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ROBERT SCHUMAN CENTRE

Institutional Reform in the European Community:
Are there Alternatives to the Majoritarian Avenue?

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Institutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?

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Abstract

Traditionally, the weakness of the European Parliament and of European political parties is presented as a central cause of the European Community's legitimacy crisis. This article suggests an alternative reading of the situation. Not only is the legitimacy crisis much more complex than is generally believed, but the strengthening of the Parliament, and the development of party politics that would ensue might ultimately threaten the stability of the Community. The experience of parliamentary federations suggests that the majoritarian features of the parliamentary system may be a source of tension. No matter how necessary the democratization of the EC's institutional setting may be, reforms must not be detrimental to the quality of centre-periphery relations.

With the conclusion of the Single European Act, it can be said that the European Community (EC)[1] has entered into an era of what one Canadian scholar has called "mega-constitutional politics": a phase of major constitutional transformations, in which discussions on institutional issues absorb a substantial part of the political system's energy.[2] The EC has gone through two major institutional overhauls - the Single Act and the Maastricht Treaty - in less than ten years, and a third one is already scheduled for 1996. Issues such as the proper use of the subsidiarity principle, or the role of national parliaments in the decison-making process, recurrently re-emerge at the forefront of the political debate. Major political leaders and parties have felt it necessary to make their views on the future of the community known.[3]

So far, whenever the question of the EC's legitimacy has been addressed in academic literature, attention has unavoidably focussed on the European Parliament. Its weakness has been seen as the root of the problem, and its strengthening as the main cure for the evils of the Community.

In my view, this line of analysis is not satisfactory. On the one hand, the legitimacy crisis of the EC is much more complex - and hence more difficult to solve - than is traditionally thought. On the other, the discussion has often suffered from a lack of critical distance. A comparative analysis would suggest that in fact, if not in law, the European Parliament is often better off than its national counterparts. Moreover, insufficient attention has been paid to the specific nature of the EC, which is not - nor is it called upon to become- a state.[4] Given this *sui generis* character, it could be argued that the strengthening of the European Parliament and of European parties, far from solving the current legitimacy crisis, as is often alleged, might in some respects aggravate it. Indeed, the experience of parliamentary federations suggests that the majoritarian features of parliamentary systems are often detrimental to centre-periphery relations. The negative features of majoritarianism are likely to be accentuated in a divided power system such as the EC. These two arguments are developed in the following pages.

The article is structured as follows. Section 1 attempts to show that the EC has moved away from the somewhat formalist model of state legitimacy which dominated its first thirty years of existence. Section 2 discusses the "classical" analysis of the democratic deficit, which has influenced many proposals of institutional reform. Section 3 reviews the changes in the Parliament's position introduced by the Maastricht Treaty and tries to anticipate what their implications might be on relations between the Community and its Member States. Section 4 sketches an alternative, non-majoritarian avenue for the reform of European institutions.

The Legitimacy Crisis of the Community.

Is there a Legitimacy Crisis?

It has long been held - and is still maintained by some - that the legitimacy of the Community is primarily state-based. Like any international organization, the EC has been created by states and its actions are legitimated by their will. Do not the member-states, in the shape of the Council of Ministers occupy a central place in the Community's institutional structure? Do they not designate the members of the European executive? Is their agreement not necessary for most Community decisions? Such a view finds its intellectual roots in De Gaulle's well known scheme of an Europe of the States ("Europe des patries"):

> "Il ne peut y avoir d'autre Europe possible que celle des Etats, et cela en dehors des mythes, des fictions et des parades. Ce sont les Etats seulement qui ont créé la Communauté..., qui lui donnent une réalité et une efficacité".[5]

On this premise, it has been argued that insofar as State organs are legitimated at regular intervals by universal suffrage, it can be concluded that the Community itself indirectly benefits from this ballot-box legitimation. Some, like former French Foreign Minister Roland Dumas, have even argued that the best way to of enhancing the legitimacy of the European Community would be to strengthen intergovernmental organs like the European Council, since the latter is the "emanation of the democratic legitimacy of the States", as is it made up of the Heads of State and Government.[6]

However, the relaunch of European integration with the internal market programme has revealed the legalistic character of this line of argument. In fact,

for such an indirect legitimation scheme to function, several conditions must be met. First of all, the decisions taken by the Community must be the genuine fruit of the collective will of the member-states - otherwise it is difficult to see with what authority the Union can claim to base its decisons on some kind of state legitimacy. It is further necessary that the electorate be given the opportunity, when national elections take place, to express an opinion on European issues. Short of this, the legitimacy of Community action would primarily be of a merely formal nature.

Merely listing these conditions is sufficient to perceive how far removed they are from reality. Not only are the member-states often tempted to place the responsibility for unpopular decisions on European institutions, they have also witnessed the restriction of their powers of control with the move to majority voting in a certain number of areas laid down by the Single Act. When some of the member-states are outvoted, it becomes difficult to claim that the final decision rests on their collective will. The unreality of this inter-state framework becomes greater still when elections are examined. European issues are already singularly blurred in the European elections, which, as explained elsewhere in this issue, are above all an opportunity for wide-scale opinion polls on the popularity of the national governments. Although Europe has become a matter of contention in many national elections, the debate rarely goes beyond the level of shallow statements on the historical meaning or the future of the integration process. Issues relating to the substance of European policies - similar to the kind of issues people vote on in domestic elections - are conspicuous only by their absence.

