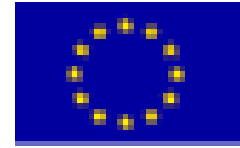


**From the Convention to the IGC:
Mapping Cross-National Views
towards an EU-30**



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**"Reforming the EU Institutions - Challenges for the
Council"**

**EU institutional reform:
Setting the scene "The fallacy of the particular"**

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My starting point is the 'fallacy of particulars' that has permeated the whole discussion on the Future of Europe. In my opinion one of the main causes of the failure of the Convention as a political-pedagogic experiment, as an opportunity, that is, to excite the curiosity of European citizens other than those with a professional or academic interest in the debate, is the pitfall of misplaced particularity. Already the Declaration of Laeken listed more than 50 concrete questions the Convention is supposed to answer. We all know them so for time sake I will not repeat them; and we also know that, apparently, this list was still too short. As the Convention made progress the participants and those professionally concerned have done their utmost to get their own options and proposals on the agenda.

We will try to look at this "waterfall" of very diverse proposals through the eyes of a common European citizen. Why should he be against an elected President of the Commission or against a more permanent presidency of the EU? But why would he be in favour of it. Why not leave in principle everything as it is, only to potter a little bit with some of the decision-procedures with a view to the coming enlargement. And how do all the proposals and alternatives he/she now and then reads about in his paper, relate to each other? Can we freely choose the, at first sight, most attractive options or do specific choices – for example the choice for a parliamentary election of the President of the Commission – constrain us when it comes for example to the question whether a unitary structure is preferable to the existing pillar structure?

The problem is clear. The fallacy of particulars I referred to earlier comes down to the problem that a sheer enumeration of concrete particular options makes invisible exactly what can render sense and direction to a debate on such a complex phenomenon as the EU and its future. What is made invisible is the structure of logical and then ideological relations underneath the surface of the concrete and the particular, patterns of possible choices that reveal the political thrust of a particular, separate choice.

I take it to be a task for us, academic observers of the EU, to supply such a framework, to reconstruct coherent patterns of choices, taking the ongoing discussions as our cue and material. That is at least what I will try to do this morning, albeit in a sketchy way and without claiming that my reconstruction is complete and final.

I will confine my analysis to three dimensions which, just for convenience, I will label as the institutional, the normative and the methodical dimension. Each of these three dimensions is characterised by an important dilemma – and my point is, basically, that different proposals concerning the reform (or not!) of the EU can be arranged with a view to these dilemmas. That makes it possible, subsequently, to evaluate a specific set of choices in terms of its coherence and its political thrust. Although the three dimensions I distinguish form together a loosely coupled structure, as it is called, it will become clear that there is a certain trans-dimensional coherence. That means that the choice for a specific option (or lemma) within a certain dimension will constrict the set of possible choices in the other dimensions. In a more positive vein: What I hope to offer in the end is a framework that makes it possible to relate rather diverse proposals of reform with a view to the European future they imply.

What I labelled the institutional dimension refers first of all to the allocation and division of political competencies within the EU – the EU understood as a political system that produces collectively binding decisions. Accordingly in what follows I will emphasise the legislative and executive functions of the EU leaving its judicial features aside. Besides, instead of trying to answer the impossible question of what kind of political object the EU really *is* I simply take for granted a description of the EU as a 'multilevel' system of governance. And I also take for granted that everyone here knows what is meant by that description, at least in a broad sense.

Within a multi-level, or if you want: quasi-federal system of governance the allocation of competencies can, in principle, take two different forms. As Tanja Börzel and Thomas Risse have put it: the institutional organisation of political competencies can be based on the principle of 'sharing' or on the principle of 'splitting'. It is based on the principle of sharing if and when the political authorities of the constituent elements and those of the higher, uniting level – let us say: the governments of the member states and the supra-national institutions of the EU – are jointly fulfilling legislative and executive tasks. We talk, on the contrary, about 'splitting' if and when political competencies are divided among the lower and higher levels according to a mutual division of policy domains. Please note that this distinction between 'sharing' and 'splitting' is an ideal type with the sole purpose to bring out more clearly the political logic of both principles. It is not likely that in the real world we will ever find a political system completely and univocally based on only one of them.

