature, such as providing the necessary impulse towards Union development and defining its general orientations and priorities, as well as in questions of foreign policy and common security (determining strategic interests and establishing PESC aims, adopting whatever European decisions are deemed necessary) and common defence policy (in particular its implementation by unanimity). Additional competencies are the function of community constitutional control with regard to the suspension of rights for violation of the above-mentioned fundamental rights, which turns the European Council into the defender of the supraconstitutional values of the European Constitution, whereas the Justice Tribunal takes charge of controlling ordinary legality (and constitutional legality) and the Commission exercises control functions over administrative legality and enforcing Union Law. The corollary of these political functions and defence of the constitution pertaining to the Council of Europe is their explicit distancing from the legislative function.

However, this does not mean that the European Council does not exercise an increasingly executive function. This role with a more executive impact could be the result of the creation of the new President of the Council of Europe and the tasks of strategic orientation assumed by the Council of Europe.

To achieve the strengthening of *the Union leadership* the main instrument that has been introduced is that of a stable presidency in the Council of Europe. Undoubtedly, in a union of twenty-five states, the Union’s capacity for action at home and abroad will depend on the ability of political leaders to define strategic objectives and transform them into specific policies. To achieve these aims The European Union must achieve a relationship of osmosis between the intergovernmental elements and the communities comprising it, as an effective union of States and citizens responding to this dual legitimacy. From the viewpoint of the Convention, achieving these objectives demanded the strengthening of three main institutions making up the Union’s institutional balance, the Council, the Commission and the Parliament.

The bill lays down that, whilst the European Council establishes and directs the Union’s strategic aims, it is the responsibility of the Council of Ministers to prepare European Council meetings and perform the follow-up of them, and these tasks should be carried out in contact with the Commission.

It is foreseeable that the presence of a stable President in Brussels with the capacity to orientate the work of the Council and the Commission in a political sense will lead to a significant modification in the present shareout of functions among the three institutions. With the election of a President of the European Council by the heads of State and Government, greater continuity, visibility and consistency in the Union’s internal direction and in its representation abroad is foreseeable. But, just as just as a too weak President of the Council would

⁴ See articles I-24.4 and III-196.3.

not be able to generate the necessary consensus among European Council members, it is no less certain that a President of the European Council who was excessively executive in style and had little diplomatic ability, would store up potential for conflict with the President of the Commission and the Minister of Foreign Affairs of the Union.

The main problem concerning the Council of Ministers is the danger that the Council for General Affairs may evolve towards becoming a merely executive body of the political strategies and aims indicated by the European Council. By placing the Heads of Government in a central position in the community institutional system it can be foreseen that there will be a displacement effect towards the European Council of the work of the Council of Ministers, which would simply increase the Council's present problems of functioning, and, by default, create similar problems in the European Council.

C. The watering down of the functions of the Council and the difficulties involved in putting into practice the separation between legislative Councils and executive Councils

The Bill lays down that the Council for General Affairs and Legislation exercises along with the European Parliament the legislative and budgetary function, and, in collaboration with the European Council and the Commission, functions of policy formulation and coordination.

This is the central question with regard to the new institutional position of the Council. What will be its real role in the angle between an increasingly executive European Council which will continue to have economic and personal resources essential for carrying out community policies? The text of the Bill lends itself to diverse interpretations and possibilities. On the one hand, the Council for General Affairs has specifically assigned as a function of its own the preparation of European Council meetings and the supervision of action taken as a result of those meetings. This function must be performed by the Council in contact with the Commission, and it is clear that in exercising the room for manoeuvre granted to it by the literal nature of the text there will lie the Council's capacity to avoid ending up as a merely executive body of the European Council. In this context, the possibility that, by simple majority, the Council might ask the Commission to put forward proposals and carry out whatever studies it should deem relevant with regard to achieving the aims of the Union, might be an element used to strengthen the Council's position.⁵ Much will depend upon the future of interinstitutional agreements which may be established between the Council and the Commission, as well as the way in which the new structure of the Council for General Affairs evolves.

The Bill in fact stipulates the distinction between the Council of Ministers in its legislative function and the Council of Ministers for General Affairs, though as a single body it is the "Legislative and General Affairs Council" which must keep watch over the coherence of the work done by the Council of Ministers as a whole. When it acts according to its legislative function, the Council of Ministers will have to deliberate and give an opinion, jointly, with the European Parliament, on European laws and European framework laws.

The makeup of the Council is different depending upon whether it carries out one function or another. In the Council for General Affairs and in the other groupings of the Council

⁵ Cfr. Article III-243.

a representative of ministerial rank takes part, nominated by each member State and with right to a vote, whereas when the Council acts according to its legislative function, the representation of each member State must be exercised by “one or two more representatives” of ministerial rank whose competencies correspond to the agenda of the Council (article I-23.1). It is not specified who (singular or plural) of these ministerial representatives will have the right to vote, nor as it seems to be assumed from the text, whether the Legislative Council is the only grouping in the Council where the latter carries out legislative functions (with the exception of the Council for Foreign Affairs, which has its own legislative competencies). More than a few member States have already expressed their reservations over the concentration of the legislative functions of the Council in the Council for Foreign Affairs, realising that it presents marked difficulties of internal coordination between the different Ministers of national Governments and rejecting, albeit not always explicitly, the publicity given to legislative debates. It is foreseeable that the Intergovernmental Conference will modify the proposal contained in the Bill. In this case, it is not unthinkable that in the medium term it might be the European Council itself that carried out more and more the coordination functions of the different Council groups.