Despite these insufficiencies, the odds are that the question of the legitimation of the European political system would have remained purely academic had the

Community concerned itself solely with quotas and tariff restrictions. Indeed, to the likely dismay of pro-European elites, the question never gained the status of a major political issue in the first three decades of existence of the EC.

But the creation of the internal market would not have been possible without "flanking" policies, such as first the common agricultural policy or competition policy, and subsequently environmental or consumer protection, which affect large numbers of citizens. The Community was also directed to turning its attention to social issues and monetary policy. At the same time, the remarkable marketing success of the 1992 programme and the charisma of Commission President Jacques Delors have suddenly enhanced the visibility of institutions that were long ignored by public opinion. An increasing number of European citizens have thus gradually become aware that unlike most international organizations, the Community can influence their daily lives, and that it is therefore necessary to take account of its decisions. Some social groupings - farmers, fishermen, for instance - have long been aware of it. The Irish have learnt that EC could impinge upon their anti-abortion laws, the British that it could force them to reconsider their regulations on Sunday trading, the Germans that monetary union could possibly entail doing away with the Deutschmark. As the visibility of European politics increased, the question of the Union's legitimacy became more acute.

The Maastricht Treaty served as a revelatory mechanism, in furnishing an opportunity for national public opinions to make themselves heard. This exercise clearly indicated that the indirect legitimation of the initial stages no longer appeared to them to be appropriate given the development of Community activities. In countries where referenda were held, such as Denmark and France, large segments of public opinion voiced their discontent with the current

operation of the European political system. In other countries, the ratification debates revealed a similar uneasiness.

To the question "is there a legitimacy deficit in the EC?", European opinion seems to have answered in the affirmative. We shall now try to see how this deficit can be explained - and possibly remedied.

The Democracy Deficit(s): Theory and Practice

The Democratic Deficit

Of all the aspects of the legitimacy crisis of the Community, the democratic deficit is undoubtedly the most widely known. The European Parliament made of it one of its chief weapons of battle.[7] As this concept is discussed at length in another contribution to this issue,[8] I shall limit myself here to the few remarks that are necessary for the purpose of this article.

The integration process involves, among other things, a transfer of legislative activity to the European level. Classical democracy deficit analysis starts from the premise that the role of parliaments in this process is reduced: most national parliaments intervene at best in the implementation phase, and Community Directives often do not leave them a significant margin of appreciation. At the same time, the European Parliament is far from possessing powers equivalent to those of its national counterparts, even if its situation has been appreciably improved in recent years. At present, the Parliament remains oddly excluded in certain areas (commercial policy, for example); it possesses only an indirect right of initiative and even in the framework of the co-decision procedure, its powers are only imperfectly aligned with those of the Council.

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Thus, it is argued that, on the one hand, the national assemblies are often presented with a *fait accompli*, while on the other the European Parliament, although it has seen its political standing grow in the last decade, does not yet enjoy the full range of powers accorded to the parliamentary assemblies in the European political systems. In other words, integration is realised by a dispossession of the national legislative powers, which is only partly compensated for by the emergence of the European Parliament. As Community legislation is mainly a product of the cooperation between the national and European administrations, one can say that in overall terms, European integration has led to a weakening of the legislative branch, and to a strengthening of the executive.[9] As a result, Community legislation is often devoid of the legitimacy which attaches to the decisions taken by representatives of the people.

"Classical" democracy deficit theory, which has occupied a central place in debates on the institutional evolution of the EC, suffers however from several flaws. It generally overestimates the importance of legislatures in national systems. More importantly in the present context, it is inspired by a somewhat reductive view of democracy, which is implicitly equated with the mere voting of laws by parliamentary assemblies.

In fact, even a vague familiarity with democratic theory (like my own) suffices to underline multi-faceted nature of the concept of democracy. It entails among other things the possibility for citizens to choose their rulers and to sanction them if their action is deemed inadequate. It also implies the possibility for voters to control what political leaders do - which, to say the least, is problematic in the European Community. Moreover, the legitimacy crisis is aggravated by structural features: European decision-making processes tend to

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privilege the technical dimension of problems, rather than their political aspects - a phenomenon which I have labelled political deficit, for lack of a better expression. These three elements are analyzed in greater detail in the following sections.

The Accountability Deficit

In the European tradition, parliamentary assemblies play a central role in the designation of the government. In electing their representatives, citizens participate indirectly in the choice of those who will govern them. As a result, when they are unhappy with the policies pursued by their government, voters can express their discontent in the ballot box.

For a long time, this fundamental aspect of all democratic systems has been absent at European level. Until the Maastricht Treaty, the designation of the Commission was the exclusive privilege of the national governments. True, the Commission could be censured by Parliament, but as the latter was deprived of any real power in the appointment process, this possibility was never used. The Council itself escapes all censure, even if its individual members can be subjected to parliamentary control in their home country. The only institution on which the electorate could have a direct influence was the European Parliament, which is widely reputed to be the most feeble of the political institutions of the European Community. Thus, the electorate have had no possibility of directly expressing their views on the actions of the principal European institutions - the Commission and the Council. The latter could therefore operate without incurring any electoral sanction. This relative impunity has contributed to the creation of a yawning chasm between citizens and the European political system.