This being said however, it is common wisdom that the German federal system may serve as a good example of a system based on sharing, while the federal system of the USA tends to obey the principle of splitting.

When we look at the EU the distribution of competencies follows first of all the principle of sharing. There are some exceptions of course, like the Central European Bank, but these are the exceptions that confirm the rule. A marked contrast to the USA is the strong, institutionally based intertwinement of legislative and executive functions within the EU. The Council for example is not only the most important legislator but for obvious reasons of national interest is, via the so-called Comitology, also present when it comes to the implementing activities of the Commission. The Commission in turn has not only executive tasks but also plays an important role in legislation because of its right of initiative. The exception here is of course the EP – and we know its complaints about that. Besides legislative functions EP has advisory competencies regarding the implementation of European decisions but it still has no formal admittance to all the committees which together form Comitology and are installed by the Council to screen and control the implementing activities of the Commission.

Besides this structural intertwinement of legislative and executive functions at least two other phenomena strike an observer of the EU. That is, first, the central position of the executive bodies. As Phillip Dann has put it: “Weaving together legislation and implementation, this structure demands the prominence of executive actors in the law-making procedure of the federal level since only the bureaucracy of the sublevel has the knowledge, resources and power to render the common legislation workable.”(Dann 2002, p. 13) Also if compared to the German political system the prominence of institutions and bodies of executive origin is remarkable, if only because of the fact that the Council still is the most important legislator, notwithstanding the increased powers of the EP.

A second and often noticed characteristic of EU politics is a strong inclination to decide by consent, even if some kind of majority voting is the formal decision rule. In a rather general, if not crude fashion one could of course try to explain the dominance of consent politics by pointing to the huge diversity of interests and political perceptions brought to the fore by the member states. Without the intention to look for political solutions that meet the diverging interests of the member states, be it via package deals, log-rolling or politics by the purse, so the argument runs, the process of European integration would have been stifled long since. Well, that may be the case, but if you only take into account the institutional structure of the EU and its concomitant distribution of powers, politics by consent seems the natural outcome. The strong intertwinement of legislative and executive functions drawing in the member states as well as the supranational institutions demands an intensive co-operation between all the elements of the system as inevitable condition of policy making and effective politics.

The dominance of politics by consent is, of course, the reverse side of what Fritz Scharpf has coined the 'Politikverflechtungsfalle', the 'joint decision trap' which also haunts the multi-level system of the EU. Inherent to a system of jointly shared competencies within a multi-level polity is the enduring danger of a blockade of political decision-making, in particular when the political programmes and attitudes of

the 'higher' and 'lower' levels are too divergent. Now this is a serious problem and to resolve it one might well consider reforming the EU in the direction of, let us say the USA model. Wherever possible substitute the principle of splitting for the principle of sharing. Please note that this would imply a strengthening of the autonomy of the member states *and* of the supra-national level as well. For different reasons this may be an attractive option – and not only for Americans as is shown by the European debate on the subsidiarity principle. According to some a clear and strict distribution of political competencies over the lower and higher levels of the European polity is not only feasible but also desirable as a remedy against an ongoing excavation of the sovereignty of the member states. Other proponents would emphasise the democratic gains of a partition of well-defined competencies among territorial delimited jurisdictions. The idea is that it would bring politics and all that belongs to it closer to the citizen and augment his or her chances for self-government, albeit in a restricted number of policy areas.