Alongside the Council for General Affairs and the legislative Council, a third grouping is established of constitutional rank of the Council of Ministers, the Council for Foreign Affairs, whose function is to draw up the Union’s “foreign policies”, following the strategic lines defined by the European Council and to keep a check on the consistency of its performance on this matter. The number and composition of other possible Council groupings are made dependent upon a European law of the European Council unanimously adopted. The Presidency of the Council for Foreign Affairs will be held by the Union’s Minister of Foreign Affairs. The presidencies of the other Council groups (including that of the Council for General Affairs and that of the Legislative Council) will be held by the representatives of member States in the Council of Ministers, for one-year periods, by rotation on an equality footing, with regard to European political and geographical balance and the diversity of member States. This will be established in a European law to be adopted unanimously by the European Council. As far as decision-making is concerned, the advance in the large number of issues passing to the qualified majority (80 issues) will henceforth require any Council decisions to be adopted unanimously, and will require a specific explanation, even though there will still be a by no means trivial number of areas in which the possibility of a veto continues to be held.

D. The redefinition of the nature of the Commission and its steady loss of the monopoly of legislative initiative

The Commission appears to have a plural configuration in the Bill. Among the new functions of political initiative possibly the most important is that of coordination, execution and management of community programs, and the adoption of initiatives of the annual and plurianual program, with a view to achieve interinstitutional agreements. That is, it is the Commission which can maintain a capacity for initiatives in establishing the calendar and activities to be carried out by the Union, even if it must perform this task in contact with the Council and following the political guidelines fixed by the European Council. Its room for manoeuvre is completed with its responsibilities in seeing that the budget is carried out and the day-to-day management of Union programs.

To this is added the right to initiate legislation, which the Commission maintains in general terms, though there is a steady increase in the areas in which this Commission's capacity is being eroded. In carrying out the tasks related to justice, freedom and security, it shares this competency with member States. In foreign policy and common security and common defence policy, the Commission has been totally excluded in favour of the Ministry of Foreign Affairs of the Union. For its part, the European Parliament has the capacity to ask the Commission to present legislative proposals. Also, finally, the Council may ask the Commission to present legislative proposals and to make prior studies. In all these cases, Commission initiative when establishing interinstitutional agreements will have to bear in mind the relatively weakened position it occupies in the new institutional blueprint. The Commission does not seem to be shaped in the Bill as a political body, on an equality footing with the Council and the Parliament, but rather as a body whose essential functions are located in the exercise of regulatory power, and subordinate to the member States in its power to execute policy.

The main nucleus of the new regulation established by the Bill with reference to the Commission gives it general titular power for regulation, under a series of specific conditions, aimed at strengthening the system of a rule-making hierarchy in the Union. The capacity to adopt delegated regulations is determined by the specific demarcation in European laws and framework laws of the aims, contents, scope and duration of the delegation, as well as the prohibition on delegating the essential elements of a specific issue or area. Moreover, the position of the Commission as a body for the carrying out of regulations means that the European Parliament or the Council are endowed with the capacity to revoke delegation or, alternatively, to submit the coming into force of the delegated regulation in a period of time fixed by European law or framework law during which either of the two co-legislating bodies can table objections.

Moreover, the Commission is a body which carries out Community rules, but is subordinate with regard to member States, who are the ones who have the obligation in the first place to adopt all the measures of Internal Law necessary to the carrying out of legally compulsory acts of subordinate execution (indirect execution) and to adopt rules or decisions on execution of those compulsory acts (laws, framework laws, regulations and European decisions) which may require uniform conditions for their execution throughout the Union and in which it is explicitly laid down that the Commission's competency of execution of the Commission is not only subservient to member States but is indirectly exercised. This competency is also shared by the Council, which can be granted execution in specific cases where duly justified, and always the carrying out of foreign and common security policy and policies of common defence. In any case, all acts of execution carried out by member States, the Commission or the Council are submitted to control systems which will have to be carried out by member States. Thus an element of doubtful renationalisation is introduced into the execution of community policies.

Greater complexity is shown by the figure of the Minister of Foreign Affairs, with a dual nature; on the one hand, as an agent of the Council of Ministers, he/she directs foreign policy and common security, as well as common security and defence policy, he chairs the Council for Foreign Affairs and takes part in the work of the European Council. Furthermore, he has the right to take initiatives in formulating both policies, and also as Vice-President of the European Commission he will take charge in the heart of the Commission of foreign relations and coordination of other aspects of the Union's foreign activities. For these competencies he will be subject to the procedures by which the working of the Commission is controlled.

The fact that a reduction has been achieved in the number of Commissioners, although this reform only comes into force from 2009 onwards, and that the President of the Commission has had his capacity to lead the Commission strengthened, since it is he who individually chooses and can dismiss the Commissioners, represents a not inconsiderable consolidation of the role of the President of the Commission. However, the fact that the Minister of Foreign Affairs plays a dual role in the Commission and the Council, being elected by the European Council, but at the same time submitting to the collegiality of the Commission, raises question marks concerning the Commission's capacity to be able to take part in setting up lines of action in foreign policy, if at the same time, they have to provide the main human and financial resources. It must not be forgotten that, at the end of the day, and in spite of the fact that ratification of the President of the Commission must be by an absolute majority of members of the European Parliament, it is the European Council which designates both the President of the Commission and the Minister of Foreign Affairs.