However, this situation could well change in the wake of the Maastricht Treaty. As will be analyzed in greater detail below, the Commission, henceforth, has to obtain the investiture of the Parliament before it can begin to function. The debate on the appointment of Mr. Delors' successor, former Luxembourg Prime Minister Jacques Santer, has clearly shown that the Parliament fully intends to utilise this new power. Furthermore, its powers of control have been strengthened, which should allow it to make its influence felt in a more constant way on day-to-day decisions. One cannot rule out the possibility that the European electorate may eventually become aware of this power shift. This might in turn prompt European parties to nominate their candidates for top Brussels jobs. The question of the executive's composition could thus become one of the issues in European level elections, as it currently is at national level. In voting for one party, citizens will be able to express their preference for Mr. X or Ms. Y as head of the Commission and, subsequently, their opinion on that person's performance in office. Thus, the strengthening of Parliament's control over the Commission might well sow the seeds of a profound change, which may reduce the gap which currently exists between public opinion and European institutions.

The Transparency Deficit.

If Maastricht has undoubtedly contributed to reducing to some extent the democratic deficit, its effects on the transparency of the Community system are clearly less positive. The reflection of laborious compromise, the Treaty has multiplied decisional procedures, carefully measuring out the prerogatives of each institution.

European citizens have already had difficulty in understanding certain pecularities of the European system, such as the primarily legislative role enjoyed by a body like the Council of Ministers, composed of members of national governments. They are now faced with the growing complexity of this system: no less than 21 different procedures can currently be used by European institutions.[10] In the field of environmental policy, for instance, four different procedures have been laid down in the Maastricht Treaty, not including the possibility of resort to Art.100A, the corner stone of the internal market. Combined with the secrecy which still shrouds the work of the Council of Ministers,[11] this institutional alchemy makes it somewhat unlikely that European citizens will be able to understand who is responsible for decisions taken at European level.

The system is even more opaque at the implementation level. Who can say with exactitude the number of commitees of experts in existence at European level? Who can vaunt their knowledge of the rules which govern their composition and mode of functioning? At best a handful of people. Yet, these committees are called upon to take a range of important decisions in areas which concern the daily life of each and every citizen.

This lack of transparency is at the root of the feeling of distance that most citizens attest to when speaking of the European institutions. In such a context, the idea of political accountability for decisions taken at European level is barely more than illusory. How can the voter be in a position to scrutinize actions at European level, if he is unaware of the roles alloted to the various institutions and how these institutions actually use their powers? Irrespective of the rights citizens may be granted, short of a major effort to simplify and publicise these institutions, they will not be in a position to exercize them in an effective manner.

The Political Deficit.

Legitimacy in the European Union also suffers from the way political debates unfold. National politics are characterised by a number of familiar landmarks. Debate is structured around some large themes: the relationship between freedom and solidarity, the tension between free market and redistributive policies, the left-right cleavage, etc.. The citizenship are relatively familiar with the most important rules of the political game (the majority-opposition dialectic) and they often know the principal actors (political parties, trade unions). Finally, a certain number of fora exist within which political debate can build up: the Parliament, naturally, but also, and to an increasing extent, the media.

The contrast with the situation at European level is striking. Technical aspects often dominate the various issues at stake. Rightly or wrongly, public opinion does not often associate Europe with great societal debates. Political actors are weakly organised at European level; European parties cluster together many heterogeneous groups, united only by a relative discipline. As we have seen, the rules of the game are so complex that they are unknown to the general public.

Even supposing that genuine political debate could develop, it is difficult to see where it could take place. A real political arena is itself lacking: the Parliament has not yet emerged as a forum; as for the media, they often treat European issues as being of marginal interest.

To what factors can we attribute this striking contrast between European and national levels?

Several factors need to be taken into account. First, the European Community only disposes of limited competences. Its primary vocation was an economic one: to integrate the national economies into a single market. It has only gradually extended its activities into a number of neighbouring areas, by reason of the links which unite economic integration with sectoral policies such as social policy, environment policy or consumer protection. This encourages a prismatic approach to problems: many questions are approached in the light of their relationship with the internal market. Without doubt, this fragmentation of competences encourages neither a more global approach nor the starting of work on large societal projects. Consequently, discussion tends to cluster around the technical aspects of Community regulation.

This tendency is reinforced by the diversity of the Community. Dominant values - in terms of social policy or of environmental protection, for example - vary from one country to another, and this is inevitably reflected in their regulatory policies. Economic interests, like political cultures, often differ. All of these elements contribute to the relative complexity of Community decision-making. The same can be said of institutional rules: unanimity is still sometimes required, and more than two thirds of the votes in the Council of Ministers are necessary to obtain a qualified majority. The decision-making process is thus,

to a large extent, consensual. The reconciliation of national positions can often only be achieved through laborious compromise, which are difficult for the layman to decipher. The incessant haggling which characterises Community decision-making appears to leave little room for the public interest to be taken into account. In most cases, only the societal groups who are directly affected by the Community measures are sufficiently motivated to follow the long path taken by a draft piece of legislation.