There are of course also plausible arguments against such a reform of the EU. It could be argued, for example, that an established, incontestable distribution of policy areas among territorial delimited jurisdictions would run counter to the necessary flexibility of scope and territorial extend of political decisions. (zie o.a. Hooghe/Marks 2001) The scope and extend of governance has to be flexible, simply because the territorial extend of the effects of policies may vary as well as the scope of the problem which a policy is supposed to tackle. A simple and well-known illustration is provided by environmental questions. More in general it is argued that under the pressure of processes of globalization territorial boundaries signal less and less the reach of the steering capacities of governments. What Michael Zürn has called the 'denationalization of societies', referring thereby to the ongoing international and trans-national interconnecting of formerly 'national' societal subsystems, has as its result that 'governance' mirrors less and less the ideal-type of the centralised state that is sovereign and omnipotent on its 'own' national territory. (Zürn 1998) As this process of denationalization intensifies, the need of more variability and flexibility will only increase though without any certainty about which problems demand which levels of decision-making.

The point of my analysis is neither to plead for the status quo nor to champion a transformation of the EU along the lines of the USA federal system. The aim is rather to sketch an analytical framework with the help of which proposals to reform the EU may be placed in a broader perspective. For example, as I already suggested, those who champion the principle of subsidiarity in order to increase the political autonomy of the member states do argue for a development according to the principle of splitting – at least in principle. The same holds for all proposals that intend to strengthen the position of the EP by according it the right to install the President of the Commission or even all the Commissioners. Such an increase in the power and autonomy of a supra-national body as the EP inevitably will provoke a tendency to strengthen the position of the member states by restoring their sovereignty in a number of policy domains. Conversely, proposals to take away from the Commission its exclusive right of initiative in the first pillar or to install a more permanent presidency of the EU will strengthen and deepen the existing system of the sharing of competencies.

Let us turn to the second dimension – the normative dimension. In a general formulation the normative dimension concerns the question which criteria the European system of decision making has to fulfil for us to accept its outcomes as justifiably binding decisions which justly can and ought to be enforced. Put simply: it concerns the legitimacy on principle of the EU.

To address this normative dimension means of course to address the so-called democratic deficit of the EU, one of the serious concerns of the Convention also. More transparency is demanded, more citizen participation, serious accountability, etc.

As I would maintain there is one option, a remnant from the past, that now and then is still put forward, but is not a serious proposal anymore. This zero-option, as I would call it, comes down to the proposal to return to days of the custom union, to an EU which is nothing more than a framework of economic co-operation and as such can be legitimised by the non-political principles of economic rationality. For all kind of reasons that is a station we have already passed.

When we look to the more serious proposals to repel the democratic deficit two fundamental options can be discerned. The first one is the well known plea for a strengthening of the representative, legislative, controlling and elective functions of the EP. After all, the EP is the only directly elected representative of the European citizens, so the common argument. Not only should the co-decision procedure cover all policy areas; also the EP ought to be accorded full budgetary competencies. And then of course the right to elect and install the President of the Commission, if not all the Commissioners. This call for a strengthening of EP is also labelled the 'majoritarian' option, since according to proponents a EP based on territorial representation and operating by majority voting is the most important source of legitimacy. The obvious advantages of this option are its high rate of inclusion – virtually every citizen of a certain age is allowed to join – and the rigorous equality principle that is realized by it – one man, one vote.

The second fundamental approach to the democratic deficit of the EU emphasises the principle of '*functional representation*'. An example of this would be the White Paper on Government by Prodi. The best way to draw the European citizen into EU politics and to enhance his/her chances of political participation, so the argument runs, is not to let him/her vote every five year in his/her quality of German, Italian or Portuguese - to let him/her vote, that is, for a EP that of necessity will always remain a faraway show. Engagement and participation are served much better by drawing '*civil society*' into the European governance, to draw in, that is, the non-governmental organisations and associations by which private citizens articulate and defend their common interests. Let representatives of all kinds of civil society organisations have a say in policy areas and issues which are of an immediate interest for them.

To back up this strategy, two claims are often put forward. First an empirical claim. It starts with the assertion that within the EU it is already the case that policy decisions are produced by complex negotiation networks in which all kinds of actors interact with each other – public as well as private agents. Next it is argued that this form of governance is also more effective since the implementation of decisions will run much more smoothly if those whom it regards have the idea that they were really

engaged in the search for 'reasonable' compromises. (In terms of the distinction between input- and output-legitimacy functional representation would thus enhance output legitimacy since it would deliver the public goods in an efficient and effective manner) (Scharpf 1996; Andersen/Eliassen 1996a/b).

The second claim has a normative thrust in that it asserts that forms of functional representation ought to be developed and institutionalised because they are pre-eminently capable of linking political effectiveness with political justice. If political justice depends on the question whether those who really have something at stake in an issue under decision are also in the position to influence that decision, then in this respect – so the argument runs – functional representation performs better than current systems of territorial representation. It is exactly the combination of territorially based representation with the majority principle that makes the parliamentary system blind for the often big differences in intensity of interests among citizen when it comes to a specific issue.

As Ulrich Preuss has exposed the shortcomings of territorial representation: “[Under the regime of territorial representation] Citizens are deprived of their particularities and their embedness in particular communities, cultures and social roles and conceived as abstract political beings whose opinions converge around a concept of the public good which is more or less shared by all because all are equals. Only equals can form a general will.”(Preuss 1998, p. 8).

Of course, there other critical arguments against the majoritarian, parliamentary option, although not necessary in favour of functional representation. Perhaps the most well known one is the 'No Demos'-thesis as spelled out by Grimm, Lepsius, Weiler, Scharpf and many others. I guess you all know the ins and outs of this argument – so let me only quote Weiler's neat, concise resume of it. “If the European Parliament is not the representative of *a* people, if the territorial boundaries of the EU do not correspond to its political boundaries, than the writ of such a parliament has only slightly more legitimacy than the writ of an emperor.” (Weiler e.a. 1995, p. 13)

The critique on functional representation as a remedy for the democratic deficit of the EU is of course also well known, for example from the debate on neo-corporatism. I will not repeat them now since, again, my point is not to argue for or against one of both options, but to spell out a framework that can show the implications of specific proposals of reform. Some are quite obvious, for example demands for European referenda, for a Europe-wide election of an EU-president or for a serious European party system. All this points in the direction of the majoritarian option. On the contrary, attempts to institutionalise the Brussels lobby by issuing covenants or to strengthen the role of the Grand Committees or even install new ones, all point in the direction of increasing the role of functional representation within the EU.

The third and last dimension I would like to confront, the methodical dimension, concerns the question how a reform of the EU should be brought about. Again two approaches contend for the mastery. On the one hand what is often labelled as 'policy driven reform', on the other 'blue print-' or 'constitutional reform' (comp. Olsen 2001).

Policy driven reform starts from the assumption that any adaptation of the institutional structure of the EU should take as its cue concrete questions which present themselves

in the process of formulating and developing policies for the sake of real, existing problems. A former Dutch minister of foreign affairs, Jozias van Aartsen, even identified this approach with a 'bottom-up'-method, since according to him 'concrete questions' were first and for all questions which directly concern the average citizen. According to its proponents, policy driven reform may well lead to far-reaching institutional changes. If, for example, a specific policy turns out to be rather ineffective in a certain domain, not leading to the contemplated objects, different courses of action present themselves. One would be trying other policy instruments. Another might start however with a critical reflection on the due level of policy making and policy implementing: is it the national, the supra-national or, on the contrary, the sub-national level? Consequently this could occasion a re-allocation of certain political or administrative competencies, perhaps even via a change of the treaties. As the same Jozias van Aartsen once put it: "If we hold on to the interests of the citizens as our point of departure we will automatically touch upon questions like the political 'finalité' and the legitimacy of the EU. Because eventually we will encounter the shortcomings and imperfections of the current agreements on the competencies and roles of the European institutions."