Both the manner in which issues are approached and the bargaining to which these issues are subjected contribute to reinforce the technocratic image of the Community. The European political system is primarily seen as a closed shop, with membership confined to experts espousing the defence of national or sectoral interests, and not as a political arena within which different conceptions of the public interest can be aired and discussed. A real political deficit superimposes itself on the democratic deficit.[12] But can it be otherwise, given the intrinsic diversity of the Community?

The Consequences of Maastricht

The Maastricht Treaty has tried to overcome the difficulties outlined above by consolidating the institutional position of the European Parliament. This is reflected in the establishment, for the first time in the history of European integration, of true legislative co-decision making: in a number of areas, agreement between Parliament and Council is now required for the adoption of Community acts. At the same time, the cooperation and the assent procedures, both introduced by the Single Act, have seen their scope enlarged.[13] Though clearly indicative of an overall trend, this in itself falls short of a proper Parliamentary system. However, the Maastricht Treaty also modified the conditions under which the Commission is appointed. This further change, which has so far gone largely unnoticed, possesses the potential to considerably alter the balance of power within the Community. Given its importance it deserves a more detailed scrutiny.

Towards a Parliamentary System?

The idea of associating Parliament with the appointment of Commission members had been circulating for a number of years - well before the present day criticisms levelled at the Brussels' bureaucracy had begun to emerge. Over a decade ago, it featured in the Solemn Declaration on European Union adopted in Stuttgart in June 1983 and it has always been high on the list of Parliament's demands.

Admittedly, since the introduction of direct elections to the European Parliament, it has been the custom for the newly-appointed President of the Commission to be heard by Parliament's enlarged Bureau and for the Commission to present its programme to the full house shortly after it took office. Despite the fact that debate on this programme ended in a vote, respect for the forms of parliamentarianism could scarcely conceal the reality: the political will the Commission emerged from was the national governments', and not the Parliament's.

The procedure introduced by the new Article 158 introduces a number of radical changes. It is only following consultation with the Parliament that national governments can nominate the person they plan to appoint as Commission President. Commission members are then nominated by Member States in consultation with the president designate. However, the whole body must be given a vote of approval before taking office. In other words, the Commission must, as in classical parliamentary systems, have the confidence of a parliamentary majority.

This two-stage procedure, singling out the Commission president while formally recognizing his influence on choosing the body's members, should contribute to establishing his authority over his peers. Parliament's influence has been further increased by the link established as of 1995 between Parliament's term and that of the Commission. A six month gap has been arranged between European elections and the setting up of the Commission, to enable the newly elected Parliament to take part in nominating the latter. Any significant changes in Parliament's composition can thus be reflected at Commission level.

The model is somewhat reminiscent of the practice followed in many parliamentary systems, where nomination of the head of government precedes formation of the cabinet, for which the prime minister designated by the head of State is often compelled to negotiate with the leaders of the main parties in

the majority. The difficulties which have surrounded the appointment of the Santer Commission have shown that Parliament firmly intends to influence the distribution of portfolios among Commissioners. Influent MEPs are even advocating an evolution towards a model of "Parliamentary Commission", in which the composition and programme of the European Commission would reflect the will of the Parliamentary majority.[14] Be that as it may, in the future, the Commission - just like the executive of many parliamentary federations - will derive its legitimacy from a twofold source: the Member States on the one hand, and Parliament on the other.

This development lends new importance to the possibility of a vote of censure, provided for in Article 144. Hitherto the possibility had remained theoretical, since nothing prevented Member State governments from confirming the members of a censured Commission in their posts, as Parliament enjoyed no real influence over the choice of Commission members. Things will be different in the future. In the case of a censure vote, Parliament's new prerogativees will enable it to ensure that its grounds for censuring a Commission will be taken into account in appointing a new one.

The import of these changes is considerable. They augur a deep transformation in the nature of the relationship between Parliament and the Commission. The Commission will henceforth be fully responsible to Parliament, the influence of which will be felt over all its activities, be they administrative or legislative. This will presumably set up a knock-on effect which will reverberate through the whole set of institutional relationships. For instance, one can envisage Parliament playing a much greater role in the cooperation procedure, where to date the Commission has been a necessary intermediary between Parliament and Council. Likewise, given the relationships that are bound to grow up between

Parliament and Commission, the right given to Parliament to request the Commission to 'submit any appropriate proposal on matters in which it considers that a Community act is required'[15] may be seen as coming close to a true right of initiative.

These new developments are certainly not without their limits. Both the Parliament's and the Commission's role are fairly limited in monetary policy, where the lion's share goes to the Central Bank. Similarly, censure is ruled out in relation to the Commission's activities in the context of the two principal inter-governmental aspects of the Treaty, i.e. the newly-established common foreign and security policy, and cooperation in the field of justice and home affairs. However important these two reservations may be, it nonetheless appears that the Treaty's signatories, in their desire to establish the Community's democratic legitimacy, have radically modified the balance of power between Commission and Parliament.

Centre-Periphery Relationships

So far, most of my remarks have focussed on the horizontal axis of the institutional system, namely the relations between Community institutions. It would however be unlikely for the reshuffling of the cards among the Community institutions to take place without affecting relations between the Community and its Member States.

Although the model we can see emerging from the institutional workshop of Maastricht is still a vague outline, it appears clear that the parliamentary system, in which the executive is derived from a majority whose confidence it must keep, served as the reference point throughout the discussion on institutional

matters. Should this evolution be confirmed, centre-periphery relations would be radically altered.

The linkage between Parliament and Commission is in fact likely to transform the latter considerably. One of the main features of the Commission as designed by the original Treaties is its mixed nature as a multi-national and multi-party body. Even under a strong presidency like that of Jacques Delors, the Commission has remained a collegiate body devoid of clear political colour. This feature, while largely responsible for the technocratic profile of integration that some decry, has undoubtedly been a trump card in its relationships with Member States. Its neutrality prevents the Commission from being perceived as too alien a body in national capitals despite the institutional autonomy it enjoys. More generally, the weakness of party politics at European level has allowed to preserve the consensual character of Community decision-making.[16]

It is unlikely that matters will continue in this vein, as the Commission will henceforth need the support of a parliamentary majority. The resulting politicization in both membership and programme will perhaps make things clearer to the European voter, hereby reducing the "political deficit" discussed above. However, this may well be at the expense of good relations with national governments.

For instance, imagine the two political groups that currently dominate Parliament - the Christian Democratic EPP and the Socialist Group - coming to an agreement on a government programme. What might the relations be between a Commission born of such an agreement and, say, a Conservative government in London or a Gaullist-dominated one in Paris? Neither would be likely to see the new Commission as in any way 'theirs', even if, as prescribed by Article 157, it contains at least one of their countrymen.

The emergence of a party logic at Commission level is also likely to have effects on its institutional role. Its function as a mediator among national interests, and in particular its mission as a defender of small States, would be made more difficult by such a drift. This is not to say that either function would necessarily disappear. The experience of parliamentary federations shows that party affiliation and representative logic are not, properly speaking, incompatible. However, in the event of a conflict the former tends to gain the upper hand over the latter.[17]

The core of the problem seems to be a conflict between two kinds of logic. The logic underlying most parliamentary systems is majoritarian: a majority is to be formed in Parliament and reflected in the composition of the executive. Party lines tend to matter a great deal, as the executive can stay in office only as long as it retains the confidence of its majority. In contrast, federalism is primarily a form of "anti-majoritarian" government.[18] The component units often owe their separate existence to the necessity of avoiding a domination of minorities by the majority; the same concern has frequently led to the setting up of mechanisms aimed at guaranteeing that even at national level, decisions require a fairly large degree of consensus. The truth is that these two lines of logic are not easy to reconcile, as suggested by the experience of parliamentary federations like Canada or Australia.

Moreover, the majoritarian logic that characterizes parliamentary systems tends to promote the development of a horizontal rationality within the central institutions: coordination among the various departments of the executive and

relationships with Parliament move ahead of representing the interests of the federation's components. This clearly does not simplify relationships between the various levels of power. A number of studies attribute the relative stability of American federalism to the existence of a tight network of intergovernmental relationships - the 'marble cake' described by Morton Grodzins[19] - in which decisions are taken by specialists in a given area, without too much regard for questions of formal powers, or party considerations. By contrast, the 'horizontal' rationality typifying parliamentary regimes, particularly when combined with partisan antagonism, tends to give accrued importance to jurisdiction concerns, thereby rendering intergovernmental cooperation more difficult.[20]

Naturally, the kind of parliamentary model that will emerge at Community level will ultimately depend on a number of variables that still remain indeterminate - be it the cohesiveness of political parties or the type of coalition that will be formed. Yet, if the Parliament-Commission axis is as stout as the Treaty seems to want it to be, there is a real risk of seeing tensions develop between the Community and its Member States.

As far as we can judge, however, the danger of a major confrontation arising seems low in the near future. The Council, in which national interests are dominant, retains a central role in all legislative procedures. Furthermore, many procedures require the vote of a majority of European Parliament members, in practice amounting to a two-thirds majority of votes cast; these two conditions are even combined in the case of a censure motion. This will probably necessitate the maintenance of a 'grand coalition' in which a large number of diverse interests will be represented. However, the lack of a body charged with reconciling the various interests is liable to be keenly felt. Moreover, the

institutional changes which are currently being considered might further accentuate the evolution towards a more clearly majoritarian profile.

Towards a non-Majoritarian Avenue

The 1996 debate is expected to revolve around the question of how the Community's structure must be reformed in order to make possible an enlargement to Eastern European countries without compromising the efficiency of the institutional machinery. In this context, many of the reforms considered in Community circles - a downsizing of the Commission, which would no longer include representatives of all Member States, the generalization and simplification of majority voting, a reform of the Presidency which would de facto limit the role of smaller countries[21] - all point in the same direction, that of a strengthening of the majoritarian features of the European political system. Unsurprisingly, smaller countries have a certain concern in this respect.[22]

If these proposals are fleshed out, the Community will find itself in a paradoxical situation. On the one hand, by increasing the European Parliament's powers and by reinforcing the majoritarian element, it will have contributed to establishing the Community's democratic legitimacy, while furnishing a remedy for the political deficit I mentioned earlier. On the other hand, one of the pillars of the Community edifice, the representation of Member States, will have been seriously weakened. Do the two necessarily go hand in hand, or can we conceive of a system that would allow these two fundamental aspects of the legitimacy of any divided-power system to be reconciled? To my mind, this is one of the major questions that will have to be addressed in the forthcoming institutional debate.