All in all, until now the process of European integration has quite indulgently followed this prescription of institutional piecemeal engineering. According to some this is the very core of the so-called Schumann-Monnet method. By the same token the problems inhering in this method are also well known. European policy-development is characterised by its departmental organisation, fragmented even further by sub-specialities and concomitant partitions. Consequently, processes of reform driven by policy problems parcelled out over departments and their subdivisions are in constant danger of enhancing this fragmentation with all the risks of inconsistent and counteracting policies. (And we know already enough of that)

An obvious alternative to policy driven reform is what I called blueprint- or constitutional reform, defined by John Olsen as the attempt "to develop a coherent order according to general principles of political organisation and governance"(Olsen 2001, p. 7).

A reform based on general principles of organisation and administrative criteria, so the proponents, would go to meet the concern of many that the coming enlargement will lead to an even more disrupted EU. If ultimately an ongoing fragmentation would lead to a loss of the Union's capacity for effective and efficient policy-making, then, as Weiler warns, "it will implode normatively too: the ability to deliver the goods has been the single most important source of Community legitimacy..."(Weiler 2000 p. 1).

The reverse side of a grand design based on general principles is however the danger of rigidity, of suffocating in the formal if not technocratic rationality of the general framework the innovative impulses that, indeed, often emerge out of the pragmatics of everyday policymaking. It is only fair; however, to mention also the specific rigidity that inheres the policy driven strategy of reform. It seems at least very hard to revise substantially established patterns and objectives of policy making in the EU. You might call that 'path dependency' of course, but for all practical purposes policy driven reform often resembles much the flight forwards.

Now one may have the impression that this methodical dilemma is already solved in favour of a constitutional approach by the very installation of the Convention on the Future of Europe. In think that a little bit rash. For a start, at the Laeken Summit the heads of state and government did not vow – explicitly not – to endorse the outcomes of the Convention. More important however is the question what kind of outcome may pass for a constitutional reform.

I assume that most of us will agree that only a systematisation and simplification of the 'constitutional arrangement' that is implied by the treaties and the jurisprudence of the Court is not enough to call it a constitutional reform. And I would argue that in this respect nothing has changed much either if a Human Rights Catalogue, for example a revised version of the Charter of Cologne, is added to the treaties. For reasons of symbolic politics this might of course be desirable but by all practical standards it doesn't change much. Europe, and in particular the member states of the EU are already covered by a thick quilt of citizen rights. As Göran Therborn once observed: “The Council of Europe, with the European Convention on Human Rights, its Commission and its Court of Human Rights have made Europe into an arena of human rights more specific and compelling than in any other area of the world.”(Therborn 1997, p.368).

Here the fire-pan may be whether it will come to a real Constitution at all, instead of a treaty that Giscard d'Estaing will thereupon recommend as a Constitutional Treaty. The legal fiction that forms the backbone of a real, authentic Constitution tells us that it is not simply an arrangement of the political and judicial competencies and responsibilities within a certain territorial delimited jurisdiction. A Constitution is supposed do be a document by which a sovereign people determines how it will be governed. It is that reference to the authentic will of a sovereign people that lends a Constitution its special aura of legitimacy. Its clauses apply as a kind of pre-political law that puts everyday politics in its place and of which politicians should keep their hands of as much as possible. Practically speaking, a European Constitution seems to demand a Europe-wide referendum. But then of course we have also to take into the bargain the fiction of a sovereign European people.

Treaties, on the contrary, are not authorised by the people but by governments who already tomorrow may be exchanged for new ones. That is not to say that therefore Treaties are not valid. What is of importance however is the assertion that in case the result of the Convention will be a Constitutional Treaty, the EU will have confirmed itself in a fundamental respect. A constitutional Treaty would confirm the mixture of federal and con-federal principles that is typical for the EU as the competence to allocate competencies would rest with the governments of the member-states.