The Community's twofold legitimacy

As noted in the first part of this article, for about three decades, European integration has primarily derived its legitimacy from the consent of the States which had given birth to it. Post-Maastricht developments have revealed the dissatisfaction of public opinion, and its yearning to be listened to whenever Europe has to address major issues, an increasingly frequent occurrence. The state legitimacy that dominated the early years must therefore be supplemented by another kind of legitimacy, better suited to the current development of the Community's political system.

In today's European politics, public decisions are generally perceived as legitimate when they are adopted by institutions whose democratic character is recognized. A substantial part of the opposition met by the EC in recent years can be explained by the fact that it was perceived of as insufficiently democratic. Only by bringing it closer to standards of European democracy can one hope to restore its credibility in the eyes of the general public. The days when European integration could be regarded essentially as a "foreign affair", whose plot was followed by a handful of people, are over.

However, the parallel with the legitimacy of domestic institutions is far from complete. Europe's vocation is not to become a centralized super-state. The EC is the product of a pooling of sovereignties in a limited sphere; it is superimposed on the States, but cannot altogether replace them. The Community is an extremely diverse gathering - it will be even more so after enlargement - in which national traditions remain very strong. In a world where economic and technical transformations have strong centripetal effects, this diversity can be a strong asset, as long as it does not result in boundless competition among states.

One of the Community's historical missions is precisely to allow the peaceful coexistence of different national models. Moreover, states still enjoy a primary allegiance in national politics. The Community will only be able to consolidate its own authority if it shows sufficient respect for states, and for national specificities.

It therefore follows that the democratization of the European political system can only be achieved through the setting up of a pluralist, non-majoritarian model, in which states as such will be called upon to play an important role. State legitimacy and democratic legitimacy are the two pillars on which the Community's institutional system must rest. Only a balance between the two will ensure the stability of the whole construction. Changes operated on one front should therefore avoid becoming a source of stress on the other.

Institutional Corollaries

Given the size of this article, it is not possible to develop here in full the essential features of a non-majoritarian model. Let me however point to a few elements which ought to be considered in the construction of such a model.

As indicated above, the strengthening of the European Parliament and the reduction in the number of commissioners, especially if combined, are likely to undermine the representative character of the Community executive, and therefore its relations with national capitals. For the time being, an agreement between the European Council and the Parliament is necessary to give birth to a new Commission. Yet this body will be responsible before Parliament only, which may ultimately lead to an unwelcome politicization. Such an evolution would be a matter of concern, as the Commission enjoys important institutional

privileges, such as a monopoly of initiative in many areas, or a guarantee that its proposals will be modified only by unanimous decision of the Council. Such privileges made sense in a situation where the Commission enjoyed the confidence of the Member States, but they could become a source of imbalance if the Commission's ties with national societies were to be loosened.

The Community's double legitimacy can only be preserved through some correcting device. The remedy here might be to restore the balance between our two pillars, by making the Commission responsible also before the European Council of Ministers. Naturally, the same conditions could be required for a censure vote as for the appointment of the Commission. Even if censure remains an exceptional event, such a reform would be likely to affect the Commission's behaviour in its day-to-day activities. It might therefore usefully counterbalance the Parliament's growing influence, while softening the effect of a reduction in the number of Commissioners: a country that had no "representative" in the executive would thus have a way of ensuring that what is decided in Brussels is not detrimental to its interests.

As regards legislative procedures, the balance still leans in favour of the Member States. In most instances, except in the new co-decision procedure established by the Maastricht Treaty, the last say still belongs to the Council of Ministers, while Parliament remains completely excluded from certain areas, ranging from commercial policy to free movement of capital. Here the idea of double legitimacy suggests that Parliament's role should be enhanced. The aim here would be the establishment of a fully-fledged bicameral system, in which legislative power would be shared between two assemblies - one directly elected, the European Parliament, and the other, the Council of Ministers, composed of

members of national governments - much like the German *Bundesrat*, which brings together members of Länder government.

Turning to decision-making procedures, it is often asserted that a Community of 25 members or more could not survive without a generalization of majority voting and a lowering of the threshold for majority decisions - which is currently around 70% of the (weighted) votes cast in the Council of Ministers.[23] Undoubtedly, the problem is important. Decision-making, which was already cumbersome and lengthy in the Community of twelve, could be nearly paralyzed if Community membership were to double without the necessary adjustments having been made. This fear has led the Institutional Committee of the European Parliament to suggest in its draft European Constitution that all decisions should require a double majority in the Council of Ministers: a majority of states, representing at least a majority of the Community's population.[24] Such a solution would imply great advantages, if only because of its transparency: European citizens would know that no decision can be taken by a minority of States, or against the will of the representatives of the majority of the population. Yet, when considering the kind of coalitions possible, one realizes pretty soon that, as most new applicants for membership are small states (and some micro-states), the number of minimum-winning coalitions would be very high. In other words, there would be a serious risk of drifting towards a pattern of strictly majoritarian decisions.

I have suggested elsewhere a form of "alarm bell" mechanism,[25] enabling a significant minority of states (say, three Member States, representing a minimum share of the Community's population) to block a proposal that would in their view threaten their vital interests. Such a veto would only be overcome if the measure at hand was confirmed by an enlarged majority, in order to avoid the

possibility that an indiscriminate use of this weapon could result in a complete paralysis of decision-making.

Surely, other techniques are conceivable which would preserve the consensual character of Community decision-making. Other approaches, such as the delegation of powers to autonomous institutions, insulated from the electoral cycle, could be envisaged.[26] My concern here is not to advocate any particular mode of constitutional engineering, but rather to stress the need of preventing a majoritarian drift that would compromise the stability of the Community.

Conclusion

The Maastricht ratification debates have seen an unexpected intrusion of public opinion in Community affairs. In such a context, it seems difficult to accept the idea that the EC, like any international organization, derives its legitimation from the sovereign will of its member-States. The weak legitimacy basis of European institutions, which was at most a matter of academic discussion until recently, has suddenly become a dominant issue in European politics. To many, the strengthening of the European Parliament, which has been one of the dominant elements of the last ten years, seems to appear as a natural response to this new situation. If the people want their voice to be heard, then let their representatives play a greater role in the shaping in Community policies. In such a perspective, Parliament's institutional position, still weak in some respects, and the persistent weakness of European parties, unavoidably appear as a matter of concern.

At the same time, a number of institutional adjustments are being considered in view of an Eastern enlargement of the Community, which appears unavoidable in the medium to long term. Most of these adjustments, dictated by efficiency concerns - or, to be more precise, by a legitimate desire to limit decision costs - would in fact be likely reinforce the majoritarian character of decision-making.

Although I do not disagree with the analysis that inspires these two sets of proposals, I have tried to show in the present article the risks involved in a majoritarian option. The parliamentary system, which is dominant in Western Europe,[27] seems to have been chosen as a model for the institutional development of the European Community. Yet, this model, because of its majoritarian aspects, is ill-adapted to the needs of a hybrid creature like the EC, characterized by great diversity and by strong national feelings.

That majoritarian logic may have adverse effects in decentralized systems is by no means a new remark. Discussing the various models that could inspire the American Constitution, James Madison warned two centuries ago that

> "[w]hen a majority is included in a faction, the form of popular government... enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To ensure the public good, and private rights, against the danger of such faction, and at the same time to preserve the spirit and the form of popular government is then the great object to which our enquiries are directed...."[28]

Replace the word "faction" by the word "party", more fashionable today, and you will have a good description of the danger involved in the majoritarian option. The development of party politics at European level might be detrimental to centre-periphery relations, which are crucial for the stability of the Community. Seen in this light, the current weakness of European parties, lamented by some, may appear as a disguised blessing. Yet it is far from clear that the situation will remain unchanged if the institutional system encourages greater cohesion, and there are reasons to believe that Parliament's new prerogatives in relation to the appointment of the Commission may indeed provide that kind of incentive.

Certainly, Parliament's involvement in this process must be hailed as a positive development, given the legitimacy deficit of the EC. But the implications of this change ought to be properly assessed and, if need be, corrected. The same is true of the changes considered in view of pending enlargement.

Madison himself wisely suggested that "factions" could not be avoided, and that the problem was rather to control their impact.[29] Thus, as regards the EC, the

"great object" that will have to be addressed in the institutional debates to come is strikingly similar to the one he described: to carve out an institutional system that will bring a remedy to the current legitimacy crisis of the Community, without at the same time exposing it to the dangers of majoritarian solutions.

Further Readings

There is no shortage of literature on the institutions of the European Community. Given the rapid pace of change in the last ten years, readers should focus on recent works such as:

- Jean-Louis Quermonne, *Le système politique de l'Union européenne*, 2nd ed. (Paris: Montchrestien, Collection "Clefs", 1994). A valuable description of European institutions and decision-making processes.

- David O'Keeffe and P.M. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (London: Wiley Chancery Law, 1994).

- Renaud Dehousse (ed.), *Europe after Maastricht: An Ever Closer Union?* (Munich: Law Books in Europe, 1994).
Two collections of essays on the innovations introduced by the Maastricht Treaty.

- Joseph Weiler, 'The Transformation of Europe', *Yale Law Journal*, vol. 100 (1991), 2403-2483.
One of the few systematic analyses of the institutional evolution of the European Community since its inception.

- Andrew Moravcsik, 'Preference and Power in the European Community: a Liberal Intergovernmental View', *Journal of Common Market Studies*, vol. 31 (1993) 473-524.

- Renaud Dehousse and Giandomenico Majone, 'The Institutional Dynamics of European Integration: From the Single Act to the Maastricht Treaty' in Stephen Martin (ed.), *The Construction of Europe - Essays in Honour of Emile Noël* (Dordrecht: Kluwer, 1994) 91-112.
Two contrasting views on the dynamics of institutional change.

There is also an abundant literature, mostly of Canadian origin, on the structural tension between federalism and the majoritarian logic of parliamentary systems.

- Donald V. Smiley, *Canada in Question: Federalism in the Eighties* 3rd ed. (Toronto: McGraw-Hill, 1980) provides one of the most complete surveys of the problem.

Endnotes

1. Although the expression European Union seems to be widely preferred in English language literature, I shall stick here to the words "European Community" as, legally speaking, the questions addressed in this article mainly relate to the structure of the EC rather than to that of the European Union.

2. Peter Russell, *Constitutional Odyssey - Can Canadians become a Sovereign People?*, 2nd ed., (Toronto: University of Toronto Press, 1993).

3. Compare for instance British Prime Minister John Major's views in *The Economist*, September 25th, 1993, p.19 with French Prime Minister Edouard Balladur's in *Le Monde*, 30 novembre 1994, pp. 1, 9 and 10.

4. For more reflexions on this methodological problem, see my "Comparing National and EC Law: The Problem of the Level of Analysis", forthcoming in *American Journal of Comparative Law*, vol. 47 (1995) 201-221.

5. Press Conference of 15 May 1962, *Le Monde*, 16 May 1962, p. 6.

6. 'Le succès de Maastricht', *Revue politique et parlementaire* (1991) 43.

7. See the report by Mr. Toussaint, Doc. PE A2-276/87 of 1 February 1988.

8. See the article by Joseph Weiler.

9. The point has been made forcefully by Andrew Moravcsik, 'Why the European Community Strengthens the State: Domestic Politics and International Cooperation', Paper presented at the Conference of Europeanists, Chicago, April 1994.

10. For a detailed analysis, see Jean-Claude Piris, 'After Maastricht, are the Community Institutions more Efficacious, more Democratic and More Transparent?', *European Law Review*, vol. 19 (1994) 450-487.

11. Limited progress has been achieved in this respect after the Maastricht Treaty. The rules of procedure of the Council of Ministers now provide that votes can be made public when the Council acts as a law-making body, and that public sessions can be held when it engages into programmatic discussions. See OJ N° L304/1 of 10 December 1993.

12.See on this point the debate between Jean-Marc Ferry and Paul Thibaud in their *Discussion sur l'Europe* (Paris: Calmann-Lévy, 1993).

13.For a more detailed analysis, see Renaud Dehousse, "The Legacy of Maastricht: Emerging Institutional Issues", *Collected Courses of the Academy of European Law*, vol. 3, Book 1, (1992) 181-239 at 224-228, on which this section largely draws.

14.David Martin, "To be Efficient, the Commission needs major Reform", in *What Future for the European Commission?*, (Brussels: Philip Morris Institute for Public Policy Research, January 1995), p.59

15.Article 138b, second sentence.

16.Unsurprisingly, this element is regarded as essential in neo-functionalist analyses of the integration process. See e.g. Ernst Haas' preface to the second edition of *The Uniting of Europe*, 2nd ed. (Stanford: Stanford University Press, 1968) XXV.

17.J. Lemco and P. Regenstreif, 'The Fusion of Powers and the Crisis of Canadian Federalism', *Publius*, vol. 14 (1987) 105-113.

18.W.S. Livingston, *Federalism and Constitutional Change*, (Oxford: Clarendon Press, 1956).

19.M. Grodzins, *The American Federal System: A New View of Government in the United States*, edited by D.J. Elazar (Chicago: Rand McNally, 1966).

20.The phenomenon has been described by Donald Smiley, 'The Structural Problem of Canadian Federalism', *Canadian Public Administration*, vol. 14 (1971) 326-43. See also Watts, 'The Historical Development of Canadian Federalism', in R.L. Mathews (ed.) *Public Policies in two Federal Countries* (Canberra: Australian National University Press and Centre for Research on Federal Financial Relations, 1982) 13-26.

21.See e.g. Jean-François Guilhaudis, *L'Europe en transition* (Paris: Montchrestien, 1993, at 131-133; Christian Lequesne, 'Les perspectives institutionnelles d'une Union élargie', *Pouvoirs*, N°69 (1994) 129-139.

22.See the memorandum presented by Benelux countries at the Lisbon European Council, *Agence Europe*, Saturday 20 June 1992, N°5754, 12.

23.See the works by Guilhaudis and Lequesne cited above, supra note 21.

24.Draft article 20, see doc. EP 179.622, 10 February 1994.

25.R. Dehousse, "Community competences: are there Limits to Growth?" in R. Dehousse (ed.), *Europe after Maastricht: An Ever Closer Union?*, (Munich: Law Books in Europe, 1994) 103-125 at 121-123.

26.Giandomenico Majone, *Independence v. Accountability? Non-Majoritarian Institutions and Democratic Governments*, EUI Working Papers SPS N° 94/3.

27.Philippe Lauvaux, 'Eléments d'un modèle constitutionnel européen' in Bruno De Witte and Caroline Forder (eds.) *The Common Law of Europe and the Future of Legal Education*, (Deventer: Kluwer, 1992) 119-131.

28.*The Federalist Papers*, N°10, ed. by Garry Wills (New York: Bentam, 1982) 45.

29."The *causes* of faction cannot be removed;.... relief is only to be sought in the means of controlling its *effects*." (Ibid)
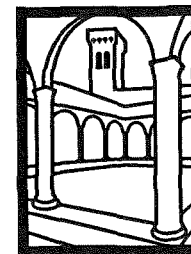
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